ON AMERICAN DRONE STRIKES AND (POSSIBLE) EUROPEAN RESPONSIBILITIES: FACING THE ISSUE OF JURISDICTION FOR "COMPLICITY" IN EXTRATERRITORIAL TARGETED KILLINGS

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Abstract

States Party to the European Convention of Human Rights (ECHR) regularly provide third States with key aid or assistance in performing extraterritorial targeted killings through armed drones: by doing so, they can be said to engage in conduct amounting to "complicity" for the purposes of international law of State responsibility. Strictly speaking, however, ECHR provisions do not apply to such conduct, which cannot be included into existing models of "jurisdiction" as per Article 1 ECHR – namely, "spatial" and "personal". This results in a troublesome legal vacuum. The present article proposes an appraisal of such conduct through the lenses of a third jurisdictional model, already acknowledged by other human rights systems but largely ignored (or even discarded) by the European Court of Human Rights: the so-called "impact" model, which covers extraterritorial effects of territorial conduct. It will be demonstrated that to a limited extent the ECHR case-law already resorts to such model, as in several cases jurisdiction is believed to arise when impugned events, albeit taking place extraterritorially, are the consequence of State's conduct (thus through a "causation" test) or when third States' conduct can somehow be attributed to a State Party (through an "attribution" test). Albeit implicitly, this is an endorsement of the "impact" model of jurisdiction. It is argued that the Court should fully recognize this third model, and consequently apply it to extraterritorial conduct amounting to "complicity" in order to ensure a principled scrutiny over States Party's conduct.

Keywords: drones; extraterritorial targeted killings; ECHR; jurisdiction; complicity

1. INTRODUCTION

There is widespread acknowledgment that some States party to the European Convention of Human Rights (ECHR) have been providing third States with assistance in performing targeted killings on the territory of other third States. Official inquiries have been carried out in the UK with a view to shedding light

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on the Ministry of Defense's support to US drone strikes.[1] As revealed by investigative journalists, whistle-blowers and former pilots, several drone attacks that occurred in Yemen have allegedly been carried out from the US Air Force Base in Ramstein (Germany).[2] In addition to this, there is "mounting evidence" suggesting that Germany has been sharing relevant intelligence with the US, which would facilitate geolocation of potential targets for extraterritorial targeted killings.[3] At the time of writing, the legality of Germany's conduct is under judicial review before the Higher Administrative Court of Nordrhein-Westfalen.[4] Another military base allegedly playing a key role in extraterritorial targeted killings is located in Sigonella (Italy). According to a number of sources, armed drones are currently stored in Sigonella, and likely operated in the Sahel area therefrom.[5] Administrative proceedings aimed at information disclosure on the use of Sigonella have been instructed before Italian courts.[6]

Consider now the following scenario. The US operates a drone strike from a military base located on the territory of a State Party, upon authorization of the authorities thereof; it later turns out that the operation actually resulted in an unlawful resort to lethal force against an individual or a group of individuals. The wrongful act would consist in the breach of the individual's right to life as enshrined in Article 2 ECHR. It is therefore appropriate to wonder whether, and on what legal bases, the State Party can be held responsible for its conduct, namely aiding or assisting a third State in actions amounting to an extraterritorial violation of certain individuals' right to life.

The aim of the present contribution is to test existing boundaries of the ECHR system in order to show that States Party' conduct can be made object of the Court's scrutiny. This would constitute an important step towards transparency and, should that be the case, responsibility. First, both a factual and legal explanation of the material conduct of States Party is due for clarifying their

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[1] "UK 'complicit in killing civilians and risks being prosecuted over illegal drone operations', major report suggests", Independent, 17 July 2018, available at: <http://www.independent.co.uk/news/uk/home-news/drone-strikes-uk-us-illegal-civilian-deaths-war-crimes-dead-appg-report-a8450206.html>.

[2] For more on Ramstein, see "US Ramstein Base Key in Drone Attacks", Spiegel Online, 22 April 2015, available at: <http://www.spiegel.de/international/germany/ramstein-base-in-germany-a-key-center-in-us-drone-war-a-1029279.html>.

[3] GIBSON, "The US's Covert Drone War and the Search for Answers: Turning to European Courts for Accountability", in European Centre for Constitutional and Human Rights, *Litigating Drone Strikes. Challenging the Global Network of Remote Killing*, Berlin, 2017, p. 105 ff., available at: <http://www.ecchr.eu/en/publication/litigating-drone-strikes-challenging-the-global-network-of-remote-killing/>.

[4] See BERING, "Legal Explainer: German Court Reins in Support for U.S. Drone Strikes", Just Security, 22 March 2019, available at: <http://www.justsecurity.org/63336/legal-explainer-german-court-reins-in-support-for-u-s-drone-strikes/>.

[5] "Italy Quietly Agrees to Armed U.S. Drone Missions Over Libya", The Wall Street Journal, 22 February 2016. More recently, see: "Secret War", The Intercept, 20 June 2018, available at: <http://www.theintercept.com/2018/06/20/libya-us-drone-strikes/>.

[6] For the current state of these proceedings, see: <http://www.ecchr.eu/en/case/sicily-air-base-freedom-of-information-litigation-on-italys-involvement-in-us-drone-program/>.

contribution to extraterritorial targeted killings (Section 2). Second, the notion of "jurisdiction" as enshrined in Article 1 ECHR will be tackled with a view to showing that the two largely acknowledged models of jurisdiction – namely, "spatial" and "personal" – are unsuitable for applying to the scenario under consideration (Section 3). Subsequently, a third model of jurisdiction is considered (the "impact" model) which is based on the extraterritorial effect of a territorial conduct (Section 4). It will be inquired whether such model can be used by the Court to address cases pertaining to our scenario (Section 5). Section 6 will be devoted to concluding and shedding light on open, critical issues connected with the proposed approach.

2. States Party's Conduct Through the Lenses of "Complicity"

2.1. The case of Sigonella (Italy)

As preliminary remarks, it is important to focus on the actual conduct of the hypothetical State Party in order to understand the contours of its involvement in a particular drone operation. The State Party places its own territory (specifically, a military base or a portion thereof) at the disposal of a third State and confers it authorization to conduct extraterritorial targeted killings therefrom. In short, this is what is taking place in the Italian military base of Sigonella.

Sigonella is a joint Italian-US-NATO facility with separate supporting areas.[7] US presence in Sigonella dates back to late 1950s and has been growing exponentially since then. Thanks to its strategical position, Sigonella is officially acknowledged as the "hub of the Mediterranean" as it provides operational, command and control, administrative and logistical support to US and NATO forces in contingency operations in North Africa and Near East.[8]

The relevant document for understanding Sigonella's status in the US-Italy bilateral relation is the so-called Technical Arrangement on Sigonella (TAS).[9] According to Section V.1 ("Use and Operation"), "[t]he installations have been ceded in use to the United States of America to be employed by the latter"; more specifically, Section IX.1(b) ("Infrastructure") establishes that buildings and facilities are classified depending on joint or exclusive use, and contemplates infrastructure "for exclusive [US] use".

As far as drone operations are concerned, the TAS remains silent as it predates their storage at the base. In February 2016 the then Italian Minister of Defense, Mrs Pinotti, confirmed that the US had been given permission to employ the mili-

[7] All information concerning the military base of Sigonella is available at: <https://www.cnic.navy.mil/regions/cnreurafswa/installations/nas_sigonella.html>.

[8] See: <https://www.globalsecurity.org/military/facility/sigonella.html>.

[9] Technical Arrangement Between the Ministry of Defense of the Italian Republic and the Department of Defense of the United States of America Regarding the Installations/Infrastructure in Use by the U.S. Forces in Sigonella, Italy, 6 April 2006. The text of the Arrangement is available at: <https://www.state.gov/documents/organization/107265.pdf>.

tary base of Sigonella to carry out drone strikes on ISIS targets in Libya, adding that drone operations were to be green-lighted by Italian authorities (i) on a case-by-case basis, and (ii) only for defensive purposes.[10] It is therefore implied that in addition to a general authorization for storing and operating armed drones from Sigonella, presumably conferred through a specific agreement appended to the TAS, Italian authorities must be informed about particular drone operations and then release *ad hoc* authorizations to the US.[11] The agreement has not been made public yet; however, two important implications stem from such declaration.

First, the degree of the information shared by the US with its European partner is correlated with the scope of the *ad hoc* authorization: the more detailed the information is, the more effective the check and control system will work. By contrast, poor and insufficient information would not allow the State Party's authorities to conduct a proper reviewing process before authorization, which should be logically denied. In short, there is at least a presumption that authorization occurs upon an effective review of detailed information.[12]

Second, and consequently, States Parties retain the power to deny authorization in the cases set forth by the relevant agreement. Guidance can again be found in the TAS. Annex No. 5 ("Command relations") establishes that in the event the Italian Commander suspects that US activities, duly notified to him/her, contrast with "applicable Italian law", s/he must inform the US Commander and – that being the case – seek advice within his/her own chain of command.[13] In other words, a specific mechanism for blocking US operations and resolving disputes is provided by the TAS; presumably, the same applies to drone operations, as implied by Minister Pinotti's declarations. One can expect other agreements between the US and States Party to contain analogous provisions.[14]

The contours of States Parties' conduct can be outlined with sufficient precision now. Importantly, it seems that territorial States are not kept in the dark, but rather provide informed assistance in military operations carried out from territorial bases – operations subject to abortion by States Parties should those operations conflict with "applicable law". It seems there is no reason for limiting the scope of this clause to statutory law dealing with technical matters (i.e. regulating air traffic); constitutional law as well as domestic provisions giving effect to international obligations – such as those enshrined in the ECHR – are included as well.[15]

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[10] Camera dei Deputati, "Resoconto Stenografico 576", 24 February 2016, p. 61.

[11] Such procedure is fully consistent with TAS provisions, namely Section VI.3 and VI.4. More extensively see MAURI, "Droni a Sigonella: quale valore giuridico ha (e quale impatto produrrà) l'accordo italo-americano?", Quaderni di SIDIBlog, 2016, p. 319 ff.

[12] As implied by the Minister of Defense Pinotti's words: see *supra* note 10.

[13] See Annex 5, Art. 1(c), TAS, *cit. supra* note 9.

[14] It must be noted that the US Government is interested in obtaining "blanket" authorizations from its military partners. See for instance "Italy seeks to keep allies in check as Libya wrangles over govt", Reuters, 25 February 2016, available at: <http://www.af.reuters.com/article/commoditiesNews/idAFL8N1645I8> ("Washington had sought permission to use the armed drones without any preconditions. Italian insistence on giving the green light to any operation will seriously limit their scope").

[15] See *amplius* MAURI, *cit. supra* note 11, pp. 324-325.

Conferring authorization for extraterritorial drone operations expected to result in the violation of international law may therefore expose the territorial State to international responsibility.

2.2. Complicity

In applying the categories of international responsibility, the conduct described so far appears to fall within the scope of the concept of "complicity".[16] The term – which *stricto sensu* is not one of art in international law – echoes the concept of "aid and assistance" adopted by the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), more specifically Article 16.[17] This provision states:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> a. That State does so with knowledge of the circumstances of the internationally wrongful act; and
> b. The act would be internationally wrongful if committed by that State.

The constitutive elements of responsibility for complicit conduct are: (i) a material, or objective, element; (ii) a cognitive, or subjective, element. The precondition for complicity to arise lies in the so-called "opposability clause": both the complicit State and the principal State must be bound by the same international obligation.[18]

From the material point of view, the complicit State is only required to aid or assist the principal State for its responsibility to arise. Supply of military, economic, or technical assistance is a case of material conduct usually qualifying

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[16] For general literature on complicity, see PUMA, *Complicità di Stati nell'illecito internazionale*, Torino, 2018; JACKSON, *Complicity in International Law*, Oxford, 2015; AUST, *Complicity and the Law of State Responsibility*, Cambridge, 2011; NOLTE and AUST, "Equivocal Helpers: Complicit States, Mixed Messages and International Law", ICLQ, 2009, p. 1 ff. For more specific complicity-related issues, see DE WET, "Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request", ICLQ, 2018, p. 287 ff.; BOIVIN, "Complicity and beyond: International law and the transfer of small arms and light weapons", IRRC, 2005, p. 467 ff.

[17] For an appraisal of complicity in the framework of "shared responsibility", see the key contribution of LANOVOY, "Complicity in an Internationally Wrongful Act", in NOLLKAEMPER and PLAKOKEFALOS (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge, 2014, p. 134 ff. For a critical appraisal of the notion of complicity as enshrined in the ARSIWA, see CORTEN and KLEIN, "The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel Case", in BANNELIER et al. (eds.), *The ICJ and the Evolution of International Law*, Abingdon-New York, 2011.

[18] See LANOVOY, *cit. supra* note 17, pp. 156-161.

as complicity.[19] An interesting point is how much intense must accessory State's "participation" to the principal wrongdoing be in order for complicity to qualify. Too direct participation would engage primary responsibility for the aiding or assisting State as well (joint responsibility);[20] conversely, too indirect and thus remote contribution would be insufficient for triggering the accessory State's responsibility. Assessing the degree of participation, however, is not an easy task – a circumstance that may explain the difficulties associated with, for instance, extending complicity so as to cover omissive conduct,[21] or distinguishing it from due diligence standards.[22] These conundrums, however, will not be touched upon here.

From the cognitive standpoint, an additional difficulty lies in that Article 16 ARSIWA, as it sets a high bar for the mental element to qualify.[23] The text refers to "knowledge of the circumstances of the internationally wrongful act", an expression interpreted as requiring "full knowledge of the facts",[24] or as being only deliberate in character, awareness of the act not being necessary in its ultimate purpose.[25] One commentator has explained that such interpretation of the subjective element would imply accessory State's responsibility if this supplied the principal State with armed drones to be used to commit extrajudicial killings, irrespective of the circumstance that the former may not know that those drones will be used to kill a particular individual in a particular operation.[26]

For the purposes of the present contribution, another important aspect of complicity consists in the causal link between the aiding or assisting State's conduct and the performance of the internationally wrongful act by the principal

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[19] See *ibid.*, p. 141 (making the example of supply of ammunitions to rebels in Syria); ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Art. 16, para. 1. A well-known case is Germany's alleged complicity with the US in carrying out an armed attack against Lebanon in 1958: the material conduct of Germany consisted in placing its own airfields at the disposal of US aircrafts; see *ibid.*, para. 8. By simply replacing these States with those involved in our hypothetical scenario, it is clear that the objective element would not hardly qualify for extraterritorial targeted killings operated through armed drones taking off from States Party' military bases.

[20] See extensively LANOVOY, *cit. supra* note 17, p. 144 (citing all relevant doctrinal opinions).

[21] The issue of combining complicity with omissive conduct has been addressed not only by scholarship, but also by international adjudicatory bodies. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Report, 2007, p. 43 ff. (*Genocide Case*); LANOVOY, *cit. supra* note 17, p. 145; DE WET, *cit. supra* note 16, p. 298; JACKSON, *cit. supra* note 16, p. 155 (suggesting that complicity through omissive conduct is plausible).

[22] CORTEN and KLEIN, *cit. supra* note 17, p. 332 (arguing in favor of due diligence, which would render complicity a redundant concept).

[23] On the cognitive element, see recently MOYNIHAN, "Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility", ICLQ, 2018, p. 455 ff.

[24] *Genocide Case*, *cit. supra* note 21, para. 432; LANOVOY, *cit. supra* note 17, p. 151.

[25] PALCHETTI, "State Responsibility for Complicity in Genocide", in GAETA (ed.), *The UN Genocide Convention – A Commentary*, Oxford, 2009, p. 340 ff.

[26] LANOVOY, *cit. supra* note 17, p. 153.

State ("causation"). It is argued that causation is one of the most controversial notions in the law of State responsibility in general, to the point that one author has described its inquiry by international adjudicating bodies as "haphazard and unprincipled".[27] It should therefore be of no surprise that the Commentary refers to a (quite vague indeed) test of "significant contribution" by the accessory State to the principal one – a test that should be placed within the discussion of the material element of complicity – when discussing the cognitive element.[28] A major problem with the application of the causation test to complicity is related to the difficulty in measuring the impact of the accessory State's conduct on the breach and the injury resulting therefrom. The strictly proximate cause is the principal conduct, to which the complicit State's conduct merely accedes.[29] This difficulty is believed to explain why many international tribunals have found additional support by resorting to a test of "reasonable foreseeability" of the breach or the injury by the complicit State: a lack of proximate causation is compensated by a strong mental element. Albeit dogmatically reproachable, this mixed-up approach is the one currently existing, not only as far as complicity is concerned but also more generally for international responsibility,[30] and will be of great importance later in this contribution.

In sum, the case of States Party providing military bases for stocking armed drones and authorizing extraterritorial targeted killings operated therefrom can abstractly fit in the category of complicity. The objective element would consist in placing a military infrastructure at the disposal of a third State and confer authorization upon request. The subjective element would materialize whenever the State Party deliberates green light for a targeted killing operation. As additional fuel, the causal link could be said to be in place when the authorization "contributed significantly" to the commission of the particular wrongful act and that both the breach of a given primary norm (say, the customary norm prohibiting extrajudicial killing) and the injury resulting therefrom were "reasonably foreseeable" by the State Party's authorities.

The construction in terms of complicity is not meant to imply that Article 16 ARSIWA as such applies to our scenario. First, the "opposability clause" bars the invocation of States Party responsibility for complicity as the international obligations at stake (namely, Article 2 ECHR) do not apply to the principal State; at most, the customary provision protecting the right to life does. Second, also admitting that Article 16 ARSIWA applies, hypothetical victims would have little to no chance to invoke the principal's responsibility under the general regime of State responsibility and, more importantly, seek redress.

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[27] PLAKOKEFALOS, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity", EJIL, 2015, p. 471 ff., p. 473; see also GATTINI, "Breach of International Obligations", in NOLLKAEMPER and PLAKOKEFALOS (eds.), *cit. supra* note 17, p. 25 ff.

[28] ARSIWA, Commentary on Art. 16, para. 5.

[29] LANOVOY, *cit. supra* note 17, p. 164; PLAKOKEFALOS, *cit. supra* note 27, p. 487 (commenting on the case-law of international adjudicatory bodies).

[30] *Ibid*.

Rather, the conceptual framework of complicity serves a much practical purpose, namely to demonstrate that, in spite of the "opposability clause", States Party can still be held responsible under the ECHR system for breaching obligations incumbent *directly upon them*.[31] As will be shown below, it is not rare that the European Court of Human Rights (ECtHR) resorts to key components of complicity – namely, the causal link between aiding and assisting conduct and the wrongdoing – in order not only to assess States Party's conduct, but also to verify whether impugned events fall within States' "jurisdiction" as per Article 1 ECHR. This makes our analysis through the lenses of complicity relevant also for the purpose of demonstrating that ECHR provisions apply to aid and assistance to extraterritorial targeted killings.

3. Traditional Accounts of Jurisdiction in Strasbourg's Case-Law

Jurisdiction is possibly the first and decisive obstacle the ECHR system appears to be fraught with in our scenario. No obligation deriving from that instrument – and therefore no responsibility on the part of States Party – arises if the individual does not fall within the State Party's jurisdiction.[32]

As is well known, the State's jurisdiction under Article 1 ECHR is meant to be "primarily territorial".[33] In ordinary conditions a State exercises its jurisdiction on its own territory, so conducts occurring outside would not trigger the obligations enshrined in the ECHR (i.e. the "spatial" model). The circumstance that the primary account of jurisdiction is essentially connected with space must not be misunderstood, as in fact this does not imply that, on the one hand, every conduct occurring within the territory of a State Party triggers the jurisdictional link *per se*, and on the other one that every conduct occurring outside the territory does not.

Focusing on the latter, jurisdiction has been stretched so as to cover extraterritorial conduct of the State upon condition that its authorities exercise either effective control over a given area (again, a "spatial" model) or authority and control over individuals outside the territory (a "personal" model). In the latter sense, jurisdiction has been established with respect to, *inter alia*: activities carried out by State agents (also diplomats and consuls) on the territory of a third

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[31] As is easy to see, in terms of accountability, this would be a preferable option as a judicial organ would scrutinize States' activity and, in case, declare those States responsible and afford victims just satisfaction.

[32] See Schabas, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 92 (describing jurisdiction as a "threshold criterion" as in the absence of it ECHR provisions are not triggered); Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford, 2011, p. 118 ff.; De Schutter, "Globalization and Jurisdiction: Lessons from the European Convention on Human Rights", Baltic Yearbook of International Law, 2006, p. 203 ff.

[33] *Banković and Others v. Belgium and Others*, Application No. 52207/99, Grand Chamber, Decision of inadmissibility of 12 December 2001, para. 59.

State;[34] military occupation of a third State's territory;[35] activities through other agents in officials ships and aircrafts, also in international waters.[36] The rationale ultimately lies in the "exercise of physical power and control over the person in question":[37] while such exercise is normally presumed for activities taking place within the territory, it must be ascertained on a more stringent basis for extraterritorial acts. In both cases, it is always a relation of *power* coming to the fore, in order to demonstrate which the Court resorts to attribution. Again, while remaining discrete notions, attribution and jurisdiction appear inextricably intertwined.

Jurisdiction, however, has been expanded so as to cover not only "extraterritorial" conduct, but also "territorial" conduct resulting in the extraterritorial violation of a substantive ECHR provision. In case-law concerning extradition, expulsion and *refoulement,* the Court has dealt with cases where the actual or potential violation of the ECHR occurred as a consequence of the conduct of a State party (i.e. decision to remove the applicant from its territory) outside its territory (namely within the jurisdiction of a third State), and this notwithstanding it acknowledged the existence of jurisdiction. The Court first took this position in the *célèbre Soëring* case.[38] The Court held that the UK was responsible for violating Article 3 ECHR as at the time the applicant (Mr Soëring) was to be extradited there were substantial grounds for believing that he would face a "real risk" of being subject to a treatment contrary to Article 3 ECHR in the receiving State (the US).[39] Importantly for the purpose of the present contribution, the Court's rationale in *Soëring* can be formulated as follows, at least *prima facie*. The UK was held responsible for its own conduct, irrespective of the fact that the actual violation: (i) had not occurred yet; (ii) had it occurred, it would have been within a third State's jurisdiction. *Soëring* is neither an isolated nor an Article 3-limited case. The Court has adopted the same approach when a violation of the right to life was at stake,[40] as well as the right to personal liberty (Article 5 ECHR) and the right to a fair trial (Article 6 ECHR).[41]

Commenting on this case, one author noted that the applicant's presence within the territory would not be an essential element for jurisdiction to arise: the rationale in *Soëring* could be read as prohibiting States to engage in conducts

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[34] *Issa and Others v. Turkey*, Application No. 31821/96, Judgment of 16 November 2004.

[35] *Al-Skeini and Others v. the United Kingdom*, Application No 55721/07, Grand Chamber, Judgment of 7 July 2011, para. 138.

[36] *Medvedyev and Others v. France*, Application No. 3394/03, Judgment of 29 March 2010, para. 87; *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Grand Chamber, Judgment of 23 February 2012.

[37] *Al-Skeini*, *cit. supra* note 35, para. 136.

[38] See *Soëring v. the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989.

[39] *Ibid*., paras. 88 and 91.

[40] *Al Nashiri v. Romania*, Application No. 33234/12, Judgment of 31 May 2018, para. 457; *Husayn (Abu Zubaydah) v. Poland*, Application No. 7511/13, Judgment of 24 July 2014, para. 454.

[41] *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Grand Chamber, Judgment of 13 December 2012, para. 239; *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, para. 233.

resulting in the extraterritorial violation of ECHR provisions, irrespective of the place where the applicant is located.[42] One may however object that such explanation of *Soëring*'s rationale goes too far: the Court dealt with a case regarding the "exposure"[43] of an individual to a potential violation of Article 3 ECHR. Accordingly there is no exception to the traditional "territorial" model of jurisdiction. This view seems to be confirmed by subsequent case-law regarding the so-called extraordinary renditions, in which the Court has stated that the violation of a right protected by the ECHR "must be considered *intrinsic in the transfer*":[44] transfer implies territorial presence. It follows that in the Court's reasoning the alleged violation occurs territorially – that is, by virtue of the actual exercise of power upon a territorially-based individual.

Turning now to the case where the military base of a State Party is employed by a third State to carry out unlawful killings through armed drones, none of the abovementioned accounts of jurisdiction would trigger the Court's scrutiny. The "personal" model is not applicable to the facts, as the State Party would not exercise its authority or powers on individuals on the territory of another State. The "spatial" one is of no use as well: even drawing an analogy with case-law relating to extradition, expulsion and *refoulement*, if the *Soëring* rule is interpreted in the sense that State responsibility depends on the "exposure" of individuals to a "foreseeable" violation and, *a priori*, on their presence on State's territory or controlled areas, extraterritorial targeted killings would not trigger the jurisdictional link, as at no time the potential victims come within that territory or those controlled areas of the State Party.

4. The "Impact" Model

A model of jurisdiction based on the mere "impact" that States Party's activity may have on the enjoyment of human rights by individuals located outside States Party's territory and their authorities' reach seems left outside the scope of Article 1 ECHR. The simple fact that such conduct is attributable and etiologically linked to a State Party seems not to suffice. However, the present Section will demonstrate that: *first*, to a certain degree, a different understanding of jurisdiction encompassing extraterritorial effects of territorial conduct has already been endorsed by the Court, albeit mostly implicitly and even confusingly (Section 4.1); *second*, such model of jurisdiction is regularly adopted by other judicial and quasi-judicial human rights bodies (Section 4.2); *third*, theoretical obstacles that may put this model in question can be smoothly overcome (Section 4.3).

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[42] Jackson, "Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction", EJIL, 2016, p. 817 ff.

[43] See *Soëring*, *cit. supra* note 38, paras. 88, 91, 92, 99, 105 and 111.

[44] *Al Nashiri*, *cit. supra* note 40, para. 454; *El-Masri*, *cit. supra* note 41, para. 212.

4.1. Some implicit precedents in ECHR case-law

In many cases the Court of Strasbourg has taken a strong, explicit position against the "impact" model of jurisdiction; conversely, it has tacitly endorsed it in others.

The most well-known example of this model's rejection is provided for by the *Banković* case, in which the Court addressed the alleged violations resulting from the 1999 aerial bombardment of the Serbian radio/television station (RTS) in Belgrade by military forces of the NATO coalition.[45] The applicants had attempted to argue that as the relevant decisions were adopted on the territory of the respondent States, jurisdiction could be established "for the same reasons it was in the *Soëring* case".[46] Importantly the Court dismissed the argument affirming that the case before it was not comparable to *Soëring*, attaching decisive importance to the presence on the individual on the respondent State's territory. The Court later confirmed its findings in several cases, declaring the applications inadmissible for lack of jurisdiction as per Article 1 ECHR.[47] In short, the fact that a State can take a decision producing effects extraterritorially would not constitute a sufficient connection with the individuals potentially affected by such decision, who then do not come within the former's jurisdiction. The *ratio decidendi* that one could distil from the mentioned case-law would be that "jurisdiction to decide"[48] does not fall within the perimeter of Article 1 ECHR; exercise of actual power on individuals alone does not attract potential victims within the State's jurisdiction.

Such conclusion is belied by a set of different cases, which conversely may lead to retain that there actually is an emerging trend towards the acceptance of a third jurisdictional model. These cases – which are of great use to grasp the implications of an understanding of jurisdiction silently moving under the radar – may be grouped in three different clusters.

First, there are cases in which the Court has adopted the third jurisdictional model only tacitly, that is without confronting the issue of the possible lack of jurisdiction. A telling example is *Kebe v. Ukraine*,[49] a case involving three Eritrean nationals on board a vessel docked in an Ukrainian port and flying the Maltese flag, who were denied disembarkation by Ukrainian authorities. In fact, the Government submitted that the first applicant had not been within its juris-

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[45] *Cit. supra* note 33.

[46] *Ibid*., para. 53.

[47] *Ben El Mahi and Others v. Denmark*, Application No. 5853/06, Decision on Admissibility of 11 December 2006 (for a case involving Moroccan nationals complaining about the publication in a Danish newspaper of caricatures of Muhammad); *Chagos Islanders v. the United Kingdom*, Application No. 35622/04, Decision on Admissibility of 11 December 2012 (for a case concerning the expulsion of the applicants from their homes, situated in a group of islands which are an Overseas Territory of the UK), para. 65 ("[t]he ultimate decision-making authority of politicians or officials within the United Kingdom is not a sufficient ground on which to base competence under the Convention for an area otherwise outside the Convention space").

[48] See *infra*.

[49] Application No. 12552/12, Judgment of 12 January 2017.

diction as he was on board the vessel flying a third State's flag;[50] hence neither the "spatial" nor the "personal" model of jurisdiction would be applicable. After recalling its case-law on Article 1 ECHR, the Court took note that "that Ukraine had *jurisdiction to decide* whether the first applicant should be granted leave to enter Ukraine" was not disputed by the parties,[51] and therefore concluded that the applicant was within the respondent State's jurisdiction "to the extent that the matter concerned his possible entry to Ukraine and the exercise of related rights and freedoms set forth in the Convention".[52] As has been highlighted, the Court chose not to rely on the fact that the Maltese ship was actually in the territory of Ukraine, but on the latter's power to authorize the entry.[53] In other words, jurisdiction was apparently based on the *power to adopt a decision* likely to impact on the applicant's right under Articles 3 and 13 ECHR.

The Court's reticence is even more visible in the *Women on Waves* case.[54] Portuguese authorities had intercepted the applicant's ships in international waters and prevented them from entering its territorial sea, thence violating their right to free association and expression. Again, what was at issue was a decision taken by State authorities in the exercise of sovereign prerogatives that allegedly affected the rights of individuals outside its jurisdiction (both spatially and personally). However, the Court did not offer any element of reflection as this time jurisdiction was neither objected by the Government nor was it addressed *ex officio* by the Court; its existence was simply taken for granted. In the same line are numerous cases regarding applicants that, yet residing outside the State Party, complain about a violation of their rights (mainly Article 8) as a consequence of decisions taken by State authorities and involving their familiars situated on the territory of that State.[55]

In a second strand of cases, the Court grounded its findings on the existence of a jurisdictional link by resorting to diverse legal concepts, in particular "causation". The first case to focus on is *Pad and Others v. Turkey*.[56] The applicants had been shot by Turkish authorities from an helicopter, while attempting to enter Turkey illegally from the territory of Iran. The helicopter was flying in the Iranian aerial space, and therefore had no "effective control" on the terri-

[50] *Ibid*., para. 67.

[51] *Ibid*., para. 75.

[52] *Ibid*., para. 76.

[53] De Vittor, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", DUDI, 2018, p. 5 ff., p. 21.

[54] *Women on Waves and Others v. Portugal*, Application No. 31276/05, Judgment of 3 February 2009.

[55] *Stochlak v. Poland*, Application No. 38273/02, Judgment of 22 September 2009; *Mayeka and Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006; *contra* see *Haydarie and Others v. the Netherlands*, Application No. 8876/04, Decision on Admissibility of 20 October 2005; *mutatis mutandis* see *Wahab Khan v. the United Kingdom*, Application No. 11987/11, Decision on Admissibility of 28 January 2014. For deeper reflection on this case law, see Vezzani, "Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani", RDI, 2018, p. 1086 ff., p. 1107.

[56] Application No. 60167/00, Judgment of 28 June 2007.

tory where the applicants were situated ("spatial" model), nor on the applicants themselves ("personal" model). While the *Banković* rationale would have led to a declaration of admissibility *ratione loci*, quite surprisingly the Court reached an opposite conclusion. Albeit the exact location of the impugned events was not clearly determined, the Court contented itself with ascertaining that Turkey had not contested that the fire had been discharged from Turkish helicopters and that the alleged violation was *caused* thereby.[57] The jurisdictional link had allegedly been triggered by the causal relation between an action (attributable to a State Party) and the event (consisting in an ECHR violation).[58]

In the same line stands *Andreou v. Turkey*.[59] The Court considered that the shooting of the applicant by Turkish agents, occurred between the UN buffer zone and the Greek-Cypriot National Guard checkpoint – therefore outside the territory of the responding State and absent any "effective control and authority" thereon –, had triggered the jurisdictional link. Interestingly, in order to justify its position on jurisdiction the Court relies on a poorly defined notion of "proximity" to the Turkish jurisdictional perimeter. First, it contends that the impugned events took place "in close vicinity" to the checkpoint where Turkey allegedly exercised its authority (thus spatial proximity, recalling the "spatial" model of jurisdiction). Second, it notes that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the *direct and immediate cause* of those injuries" triggered the jurisdictional link (thus causal proximity).[60] As in *Pad*, the Court relies on a concept of "causation" which would attract individuals normally placed outside the jurisdictional reach of a State Party within it. From a dogmatic standpoint, however, causation and jurisdiction stand as discrete notions,[61] so it is particularly noteworthy that the Court tends to conflate them in order to prove the existence of the jurisdictional link as per Article 1 ECHR.

Lastly, there are cases in which the Court relied on the concept of "attribution" in order to justify the adoption of the third jurisdictional model. Beyond any doubt, the most telling one is *Stephens v. Malta (No. 1)*.[62] The Court dealt with a request for detention set in motion by Malta and addressed to Spain, which re-

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[57] *Ibid*., para. 54, in a passage deserving full quote: "in the instant case, it was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives".

[58] There are other cases in which, albeit the Court did not take a position on jurisdiction, the same rationale applies. See for example *Xhavara and Others v. Italy and Albania*, Application No. 39473/98, Decision on Admissibility of 11 January 2001 (for a case concerning the death of Albanian irregular migrants occurred as a consequence of a collision at sea with an Italian warship).

[59] Application No 45653/99, Merits and Just Satisfaction, 27 October 2009.

[60] *Ibid*., para. 25.

[61] See *amplius* VEZZANI, *cit. supra* note 55, *passim*.

[62] Application No. 11956/07, Judgment of 21 April 2009.

sulted in an unlawful detention in Spain premised on irregular documents issued by Malta. Here the Court affirms that the question that it has to decide is "whether the facts complained of […] can be *attributed* to Malta";[63] this notwithstanding, the relevant Section of the judgment and the reasoning developed therein clearly rely on the notion of jurisdiction. Assessing the complaint under Article 1 ECHR, the Court referred both to the "personal" and "spatial" models of jurisdiction. As for the first, it easily acknowledged that as the applicant had been under the "control and authority" of Spain no issue of "personal jurisdiction" arose with regard to Malta.[64] As for the second, it argued that the "alleged unlawfulness of [the applicant's] arrest and detention" under Article 5 ECHR "had its sole origin in the measures taken exclusively by the Maltese authorities", and thus "[*b*]*y setting in motion a request* for the applicant's detention pending extradition, the responsibility lay with Malta to ensure that the arrest warrant and extradition request were valid".[65] The Court then concluded that "the act complained of by Mr Stephens, having been *instigated* by Malta *on the basis of its own domestic law* and *followed-up by Spain* in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain".[66]

The rationale emerging from the *Stephens* case must be understood in the sense of a – though implicit – recognition of "jurisdiction to decide" *à la Kebe*. Malta was held responsible: (i) absent any control by its own authorities on the applicant, at least according to the "personal" model; (ii) for a violation materially committed by a third State; and (iii) by virtue of its decision regarding the applicant alone. The conduct giving rise to Malta's responsibility was the issue of the arrest warrant by a court void of legal authority to do so in accordance with domestic law. The sole connection between Malta and the applicant was the *de jure* power Malta had to have him arrested and extradited, a power that, in the *cas d'espèce*, stemmed from an international agreement (namely the 1957 European Convention on Extradition).[67] In brief, it was the State's *power to adopt a decision* likely to impact on the applicant's right under Article 5 ECHR to establish its jurisdiction and the subsequent application of the ECHR.[68]

It is now possible to draw some conclusions from the case-law under scrutiny. First, an apparently contradictory construction of jurisdiction witnesses that

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[63] *Ibid*., para. 45.

[64] *Ibid*., para. 51.

[65] *Ibid*., emphasis added.

[66] *Ibid*., para. 52, emphasis added.

[67] European Convention on Extradition, 13 December 1957, entered into force 18 April 1960.

[68] The same rationale had been employed *a contrario* in *Drozd and Janousek v. France and Spain*, Application No. 12747/87, Judgment of 26 June 1992 (for a case concerning criminal proceedings before the Principality of Andorra's tribunals and subsequent imprisonment in France after convictions by that judge). In this case, the Court upheld the Governments' objection of lack of jurisdiction *ratione loci*, but stated: "le terme 'jurisdiction' ne se limite pas au territoire national des Hautes Parties contractantes; leur responsabilité peut entre ren jeu à raison d'actes emanant de leurs organes et déployant leurs effets en dehors dudit territoire" (para. 91).

it is difficult, if not impossible, to consider it as a monolith – rather, it stands as a variable-geometry concept.[69] Second, it appears that when the Court intends to support the third model of jurisdiction it tends to rely on – that is, to find additional grounds of justification in – contiguous concepts (such as attribution and causation) in an attempt to prove a "proximity" between State conduct and the impugned event – in other words, a relation of *power*. Only when analysis from these standpoints too is unsatisfying does the Court conclude for the inadmissibility, as occurred, to name one, in the *Tugar* case, in which applicants sought to invoke Italy's responsibility for violations of the right to life occurred in Iraq as the consequence of Italy's failure to properly regulate the transfer of weapons.[70] So, the more a conduct is attributable to a State Party, and the more the impugned events are the "direct and immediate consequence" of such conduct,[71] the more likely jurisdiction will be believed to qualify also for extraterritorial effects of territorial conduct.

4.2. An external support

The "impact" model of jurisdiction has been accepted, and further elaborated, by most judicial and quasi-judicial human rights bodies. As is known, their case-law is often inspired, or impacted, by the ones of their peers, in a phenomenon commonly referred to as "cross-fertilization".[72] In this light, analyzing such case-law is not only interesting from a comparative perspective, but gives also additional support to the (eventual, auspiciously) affirmation of the third jurisdictional model in the Strasbourg case-law.

To begin with, even international adjudicatory bodies not tasked with monitoring the respect of human rights treaties have somehow sponsored the "impact" model. The International Court of Justice (ICJ) has affirmed that "generally" the provisions of a human rights treaty apply to State conduct beyond its territory.[73] As a matter of fact, obligations stemming from some key international instruments aimed at the protection of human rights (for example, the Genocide

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[69] For a similar conclusion on ECHR practice, see De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, 2002, p. 140 ff.

[70] *Tugar v. Italy*, Application No. 22869/93, Commission, Decision of 18 October 1995 ("the applicant's injury cannot be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered. It follows that the 'adverse consequences' of the failure of Italy to regulate arms transfers to Iraq are 'too remote' to attract the Italian responsibility").

[71] See *Andreou*, *cit. supra* note 59.

[72] For a general overview, see Hennebel, "Les références croisées entre les jurisdictions internationales des droits de l'homme", in Allard et al. (eds.), *Le dialogue des juges: Colloque Les Cahiers de l'Institut d'études sur la justice*, Bruxelles, 2007, p. 31 ff.

[73] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008, ICJ Reports, 2008, p. 353 ff., para. 109.

Convention) arise also when potential victims are located outside the State's territory and do not fall within its authority or control.[74]

In the Inter-American system, the Court of San José has recently interpreted the right to life and personal integrity as encompassing extraterritorial procedural obligations in the field of environmental protection.[75] Addressing the issue of whether the jurisdictional link is triggered with respect to State activity having an impact on the environment outside its territory – and thus on the enjoyment of human rights by individuals placed accordingly – the Court took a straightforward position in equating jurisdiction with causation: territorial conduct (i.e. the decision to advance a particular environmental policy) and the exterritorial effect (i.e. the violation of human rights enshrined in the ACHR) need to be linked in a relation of cause/effect in order for jurisdiction to qualify.[76] In the system of the African Charter on Human and People Rights (ACHPR), the "impact" model has been endorsed, albeit not explicitly, in a case regarding the imposition of a commercial embargo by a group of States against another one.[77]

Focusing now on universal human rights instruments, the idea that jurisdiction encompasses also extraterritorial effects of territorial conduct has been supported with respect to, *inter alia*, the right to food,[78] the right to health,[79] the right to privacy.[80] The Human Rights Committee, acting as quasi-judicial body, has a consolidated case-law in the field of passport issuance: the fact that States party to the ICCPR have the power to decide on issuing or denying passports to its citizens situated abroad has been considered as sufficient for triggering the jurisdictional link as per Art. 2(1) ICCPR.[81]

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[74] *Genocide Case*, *cit. supra* note 21, para. 430.

[75] Inter-American Court of Human Rights, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity)*, Advisory Opinion of 15 November 2017, para. 101 ("los Estados tienen la obligación de evitar daños ambientales transfronterizos que pudieran afectar los derechos humanos de personas fuera de su territorio").

[76] *Ibid*. ("[a] efectos de la Convención Americana, cuando ocurre un daño transfronterizo que afecte derechos convencionales, se entiende que las personas cuyos derechos han sido vulnerados se encuentran bajo la jurisdicción del Estado de origen si existe una relación de causalidad entre el hecho que se originó en su territorio y la afectación de los derechos humanos de personas fuera de su territorio").

[77] *Association pour la sauvegarde de la paix au Burundi v. Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia*, Judgment of 29 May 2003.

[78] Committee of Economical Social Cultural Rights, General Comment No. 12: The right to adequate food (Art. 11), 12 May 1999, para. 36.

[79] Committee of Economical Social Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health (Art. 12)", 11 August 2000, para. 39.

[80] Human Rights Committee, General Comment No. 16: The right to privacy (Art. 17), 8 April 1988, para. 9 ("States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant"); more recently, see Concluding Observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014, para. 22.

[81] See *Samuel Lichtenstein v. Uruguay*, Views, CCPR/C/OP/2 (1983), para. 6.1: "[t]he issue [*sic*] of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose […]

A truly ground-breaking advancement has been brought about by the recently approved Human Rights Committee's General Comment No. 36 (GC36), dedicated to the right to life.[82] Paragraph 63 deals with issues related to the notion of "jurisdiction" as enshrined in Article 2(1) ICCPR: both the "spatial" and the "personal" models of jurisdiction are explained in detail. A third model is then added, which "includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless *impacted* by its military or other activities in a *direct and reasonably foreseeable* manner".[83] Resorting to a notion of "impact", without any precedent or authority cited and evidently inspired by the concept of causation, can be understood as an attempt to translate the abovementioned relation of power by a State over an individual into legal terms.

The key passage, however, is the following: "States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life".[84] The expression "to aid or assist" clearly recalls the notion of complicity as explained above:[85] it is GC36 itself to cite Article 16 ARSIWA at the relevant footnote.[86] Jurisdiction is believed to cover also territorial complicit conduct resulting in extraterritorial violation of human rights. Put differently, this finding demonstrates beyond doubt that, for the purposes of establishing "impact" (or, as is preferable, *power*) and thus jurisdiction, it is possible to resort to assessments in terms of causation and especially complicity.

One must be cautious about implying too much from the abovementioned provision: GC36 is a mere interpretive tool elaborated by a quasi-judicial body, as such void of binding force. However, with respect to States' reception of a model jurisdiction broad enough to apply to complicity in extraterritorial violation of human rights, one commentator has observed that an early draft stimulated written comments by 23 States out of 172 State parties total, 16 of which remained neutral with regard to the formulation, raising neither objections nor support.[87] Coupled with the abovementioned practice of judicial and quasi-judicial bodies, this circumstance is conducive to considering this model of jurisdiction as sufficiently well-established in most regional and the universal systems of protection of human rights.

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therefore, article 2(1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory".

[82] Human Rights Committee, General Comment No. 36: The right to life (Art. 6), 31 October 2018.

[83] *Ibid.*, para. 63, emphasis added.

[84] *Ibid*.

[85] See *supra* Section 2.2.

[86] See GC36, *cit. supra* note 82, footnote 263.

[87] See MØGSTER, "Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR", EJIL: Talk!, 27 November 2018, available at: <https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/>. A complete list of States' reactions to the proposal is available at: <https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>.

4.3. Theoretical justifications

The findings outlined so far have an interesting counterpart in theoretical reflection. As a matter of fact, one could hardly deny that overstretching the notion of jurisdiction could produce deleterious effects, namely the emptying of any practical application and *effet utile* of that notion.[88]

Unsatisfied by a too rigid appraisal of jurisdiction, many authors lean on a more principled one,[89] yet without denying the opportunity of maintaining a qualified relation between the State and the (potential) victims of its conduct producing effects outside its territory.[90] For instance, the idea has been suggested that jurisdiction be read "qua political and legal authority" of a State on individuals.[91]

Jurisdiction would be more than the mere exercise of coercion or power over an individual; rather, it presupposes the exercise of power conceived as authority to impose "reasons for actions" or as "potential for control and the application of rules to the concerned individual".[92] It is maintained that it would amount to a logical absurdity to argue that jurisdiction can arise solely because a State has the mere power to violate an individual's right (for instance, the right to life of victims of an aerial bombing as in *Banković*); on the contrary, it is because there actually is a normative relationship between the State and the individual that the former could violate the latter's rights.[93]

One author has argued that conceiving jurisdiction in territorial terms is an "illusion" or a "misconception", as this would conflict with historical appraisal of the concept both domestically and internationally.[94] The need for distinguishing radically the "spatial" from the "personal" model too is debatable. In order to address the shortcomings of adopting such approach, it has been argued that

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[88] See for instance *Banković*, *cit. supra* note 33, para. 80 (arguing that the ECHR was not "designed to be applied throughout the world, even in respect of the conduct of the Contracting States").

[89] CONDORELLI, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", RCADI, Vol. 189, 1984-I, p. 91 ff. (describing the overcoming of a strictly territorial notion of jurisdiction as aimed to "réduire (sinon éliminer) l'iniquité inhérente au fait que des comportements d'Etats dans ce domaine, illicites s'ils surviennent dans un lieu donné, soient à qualifier comme parfaitement licites lorsqu'ils surviennent ailleurs").

[90] LATTANZI, "Il confine fra diritto internazionale umanitario e diritti dell'uomo", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli, 2004, p. 2028 ff. (endorsing a model of jurisdiction capable of encompassing all state acts resulting from the exercise of sovereign prerogatives – legislative, executive and judiciary powers).

[91] BESSON, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", Leiden JIL, 2012, p. 857 ff., p. 865.

[92] RAIBLE, "The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers", European Human Rights Law Review, 2016, p. 161 ff.

[93] *Ibid*. ("saying that one can create obligations under the Convention by violating them is simply absurd").

[94] SZIGETI, "The Illusion of Territorial Jurisdiction", Texas International Law Review, 2017, p. 369 ff.

jurisdiction as a whole should be tackled from a "functionalist" perspective.[95] The jurisdictional link would be triggered every time that States establish either "factual" relations of power entailing "direct, significant and foreseeable potential impact", or "special legal relations" with the affected individual.[96] From this standpoint, excess in both ways is avoided: denying any relevance of the cause/effect link *à la Banković*, even when States are particularly well-placed to exercise actual power on the individual, would hardly be justifiable, as well as endorsing a jurisdictional link attracting whatever State conduct – also too remote – within its scope.[97]

Conversely, others support a more progressive position, arguing that the demonstration of a relation of power between the State and the individual would not be necessary for jurisdiction to arise. From such perspective, it is the dichotomy between "negative" and "positive" obligations that needs to be rethought to the extent that jurisdiction is impacted. As negative obligations impose only a duty of abstaining from conducting against particular human rights upon States, they would not be structurally limited to a territory: in short, they would be "universal" in character.[98] On the contrary, positive obligation – inasmuch as requiring active duties by States – would only apply within territorial borders or at least wherever a State exercises effective power over individuals. Translating this distinction in terms of jurisdictional models, negative obligations would be fully compatible with the "impact" model, while positive obligations would be limited to the "spatial" and "personal" models.

As regards the conduct of aiding or assisting another State in performing a human rights violation, this would fall within the scope of negative obligations – and would therefore be compatible with the third model of jurisdiction, as has been convincingly argued with respect to torture and inhuman and degrading treatment.[99] Importantly, this doctrinal suggestion has now a counterpart in at least one international instrument, as GC36 expressly recalls the provision

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[95] SHANY, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law", Law & Ethics Journal of Human Rights, 2013, p. 47 ff. Compare with *Al-Skeini*, *cit. supra* note 35, Concurring Opinion by Judge Bonello, para. 11 ("[a] 'functional' test would see a State effectively exercising 'jurisdiction' whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, *a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control*").

[96] SHANY, *cit. supra* note 95, p. 70: "states particularly well-situated to incur IHRL obligations should do so – either because such impact is direct, significant and foreseeable or because the legal context generates legitimate expectations to this effect".

[97] DE SENA, *cit. supra* note 69, p. 231 (according to whom jurisdiction can encompass state activity that, albeit without qualifying strictly as exercise of governmental prerogatives on foreign territory, is suitable for affecting the enjoyment of ECHR rights *on a stable basis*). See also SZYDŁO, "Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda", International Criminal Law Review, 2012, p. 271 ff.

[98] MILANOVIC, *cit. supra* note 32, pp. 209-222; *Al-Skeini*, *cit. supra* note 35, Concurring Opinion by Judge Bonello, para. 9.

[99] See JACKSON, *cit. supra* note 42.

on complicity to support the "impact" model with respect to the right to life.[100] In spite of such authoritative endorsement, however, judicial case-law has not evolved to the point of acknowledging a territorially unlimited negative obligation encompassing complicity that does without an assessment in terms of exercise of actual power.

All the theoretical accounts of jurisdiction that have been examined so far lead to a seemingly obliged conclusion, namely that jurisdiction cannot be treated as a homogeneous concept. This confirms our previous conclusion regarding the practice of the Strasbourg Court:[101] from the theoretical standpoint too jurisdiction is a variable-geometry notion. However, this circumstance must not be taken as a meagre result: fragmentation does not imply theorical chaoticness; rather, it points to considering jurisdiction as a concept which is flexible enough to cover a wide range of conducts. In the "spatial" model, jurisdiction would be normally triggered as individuals are presumed to be the addressees of State power; in the "personal" model, a high degree of intensity in State's "authority and control" has been deemed necessary to activate the jurisdictional link;[102] and in the last model, geographical proximity is substituted for by a case-by-case analysis around the power the State could actually exercise upon individuals.

If one wants to spot a common denominator, this would be *subjection to State power*, a decisive element in all cases above; what is different from one to another is rather a matter of degree thereof.[103] The assessment of such degree is thus where distinct legal concepts kick in. Attribution, causation, and eventually complicity – as will be shown soon – serve mainly as "indicators" of such power: they are resorted to with a view to describing the actual relationship between individuals and the State.

5. Re-Appraising the Practice of Authorizing Extraterritorial Targeted Killings

In the light of a jurisdictional model capable of comprising extraterritorial effects of territorial conduct, the scenario that has been depicted in the Introduction takes a new shape. Crossing the Court's findings on attribution and causation with the particularities of conducts qualifying as complicity provides additional support to proving subjection to State power and therefore considering the jurisdictional link as per Article 1 ECHR triggered.

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[100] See *supra* notes 82 and 85.

[101] See *supra* Section 4.1.

[102] See *amplius* Vezzani, *cit. supra* note 55, p. 1101 ff. and references quoted therein.

[103] See De Sena, *cit. supra* note 69 (demonstrating that such conclusion is supported by literature); Szdylo, *cit. supra* note 69, p. 288: ("[i]n the case of extra-territorial jurisdiction exercised on the basis of an effective control over an area, the Court was only able to give some general criteria and factors that speak in favour of such control"). In the same line, see *Al-Skeini*, *cit. supra* note 35, Concurring Opinion by Judge Bonello, para. 13 ("[j]urisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not to fulfil them)").

From the standpoint of attribution, there may be an obstacle in that it is difficult to impute the events at issue to complicit States Party. The principal wrongdoer would not be a State Party: it is a third State that materially opens the fire against the target. However, one should not forget that States Party are found responsible for violating the ECHR on the sole basis of what can be attributed thereto: in our scenario, such conduct happens to amount to "aid and assistance" to other States. As the Court's case-law on extraordinary renditions demonstrates clearly, conducts qualifying as (territorial) complicity are scrutinized only through the lenses of negative and positive duties as they stem directly from ECHR provisions, without engaging in discussion around whether Article 16 ARSIWA strictly applies.[104] According to one author, in similar cases complicity would operate not just as a criterion for attributing responsibility (as the ARSIWA originally conceived it), but rather as a criterion for attributing conduct to a State Party.[105]

There is no reason why the same could not apply to extraterritorial complicity too: whether the impugned events take place within or outside the State Party's territory is not a decisive element for the purposes of attribution. As a matter of fact, the case of States Party authorizing third States to perform extraterritorial targeted killings through armed drones can be read as examples of *de jure* power projected on individuals on an abstractly permanent basis, to the extent that there is an international agreement (in the case of Italy, the TAS) attributing the State Party (Italy) the power to authorize this kind of operations (as inferable from Articles 3 and 4, Section VI): nothing different from the *Stephens* rationale.[106]

The criterion of causation too has to be understood in the light of the complicity framework. It has been said that public information regarding the practice of authorizing drone strikes implies that in normal circumstances – i.e. admitting that the third State did not act outside any authorization by the territorial State – the targeted killings are authorized explicitly, on a case-by-case basis, by the State Party. The objective element of complicity, in its causal aspect, would fully qualify, as the States Party's conduct would contribute "significantly" to the final event.[107] From the standpoint of the subjective element, it would be necessary to ascertain that the State Party had a sufficient degree of knowledge of the circumstances of the fact – yet with all the interpretive difficulties associated with such formula. Should this analysis lead to the finding that the State Party knew of the "direct, significant and foreseeable potential impact" of its own conduct on the potential victims' rights, jurisdiction could be expected to arise accordingly.

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[104] See *El-Masri*, *cit. supra* note 41, para. 211 ("[t]he respondent State must be considered directly responsible for the violation of the applicant's rights under this head since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring").

[105] AMOROSO, "Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law", Leiden JIL, 2011, p. 989 ff., pp. 991-999.

[106] See *Stephens*, *cit. supra* note 62.

[107] See *supra* Section 2.2.

Finally, jurisdiction can be interpreted as encompassing territorial conduct of complicity with third States resulting in the extraterritorial violation of ECHR rights, not only as demonstrated by our context-related analysis in terms of attribution and causation, but also as established straightforwardly in GC36 – a legal instrument that, albeit void of binding force, could not be disregarded altogether, if not as all States Party are party also to the ICCPR.[108]

Before turning to the conclusions, it is important to clarify three points.

First, it has been demonstrated that the application of the third model of jurisdiction requires a tailor-made, context-related analysis of the specific case. Such approach, it is argued, is a constant feature of the Strasbourg Court's case-law. For instance, the Court has recently affirmed that some duties stemming from the ECHR (namely, the duty to investigate into deaths occurred outside State territory and to cooperate with the territorial State) apply extraterritorially (i.e. even when the substantive violation did not occurred within the territory of the State) by virtue of "special features" that the Court considered not to have to define *in abstracto* "since [they] will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other".[109] In our scenario, it is a State Party's public authority (namely, the Commander) to approve the operation upon due notification, which places the assisting State in a *unique* position with respect to the foreseeable outcome (as it has the *de jure* power to avert it). The "special features" that characterize such scenario may be capable of triggering jurisdiction.

Second, in order for the Court to assess such "special features" and therefore affirm the existence of the jurisdictional link, it may be necessary to join the admissibility question with the merits of the case. Inquiring whether the respondent State had, or ought to have had, knowledge about the third State's conduct, as well as measuring the etiological nexus between the impugned events and the State's conduct of providing aid or assistance are conceptual operations that have close connections with the merits. Again, the Court has repeatedly shown an attitude inclined to keep the preliminary and merits analyses joint, particularly when the reconstruction of the impugned events was disputed by the Parties.[110]

Third, in assessing such "special features" the Court may find itself in the position of clarifying the contours of the "impact" model of jurisdiction once for all. The phenomenon of assisting third States in carrying out drone strikes constitute a unique occasion to engage in such interpretive effort. In fact, it seems that today such occasions are multiplying: to name an example, States Party – as well as the European Union – regularly aid or assist third States in carrying out border

[108] See *supra* Section 4.2.

[109] See *Güzelyurtlu and Others v. Cyprus and Turkey*, Application No. 36925/07, Grand Chamber, Judgment of 29 January 2019, para. 190 ("special features" being acknowledged in order to justify a departure from the rule according to which the obligation is triggered for the State "under whose jurisdiction the deceased was to be found at the time of the death"). This approach is fully in line with *Al-Skeini*, *cit. supra* note 35, paras. 133-137.

[110] See *Al Nashiri*, *cit. supra* note 40.

control operations, which are thus "outsourced".[111] Phenomena of intelligence gathering-and-sharing on third States' request have also spread,[112] as well as supply of weapons to third States to be employed in allegedly unlawful armed operations.[113] In brief, it is plausible that sooner or later these cases will be submitted to the Court's scrutiny, which could hardly play for time. Elaborating a convincing model of jurisdiction will ensure consistency and reduce legal loopholes that States could exploit to seek shelter from accountability.

6. Closing Remarks and Open Issues

It has been argued that the scenario under consideration in the present contribution has reasonable chances to fall within the reach of jurisdiction as per Article 1 ECHR. *First*, part of the Court's case-law dealing with exercise of *de facto* or *de jure* power upon individuals can be appraised only through the "impact" model. *Second*, while the Court of Strasbourg displays a timid attitude towards embracing this model fully, other judicial and quasi-judicial human rights bodies – the IACtHR, the AComHPR, the HRC and so on – do not. A cross-fertilization in this area is feasible. *Third*, this model of jurisdiction counts on a solid theoretical background as – albeit with diverging arguments – most scholars have embraced a notion of jurisdiction that is not unitary, but flexible enough to comprise complicit action resulting in extraterritorial violations of human rights.

Still, there are critical issues remaining open for further reflection. First and foremost, the notion of jurisdiction that has been elaborated is a variable-geometry one: rather than a monochromatic painting *à la* Rothko, it stands as a pointillistic artwork. More prosaically, one may object that conflating jurisdiction and attribution, causation, or complicity (themselves diverse legal concepts) – as the Court regularly does in order to justify a departure from traditional accounts of jurisdiction – reveals nothing more than a conceptual confusion that scholars should dismantle rather than spur.

However, it cannot be denied that, albeit dogmatically imperfect, a malleable account of jurisdiction, suitable for applying whenever States exert actual *power* on individuals, has at the very least the advantage of being a "principled" position:[114] no double-standard treatment would be reserved to States Parties tak-

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[111] See De Vittor, *cit. supra* note 53. See also Ciliberto, "Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?", The Italian Law Journal, 2018, p. 489 ff.

[112] de Wet, *cit. supra* note 16.

[113] See for instance the House of Lords' Select Committee on International Relations, "Yemen: giving peace a chance", 16 February 2019, HL Paper 290, available at: <https://www.publications.parliament.uk/pa/ld201719/ldselect/ldintrel/290/29002.html> (claiming that British authorities are not making independent checks to verify if arms supplied to Saudi Arabia are being used in Yemen in breach of international law).

[114] Jackson, *cit. supra* note 42, p. 828.

ing decisions producing effect either inside or outside their borders.[115] In present-day conditions, in which States Party's engagement in complicit conducts seems to be growing exponentially, such an interpretation of Article 1 ECHR – yet far from being the "best of the possible worlds" – may save from falling into the "worst" of the possible ones. For dogmatic-sensitive scholars, this simply means that a pondered reflection on the "impact" model of jurisdiction should not be procrastinated.

[115] *Al-Skeini*, *cit. supra* note 35, Concurring Opinion by Judge Bonello, paras. 12 ff.; MILANOVIC, *cit. supra* note 32; DE SENA, *cit. supra* note 69.