

# Understanding Human Rights Obligations of States Engaged in Public Activity Overseas: The Case of Transnational Education.

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## Abstract:

Legal consideration of extraterritorial obligations contained in the European Convention of Human Rights have largely developed in respect of military occupation or the custodial control of individuals. For a number of reasons situations involving transnational cooperation have received little judicial scrutiny. This paper examines human rights concerns associated with the rapidly expanding field of transnational education an activity frequently reliant on interstate cooperation. By re-examining the jurisprudence of the European Court of Human Rights the legal obligations of countries establishing engaged in public activity overseas are explored. The analysis is structured around a case study on the oversight of a European education facility affected by Bahrain's controversial response to pro-reform protests.

**Key words:** transnational, human rights, university, branch campus, torture, extraterritorial obligations

## Introduction

In recent years, the question of states' extraterritorial human rights obligations have been the subject of intense debate.<sup>1</sup> This interest has been sparked by two separate developments: first, an increased

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<sup>1</sup> See *inter alia* F. Coomans and M. T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004); M. Gibney, 'Genocide and State Responsibility' (2007) 7 *Human Rights Law Review* 760-773; M. Gibney, E. Roxstrom and T. Einarsen, 'The NATO Bombing Case [Bankovic v Belgium et al.]: One Step Forward or Two Steps Back?' (2005) *Boston University Journal of International Law* 55-136; Mark Gibney, Katarina Tomasevski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard International Law Journal* 267-295; R. Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of State' in G. Kreijen, *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002); M. Sepulveda, 'Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 *Netherlands Quarterly of Human Rights* 271-303; Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerp: Intersentia 2006); Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and

body of case-law from regional and international courts where the question of the scope and extent of extraterritorial human rights obligations (ETOs) have been addressed;<sup>2</sup> and secondly, a recognition that human rights of individuals are increasingly being affected by actions or omissions by foreign states or their agents. This has led to a question of the relevance of human rights law if it only focuses on the territorial state's actions or omissions.<sup>3</sup>

In this paper, we address how attention to a narrow cluster of scenarios brought before judicial consideration have resulted in certain ETOs being constructed and considered against a restrictive set of factual circumstances. Most of the judicial attention regarding the reach of extraterritorial human rights obligations has concerned situations where a foreign state is an occupying power, or it has military or custodial control over one or more individuals whose human rights are allegedly breached. This substantive focus may have restricted the legal debate to inter-state conflict, violence against individuals and detention at the expense of broader diversity of threats to human rights for which foreign states may be fully or partially responsible. Consequently fields of transnational *cooperation*, owing to their genesis under invitation and consent, have tended to fall outside of human rights law's jurified field of focus.

One increasingly prominent and rapidly growing field of inter-state cooperation is transnational education. Since its emergence in the 1990s it typically involves significant public engagement and monitoring between home and hosts states. Defined by the Council of Europe<sup>4</sup> as any higher education study programme in which the learners are located in a country different from the one where the awarding institution is based, it requires a set of practical arrangements extending the reach of regulatory systems to host countries.<sup>5</sup> In its most advanced form "branch campuses" are dependent

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International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739-806; Ralph Wilde, 'Casting light on the "Legal Black Hole": Some Political Issues at Stake' (2006) *European Human Rights Law Review* 552-557; Sigrun Skogly, 'Extraterritoriality: Universal human rights without universal obligations' in S. Joseph and A. McBeth (eds), *Research Handbook On International Human Rights Law* (London: Edward Elgar, 2010); M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009); M. Gibney and S. Skogly (eds) *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania: University of Pennsylvania Press, 2010).

<sup>2</sup> See *inter alia* *Georgia v Russian Federation* [2008] ICJ 140; *Loizidou v Turkey* [1995] ECHR 10; *Bankovic and ors v Belgium and ors* [2001] ECHR 890; *Case 9903 Rafael Ferrer-Mazorra et al. v. United States* [2001] IACHR 51/01, and a number of other cases referred to in the present article.

<sup>3</sup> See *inter alia* M. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: OUP, 2007); M. Gibney (2007) n 1 above; S. Skogly (2006) n 1 above; R. McCorquodale and P. Simons 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 40 *MLR* 598-625.

<sup>4</sup> Council of Europe 'Code of Good Practice in the Provision of Transnational Education' DGIV/EDU/HE (2002) 8 Strasbourg, 31 January 2002.

<sup>5</sup> Jane Knight, *Higher Education in Turmoil: The Changing World of Internationalisation* (Rotterdam: Sense Publishers, 2008) 123-136; Jurgen Enders, 'Higher Education, Internationalisation, and the Nation-State: Recent

on deep cooperation including local registration, transnational accreditation and quality assurance protocols.<sup>6</sup> While South–South initiatives have emerged it is institutions from the global North that have been at the forefront in establishing branch campuses in the global South.<sup>7</sup>

At the time of writing it is estimated that there are at least 210 branch campuses operating globally, a figure that does not include certain franchises, partnerships, ‘twinning’ agreements and other formal arrangements between institutions.<sup>8</sup> Given the public administrative processes underpinning the delivery and standardisation of tertiary education this activity potentially falls within the scope of human rights obligations that bind cooperating states. This nexus has become increasingly visible with the expansion of Western education programmes into states with questionable human rights records where institutions have contended with or ignored human rights challenges ranging from restriction on the freedom of expression to the use of bonded labour.<sup>9</sup> Likewise the rapid expansion of Confucius Institutes on Western campuses, funded by China’s Ministry of Education, has raised similar concerns for human rights, academic freedoms and transparency.<sup>10</sup>

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Developments and Changes to Governance Theory’ (2004) 47 *Higher Education* 361–382; Grant McBurnie and Christopher Ziguras, *Issues and Trends in Offshore Higher Education* (London: Routledge, 2007).

<sup>6</sup> Ravinder K Sidhu, Pam Christie ‘Transnational higher education as a hybrid global/local space: A case study of a Malaysian Australian joint venture’ 2014 *Journal of Sociology* 1–18

<sup>7</sup> Ibid. According to the Cross-Border Education Research Team (C-BERT) at the State University of New York the largest five importers of tertiary education are the United Arab Emirates, China, Singapore, Qatar and Malaysia see Geoff Malson ‘Why a Branch Campus Failed’ *The Chronicle of Higher Education* (February 25, 2015) Available at <http://chronicle.com/article/Why-a-Branch-Campus-Failed-/190391?cid=megamenu> (accessed 2 April 2015).

<sup>8</sup> Cross-Border Education Research Team (March, 2015). C-BERT Branch Campus Listing. Available: <http://globalhighered.org/branchcampuses.php>; see also William Lawton, Alex Katsomitros ‘International branch campuses: data and developments’ *The Observatory on Borderless Higher Education* (2012) [http://www.obhe.ac.uk/documents/view\\_details?id=894](http://www.obhe.ac.uk/documents/view_details?id=894);

<sup>9</sup> Wilkins, S. and Huisman, J. (2012) The international branch campus as transnational strategy in higher education. *Higher Education*, 64 (5). pp. 627–645; Katherine Mangan ‘U.A.E. incident raises questions for colleges that open campuses in restrictive countries’ *The Chronicle of Higher Education* (London, 18 March 2015); ‘New Abu Dhabi campus to open amid controversy’ *Washington Square News* (24 August 2014) at <http://www.nyunews.com/2014/08/24/abu-dhabi/> (last accessed at 2 March 2015); Claire Shaw, ‘MP urges UCL to “stamp out” forced labour on Qatar campus’ *The Guardian* (London, 29 August 2014) at <http://www.theguardian.com/higher-education-network/2014/aug/29/university-college-london-forced-labour-qatar-campus> (last accessed 2 March 2015). See also Lucy Hodges, ‘Warwick’s Singapore fling’ *The Independent* (London, 1 September 2005) at <http://www.independent.co.uk/news/education/higher/warwicks-singapore-fling-309381.html> (last accessed 2 April 2015).

<sup>10</sup> Jon Marcus ‘West’s universities reconsider China-funded Confucius Institutes’ *Times Higher Education* (London, 4 April 2013) at <http://www.timeshighereducation.co.uk/news/wests-universities-reconsider-china-funded-confucius-institutes/2002870.article> Joe Humphreys ‘UCD academics query plan for ‘model’ Confucius Institute’ *The Irish Times* (Dublin, 17 April 2015) at <http://www.irishtimes.com/news/education/ucd-academics-query-plan-for-model-confucius-institute-1.2178891> (last accessed 17 April 2015);

Approximately 60 Western education institutions or programmes currently operate in the Persian Gulf region alone.<sup>11</sup> One particular example which has received significant international attention following the Arab Spring protests is the campus of an Irish education institute in Bahrain operated by the 'Royal College of Surgeons in Ireland'.<sup>12</sup> In this article, Ireland's interaction with Bahrain will be used to explore the extent and substance of human rights obligations under the European Convention on Human Rights engaged through the provision and regulation of transnational education. To make this case study generalizable we selectively focus on the definitively public oversight mechanisms that extend from Ireland to Bahrain. This is to facilitate a clear human rights analysis and avoid conceptual murkiness surrounding the public/private nature of the increasingly marketised "University". Ultimately this serves to focus on what is being deterritorialised: the degree awarding powers and the external review mechanisms for formal 'recognition', often referred to as 'accreditation'. This legal analysis will be of relevance to other fields of civil cooperation and the transnational exercise of public functions such as the overseas activities of state-owned enterprises, where private corporations exercise public functions via procurement contracts, and other forms of transnational cooperation involving public oversight.<sup>13</sup>

We explore to what extent Ireland (the 'contracting state'), whose agents or institutions, upon invitation, carry out a role of public authority in a Bahrain ('territorial state'), retain their human rights obligations under the ECHR. We will start by examining some of the key cases by the European Court of Human Rights related to states' extraterritorial human rights obligations (Part I). In Part II, we will address how extraterritorial obligations go beyond situations of occupation, custodial or military control by discussing the wider application of extraterritorial obligations when a contracting state acts on the basis of invitation or consent from the territorial state. This section will largely focus on the understanding of what constitutes the exercise of public authority or function as a foundation for extraterritorial jurisdiction. From this vantage we can assess how transnational cooperation such as the situation in Bahrain's medical facilities engages Ireland's human rights obligations through its role in regulating medical education.<sup>14</sup> Part III will consider the human rights concerns that arise related to

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<sup>11</sup> Miller-Idriss, Cynthia, and Elizabeth Hanauer. "Transnational higher education: offshore campuses in the Middle East." *Comparative Education* 47.2 (2011): 181-207.

<sup>12</sup> Bill Law 'Irish medical campus in Bahrain challenged' *BBC* (30 May 2013) <http://www.bbc.co.uk/news/world-middle-east-22703138> last access 2 April 2015; Robert Fisk 'Bahrain hit by doctors' desertion' *The Independent* (London 25 March 2013) <http://www.independent.co.uk/voices/comment/bahrain-hit-by-doctors-desertion-8547097.html> last accessed 2 April 2015.

<sup>13</sup> Examples of such forms of cooperation include border control efforts and outsourcing public expertise e.g. Emma Graham-Harrison and David Batty, 'Ministry of Justice bids for contract with Saudi prison service' *The Guardian* (London, 25 January 2015) [http://www.theguardian.com/world/2015/jan/25/ministry-justice-contract-saudi-arabia-prison?CMP=share\\_btn\\_fb](http://www.theguardian.com/world/2015/jan/25/ministry-justice-contract-saudi-arabia-prison?CMP=share_btn_fb) (last accessed 24 March 2015)

<sup>14</sup> As the case study relates to the extraterritorial obligations of the Irish state, most of the references to court decisions are made to those of the European Court of Human Rights. This should not be understood as the

the Bahraini medical facilities during and after the 2011 protests and what Ireland's extraterritorial human rights obligations were in this situation and how they could have complied with them. Such a vignette provides a useful means to interrogate the role of international cooperation in the production and scope of extra-territorial human rights obligations. Part IV considers how positive obligations arise in this type of transnational arrangement.

### **Part I - Extraterritorial Obligations of states as reflected in current case law**

The discussion of the effects of the influence and harm of one state's actions to another state has a long history in international law. In the *Trail Smelter Case* the tribunal very firmly laid down the principle that no state is permitted under international law to cause damage to the territory, property or persons in another state's territory.<sup>15</sup> Similarly, the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights, have over the past 30 years heard a number of cases related to the negative effect of one state's actions upon the enjoyment of human rights of individuals in another state, and jurisprudence in this area is developing and evolving.

A common feature of the case law in this area involves addressing the following questions: how does an act by one state in a foreign state fall under the jurisdiction of the first state; and if that is confirmed, does this relate to territorial or custodial control over the area or persons suffering adverse effects from the actions.

The European Court of Human Rights has confirmed on a number of occasions that the reach of the European Convention on Human Rights can in 'exceptional circumstances' go beyond the territory of a High Contracting Party. One of the first cases where this was accepted was in *Loizidou vs. Turkey*<sup>16</sup> which concerned the ability of a Greek-Cypriot to access her property in Northern Cyprus after the Turkish occupation of that part of the island. The Turkish government held that the case could not be admissible as it concerned an area outside the territory of Turkey. However, the European Court of Human Rights clearly stated that a state's responsibility for its own acts can reach outside the territory of that state, if acts of their authorities produced effects outside their territory.<sup>17</sup>

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authors' wish to disregard the jurisprudence developed by other international or regional human rights courts or institutions.

<sup>15</sup> *Trail Smelter Case (United States vs. Canada)*, 3 R.I.A.A. 1905 (1941), quoted in Gibney, Tomasevski and Vedsted-Hansen (1999) n 1 above at [273].

<sup>16</sup> *Loizidou* (preliminary objections) n 2 above.

<sup>17</sup> *ibid.* at [62].

In the famous *Bankovic case*,<sup>18</sup> the Court considered very carefully whether the killing of individuals as a result of the bombing of a television tower in Belgrade by NATO forces, could be considered to fall within the jurisdiction of the relevant NATO members that are parties to the ECHR. The Court built its arguments on the concepts of ‘effective control’ inspired by the *Nicaragua case*<sup>19</sup> heard by the ICJ. While the *Nicaragua case* concerned questions of attribution of acts (to the USA) for the purpose of triggering *state responsibility*; the ECtHR used a similar ‘test’ of effective control over territory to determine whether or not the acts of the NATO forces were within the *jurisdiction* of the member states, and thus would allow the Court to hear the case on its merits. Article 1 of the ECHR provides that the State Parties ‘shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ In this case, the Court confirmed that in exceptional circumstances, acts outside the territory of a member state can fall within that state’s jurisdiction.<sup>20</sup> However, this could only happen if it was confirmed that the state had ‘effective control’ over the territory where the said acts were taking place.<sup>21</sup> Concerning the ‘effective control’ the Court held that:

[T]he responsibility of a Contracting Party was capable of being engaged when as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory. The obligation to secure, in such an area, the Convention rights and freedoms was found to derive from the fact of such control whether it was exercised directly, through the respondent State’s armed forces, or through a subordinate local administration.<sup>22</sup>

In later cases, the Court has been more nuanced in its acceptance of extraterritorial jurisdiction of the High Contracting Parties to the ECHR. In the *Issa case*,<sup>23</sup> the Court found that states may exercise jurisdiction outside the ‘espace juridique’ of the European system. In this case, which was brought by relatives of individuals in Northern Iraq who it was claimed had been killed by Turkish soldiers, the Court confirmed that a Party to the convention

May also be held accountable for violations of the Convention rights and freedoms of persons in the territory of another state but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in that latter State ... accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.<sup>24</sup>

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<sup>18</sup> *Bankovic* n 2 above.

<sup>19</sup> *Nicaragua v. the United States*, 27 June 1986, ICJ reports, 1986

<sup>20</sup> *Bankovic* n 2 above at [71].

<sup>21</sup> *ibid*

<sup>22</sup> *Bankovic* n 2 above [70].

<sup>23</sup> *Issa v. Turkey* App No 31821/96 [2004] ECHR 629.

<sup>24</sup> *ibid* at [71].

The final case from the European Court of Human Rights to be mentioned at this point, is *Al Skeini v. UK*.<sup>25</sup> This case brought new clarification to the Court's approach to extraterritorial jurisdiction for the states parties to the ECHR. It concerned the UK's violation of Convention rights for Iraqi individuals in Basra in Iraq, where a number of detainees died in custody and others had been killed by UK soldiers in the streets of Basra. Rather than focusing uniquely on territorial control as part of 'effective control' the Court in this case distinguished between 'state agent and control'<sup>26</sup> over persons on the one hand, and 'effective control over an area'<sup>27</sup> on the other. This is a clear indication that the Court has moved away from a complete focus on territorial control as a ground for jurisdiction, to a concept of 'control or authority' over persons. Yet, this case dealt specifically with the question of human rights violations against individuals who were in some manner subject to custodial control or territorial control by the responding state.

### 1.1 The role of 'invitation'

None of the cases above have dealt with the issue of extraterritorial obligations where the contracting state has been explicitly *invited* by the territorial state to carry out acts within its territory. Even though the situation did not concern invitation, the ECtHR confirmed in *Al Skeini*, that extraterritorial jurisdiction, and consequently extraterritorial obligations, may apply in such circumstances where a state has been invited, entered into an agreement or consented to actions. Specifically, the Court held that it

Recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the *consent, invitation or acquiescence* of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.<sup>28</sup>

From the view of the Court, it seems that if a state acts within another state on the basis of 'consent, invitation or acquiescence', and where the acts would be described as executive or judicial functions, then the foreign state may be responsible for breaches of the Convention linked to those

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<sup>25</sup> *Al-Skeini and Others v. The United Kingdom*, Application no. 55721/07 [2011] ECHR 1093 (7 July 2011).

<sup>26</sup> *ibid* at [133].

<sup>27</sup> *ibid* at [138].

<sup>28</sup> *Al Skeini* n 25 at [135] (reference to *Bankovic* in original)(emphasis added)

functions. These bilateral interactions would be qualitatively different to occupation, territorial or custodial control and may, nonetheless, still result in responsibility for breaches of obligations stemming from international human rights law including the ECHR as the acts or omissions fall within the jurisdiction of the foreign state. The wording used in the *Al Skeini* case leaves some issues to be addressed: How is 'consent, invitation or acquiescence' to be understood; and what is meant by 'public powers' in such a context?

With invitation at least the Court has been clear that for acts to be attributed back to the Contracting State the organ or agent must not be put at the disposal of the Territorial State. In *Drozd and Janousek v. France and Spain* the Court considered whether the acts or omissions of French or Spanish judges practicing in Andorra could be attributable to their home countries. It was held that neither country exercised jurisdiction because the officials in question did not act in their capacity as officials of the respondent States and were not 'not subject to supervision by the authorities of France or Spain'.<sup>29</sup> Otherwise, the Court suggested, where supervision continues, state responsibility 'can be involved because of acts of their authorities producing effects outside their own territory'.<sup>30</sup> The judges from France and Spain were in effect seconded to Andorra,<sup>31</sup> akin to being 'put at the disposal' of another state which, according to the ILC Draft Articles on State Responsibility, has the effect of absolving the contracting state of responsibility under customary international law.<sup>32</sup> Ultimately invitation, consent or acquiescence are tests to distinguish between performing public functions in place of contracting state and putting the organ of the contracting state at the disposal of the territorial state.

Determining whether an invitation places an organ of the contracting state under exclusive direction and control of the Territorial State may not involve the transposition of personnel. In *X and Y v. Switzerland*, which involved a treaty incorporating Lichtenstein into Switzerland's customs area, the decisions of the Swiss authorities in Bern had an effect outside Switzerland's national boundaries with Lichtenstein's consent. The Commission first looked to see if the agreement between the authorities meant that the Swiss were acting 'in distinction from their national competences'.<sup>33</sup> The agreement meant that the Swiss authorities acted in conformity with Swiss law and it was determined that *only the effect* of their decision was extended to Lichtenstein's territory. As such this meant that

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<sup>29</sup> *Drozd and Janousek v France and Spain*, App. No 12747/87 [1992] ECHR 52 at [96].

<sup>30</sup> *Ibid* at [91].

<sup>31</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), 73.

<sup>32</sup> *ibid* at Article 6 [5].

<sup>33</sup> *X and Y v Switzerland*, App nos 7289/75 and 7349/76 ECHR 14 July 1977, (1978) 13 DR 241; Council of Europe, European Commission of Human Rights, Decisions and Reports, vol. 9, p. 73



Swiss jurisdiction was extended to Liechtenstein and that ‘Acts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention.’<sup>34</sup>

In contrast to the Commission’s approach in *X and Y v Switzerland* recognising extra-territorial jurisdiction where authorities ‘do not act in distinction from their *national* competences’ in the Contracting State (i.e. Switzerland) the Court in *Al Skeini*, borrowing from *Bankovic*, indicated that the organ must utilise a public power ‘normally exercised’ by the *Territorial* State.<sup>35</sup> This raises the question of whether a power could be considered public in one state and private in another, or would an exercise of public power avoid giving rise to an exercise of jurisdiction because that power is not ‘normally exercised’ in the Territorial State. This would be an unsatisfactory outcome given that delegation of public power by the Contracting State may serve to fill a governmental gap identified by the Territorial State. Surely the real question is whether the delegated function is an exercise of public power from the perspective of international law rather than its domestic classification. To understand what constitutes ‘public’ it is helpful to consider how the Court typically decides what acts are attributable to the state<sup>36</sup> and how it defines the category of ‘governmental.’<sup>37</sup> In both instances the Court typically looks to where the power originates and the actors exercising them by determining legal status of the organisation, the nature and context of the activity and whether such activities are typically subject to political oversight.<sup>38</sup>

It has been suggested that the spatial model of jurisdiction first requires attribution of responsibility through agents of the State, such as soldiers, who create the conditions for jurisdiction to arise, such as the effective control of territory. From this starting point jurisdiction can emerge and give rise to positive obligations.<sup>39</sup> What we can take from our case study is that attributing responsibility and establishing jurisdiction are closely entwined when it comes to considering regulatory and administrative effects and the non-territorial model of jurisdiction. Thus, where public powers are delegated – through invitation, consent or acquiescence – both attribution and jurisdiction can be analytically fused. They flow from the same set of facts and can be considered in lockstep

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Al Skeini* n 25 at [135].

<sup>36</sup> *Yershova v Russia*, App no 1387/04 ECHR 8 April 2010 at [55].

<sup>37</sup> *Radio France and Others v France* (dec), no 53984/00, ECHR 2003X [emphasis added]; applied by *Österreichischer Rundfunk v Austria*, no 35841/02 ECHR 7 December 2006. See also Case 567/72 a decision by the Commission on the status of Austrian Communes and their ability ration personae to take a complaint to the court found them to exercise public functions on behalf of the state making them ‘governmental organisations’

<sup>38</sup> *Yershova v Russia* n 36 at [55].

<sup>39</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: OUP, 2011) 52; Gentilhomme, Schaff-Benhadj and Zerouki v France, App nos 48205/99; 48207/99; 48209/99 [2002] ECHR 437.

especially where administrative acts are producing effects. An invitation creates a narrow lawful competence which in turn gives rise to a narrow scope of jurisdiction. We now consider how this framework applies to Ireland's role in Bahrain.

## **Part II Public authority exercised on the basis of invitation – Ireland's interactions with Bahrain**

As has been explored, it is the public nature of extra-territorial activities that can give rise to 'jurisdiction.' Before further discussion on the nature of 'public authority' exercised in a foreign state, we will consider the case study of Ireland's interactions with Bahrain in the regulation of medical education. This helps to conceptualise how invitation and consent determine extra-territorial jurisdiction and the obligations of the state acting outside its territory.

### *2.1 Ireland and Bahrain - cooperation in Medical Education*

In February 2011 Bahrain experienced a sustained period of unrest, including mass protests that called for political reform.<sup>40</sup> The Government of Bahrain declared a 'State of National Safety'<sup>41</sup> and commenced a military response to the protests, killing several and injuring countless others during February and March 2011.<sup>42</sup> Hospitals featured as sites of documented human rights abuses such as torture of medical staff and patients, arbitrary detention and discriminatory dismissal of staff,<sup>43</sup> as well as Government policies promoting the withholding of medical treatment from certain groups on the basis of religion and political views.<sup>44</sup> During that same period Bahraini authorities, it emerged, also

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<sup>40</sup> US Department of State, '2011 Country Reports on Human Rights Practices: Bahrain' (2012) *Bureau of Democracy, Human Rights and Labor*, 1 at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186421> (last accessed 20 March 2013).

<sup>41</sup> Royal Decree 18/2011, Art 8 and 9.

<sup>42</sup> See Bahrain Independent Commission of Inquiry (BICI) 'Report of the Bahrain Independent Commission of Inquiry' (Manama, December 2011) paras 186 – 642 at <http://www.bici.org.bh/BIClreportEN.pdf> (last accessed 26 April 2013)

<sup>43</sup> *ibid.*

<sup>44</sup> Physicians for Human Rights 'Do No Harm: a Call for Bahrain to End Systematic attacks on Doctors and Patients' (April 2011) 19 at <http://physiciansforhumanrights.org/library/reports/Bahrain-attacks-on-doctors-2011-04-22.html> (last accessed on 20 March 2013); Médecins Sans Frontières, 'Health Services Paralyzed: Bahrain's Military Crackdown on Patients: An MSF Public Briefing Paper' (MSF, April 2011); Médecins Sans Frontières, 'Bahrain: Despite Reforms, Patients Still Fear Health System' (MSF, 12 April 2012) at <http://www.doctorswithoutborders.org/press/release.cfm?id=5896&cat=press-release> (last accessed 20 March 2013); Martin Chulov, 'Bahrain hospitals under siege as soldiers maintain Manama crackdown' *The Guardian* (London, 20 March 2011) at <http://www.guardian.co.uk/world/2011/mar/20/Bahrain-hospitals-under-siege-manama> (last accessed 20 March 2013)

engaged in the widespread torture of hospitalised protesters and detainees, some of whom died from their injuries.<sup>45</sup> As the Director General of Médecins Sans Frontières observed: '[T]he hospital became a military target, and the health system a tool for the security apparatus, patients could no longer realize their right to treatment in a safe environment, and medical staff could no longer fulfill their primary duty of providing health care regardless of patients' political affiliations.'<sup>46</sup> Since this time various human rights groups have documented continuing violations of human rights standards<sup>47</sup> and medical neutrality.<sup>48</sup>

Bahrain's medical facilities are also sites where medical students acquire mandatory clinical experience and training. Due to a bilateral agreements from 2003 onwards the Royal College of Surgeons in Ireland has administered medical education in the Gulf State from a purpose built campus. Students who complete their training at the Bahrain campus of the "Royal Society of Surgeons in Ireland" (herein RCSI-Bahrain) are conferred with Irish medical degrees. During the establishment of RCSI-Bahrain, the Oireachtas (Irish Parliament) passed a Private Act enabling the RCSI to provide courses, examinations leading to degrees in surgery, medicine, nursing both inside and outside Ireland.<sup>49</sup> In terms of governance the Bahraini programme is treated as a 'mirror-image' of the RCSI in Dublin, the curriculum and examination of its medical school in Bahrain are identical to those applied to Ireland-based students.<sup>50</sup>

As with many jurisdictions Ireland's medical education programmes are independently accredited to ensure their role in the enhancing and maintaining medical education. RCSI-Bahrain is subject to

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<sup>45</sup> BICI n 42 above, 282-302.

<sup>46</sup> C Stokes, 'Hiding Behind Health' (Médecins Sans Frontières, 20 July 2011) at <http://www.doctorswithoutborders.org/publications/article.cfm?id=5456&cat=op-eds-articles> (last accessed 20 March 2013).

<sup>47</sup> Amnesty International, 'Cancelled UN visit shows Bahrain 'not serious' about human rights' (Amnesty International, 24 April 2013 at <https://www.amnesty.org/en/articles/news/2013/04/cancelled-un-visit-shows-bahrain-not-serious-about-human-rights/> (last accessed 3 March 2015)

<sup>48</sup> Bahrain Center for Human Rights, 'Bahrain: Limited Medical Access and Breach of Medical Neutrality (A need for accountability and an end to ongoing violations)' (BCHR, 2013) at <http://Bahrainrights.hopto.org/BCHR/wp-content/uploads/2013/04/Bahrain-Medical-Access-Report-Final.pdf> (last accessed 10 May 2013); Redress, 'Bahrain: Fundamental Reform or Torture Without End' (Redress, 2013) at <http://www.redress.org/downloads/publications/Fundamentalreform.pdf> (last accessed 10 May 2013); Physicians for Human Rights, 'Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents Against Civilians' (PHR, 2012) at [www.physiciansforhumanrights.org](http://www.physiciansforhumanrights.org) (last accessed 20 April 2012).

<sup>49</sup> The Royal College of Surgeons in Ireland Charters (Amendment) Act 2003, Section 30(b)(e) Higher Education Authority of Ireland 'RCSI Granted Degree-Awarding Status' (Dublin, 2010) at <http://www.heai.ie/en/node/1382> (last accessed 20 April 2013).

<sup>50</sup> Review by the Higher Education Authority and National Qualifications Authority of Ireland of the Royal College of Surgeons in Ireland in relation to the commencement of its degree-awarding powers: Terms of Reference, Criteria and Procedures (Dublin, 2010) at <http://www.nqai.ie/documents/FINALRCSIReviewTermsofReferenceandCriteria.pdf> (last accessed 30 April 2013)

statutory regulation<sup>51</sup> by the Medical Council, the designated authority responsible for monitoring and accrediting medical education programmes, including those delivered in third countries beyond Ireland's borders. Irish law stipulates that such degrees should be awarded upon completion of approved programmes that are 'at least the equivalent' to those typically delivered in Ireland.<sup>52</sup> Practices associated with Bahraini hospitals have brought into question the compatibility of the facilities with Irish standards in medical education, and indeed the compliance of accreditation by the Medical Council with the human rights obligations of the Irish state.<sup>53</sup> Following a site visit to Bahrain in late 2014 the Medical Council decided to grant unconditional accreditation to the RCSI-Bahrain medical programme raising further questions as to the compatibility of this process and outcome with Ireland's human rights commitments.

## *2.2 Ireland exercising jurisdiction in Bahrain*

Do ECHR obligations apply when the Medical Council accredits medical education programmes outside of Ireland's territory such as that delivered in Bahrain? In other words would such a process be subject to Ireland's jurisdiction for the purposes of the ECHR? To answer this question we can explore the exceptions to the territorial limitations on the ECHR's jurisdiction using the *Al Skeini* schema described above.

### *2.2.1 'Exercise some or all public powers'*

Although an independent body the Medical Council was established and given powers by statute to act in the public interest.<sup>54</sup> Its regulations and decisions are subject to Ministerial consultation, its decisions have been subject to judicial review in Irish Courts and, furthermore, it is referred to as a public body in other domestic legal instruments.<sup>55</sup> As the Irish Medical Council appears to fulfil all of

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<sup>51</sup> Medical Practitioners Act 2007 and Qualifications and Quality Assurance (Education and Training) Act 2012. Accreditation is the term given to the Council's powers under Section 88(2)(a) of the Medical Practitioners Act to 'approve, approve subject to conditions attached to the approval of, amend or remove conditions attached to the approval of, or withdraw the approval' programmes of basic medical education.

<sup>52</sup> *ibid* at Section 88(7). For the purposes of the Act a state other than an EU member state is referred to as a 'third country'.

<sup>53</sup> S. Devi, 'Rights abuses linked to Irish surgical college in Bahrain' (2013) 381(9882) *Lancet* 1986.

<sup>54</sup> Section 6 of the Medical Practitioners Act, 2007 states that the object of the IMC is 'to protect the public'.

<sup>55</sup> Schedule 4 of the Taxes Consolidation Act 1997 defines the Medical Council as a non-commercial state sponsored body at <http://www.irishstatutebook.ie/1997/en/act/pub/0039/print.html#sched> (last accessed 3 March 2015)

the criteria used by the Court to determine what constitutes governmental or public function we conclude that the functions represent exercise of public powers. For completeness we can also consider whether the evaluation and supervision of medical education is 'normally exercised' by Bahrain. To this end Bahrain's medical education is publicly administered and monitored<sup>56</sup> and furthermore, from a transnational perspective, the UN 'Classifications of Functions of Government' include 'the inspection, operation or support of universities and other institutions'.<sup>57</sup>

### 2.2.2 Invitation and Bahrain's consent to exercise of public power

The operation of the RCSI campus on Bahraini soil was brought about through a series of agreements including a memorandum of association and in licensing arrangements.<sup>58</sup> Following on the controversies surrounding the 'Arab spring' protests this arrangement remained intact and without modification. In 2013 Bahrain's Prime Minister explicitly 'affirmed [his] government's support for RCSI and the Bahraini-Irish relations, expressing appreciation for the college's effort in training and feeding the health sector with well-qualified Bahraini medical cadres' and referred to Bahrain's interaction with RCSI as 'fields of co-operation'.<sup>59</sup> Most important of all official Irish<sup>60</sup> and Bahraini<sup>61</sup> documents both refer to RCSI-Bahrain's first expected accreditation by the Irish Medical Council in line with Ireland's statutory framework. For its part the Irish Medical Council has confirmed its place in this

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The Medical Council is also listed as a 'public body' in the Official Languages Act and the Ethics in Public Office (Prescribed Public Bodies, Designated Directorships of Public Bodies and Designated Positions in Public Health) (Amendment) Regulations 2011 (S.I. No. 707 of 2011).

<sup>56</sup> See Bahrain's 'National Authority of Qualifications & Quality Assurance for Education & Training' at <https://www.qqa.edu.bh/En/Pages/default.aspx> (last accessed 5 May 2015).

<sup>57</sup> United Nations Statistics Division, 'Detailed structure and explanatory notes: COFOG code 09.4' at <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=4&Lg=1&Co=09.4> (last accessed 20 April 2013).

<sup>58</sup> RCSI-BAHRAIN 'About RCSI Bahrain' at <http://www.rcsi-Bahrain.com/about> (last accessed 25 March 2013). See also: 'PM opens RCSI branch in Bahrain' *Bahraini News Association* (Manama, 14 October 2004) at <http://www.bna.bh/portal/en/news/377584?date=2011-3-20> (last accessed 25 March 2013); RCSI-BAHRAIN 'Prospectus' at [http://www.rcsi-Bahrain.com/files/2010/docs/20110222091512\\_PDF\\_RCSI%20Bahrain\\_prosJan2011.p.pdf](http://www.rcsi-Bahrain.com/files/2010/docs/20110222091512_PDF_RCSI%20Bahrain_prosJan2011.p.pdf) (last accessed 25 March 2013).

<sup>59</sup> Joe Humphreys 'Bahrain government welcomes improved relations with RCSI after ethics row' *Irish Times* (Dublin, 3 April 2013) at <http://www.irishtimes.com/news/Bahrain-government-welcomes-improved-relations-with-rcsi-after-ethics-row-1.1346919> (last accessed 15 May 2013).

<sup>60</sup> Review by the Higher Education Authority and National Qualifications Authority of Ireland of the Royal College of Surgeons in Ireland in relation to the commencement of its degree-awarding powers: Terms of Reference, Criteria and Procedures (Dublin, 2010) at <http://www.nqai.ie/documents/FINALRCSIReviewTermsofReferenceandCriteria.pdf> (last accessed 30 April 2013); See also 'Medical Council to review RCSI Bahrain' *Irish Medical Times* (July 2010) at <http://www.imt.ie/news/2010/07/medical-council-to-review-rcsi-Bahrain.html> (last accessed 20 April 2013).

<sup>61</sup> Higher Education Review Unit, 'Institutional Review Report: Royal College of Surgeons in Ireland- Medical University of Bahrain, Kingdom of Bahrain' (Bahrain, 2009) <http://moedu.gov.bh/hec/UploadFiles/Inst-Review-En/RCSIE1.pdf> (last accessed 20 April 2013)

arrangement: 'As the responsible body for approving programmes of medical education and training, and the bodies that deliver those in Ireland, the Medical Council has been invited to consider the same bodies' delivery of medical education internationally for the purposes of quality assurance....'.<sup>62</sup> Thus, the Bahraini authorities have demonstrated active and implicit consent to the implementation of Irish standards on Bahraini soil as including accreditation by Ireland's Medical Council.

In this context Ireland's jurisdiction would cease to apply only if the Medical Council, National University of Ireland & RCSI-Bahrain were all placed at the disposal of the Bahraini state or if accreditation led to a conflict with Bahrain's laws, neither of which have occurred. Such occurrences would disrupt attribution of legal responsibility to the Irish state. Furthermore Bahrain could simply withdraw consent to Ireland's jurisdiction in the matter of medical education. Such was the case in *Gentilhomme, Schaff-Benhadj and Zerouki v France*<sup>63</sup> where an agreement between a French education provider and the Algerian authorities was disrupted by the latter issuing a 'note verbale' rescinding an aspect of their agreement. It was this modification of Algeria's consent that disrupted any prospect for the operability of France's extra-territorial jurisdiction.

When assessing the borderlines of extra-territorial jurisdiction the Court has alluded to implicit consent through 'acquiescence'. While agreements forged in paper or international treaty will be crucial in determining consent to another state's jurisdiction there may also be instances where this could be expanded upon by a failure on the part of the Territorial State to call into question exercises of public power beyond this agreement. In *Öcalan v Turkey* the European Court on Human Rights recognized that Kenyan authorities cooperated with their Turkish counterparts when apprehending the applicant on Kenyan soil and did not find that this cooperation lapsed at any point. It observed that no 'international dispute' emerged, nor any 'deterioration in their diplomatic relations' and the Kenyan authorities 'did not lodge any protest with the Turkish government on these points or claim any redress'.<sup>64</sup> In the case of the Bahrain there is no evidence to suggest resistance to the application of Irish standards in Bahrain given that unconditional accreditation was eventually granted by the Medical Council to the Bahrain programme of RCSI.

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<sup>62</sup> 'Accreditation for the Royal College of Surgeons in Ireland Facility in Bahrain: Discussion' Joint Committee on Education and Social Protection Debate (2 April 2014) at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/EDJ2014040200005?opendocument> (last accessed 6 May 2015)

<sup>63</sup> *Gentilhomme* n 39 above.

<sup>64</sup> *Ocalan v. Turkey*, App no. 46221/99 ECHR [GC], 12 March 2003 at [95].

### *2.3 Scope and limits of jurisdiction*

When a contracting state's extraterritorial engagement is based on invitation the scope of this potential exercise of jurisdiction is determined by consent of the territorial state. Bahrain has, through its agreements with RCSI, accepted the Irish Medical Council's accreditation process. The Medical Council typically accredits Irish medical education programmes using the standards of the World Federation for Medical Education (WFME)<sup>65</sup> including assessments of the RCSI's programmes in Ireland.<sup>66</sup> Therein the WFME standards constitute the scope for Ireland's jurisdiction in Bahrain. For practical purposes, and in line with WFME Standards, medical education requires an 'operational linkage' between the educational programme and on-site clinical training or practice in local hospitals and clinics.<sup>67</sup> In the context of Bahrain this requires the Medical Council to take consideration of both the teaching programme and the facilities within which clinical training is carried out while using the WFME standards as 'a lever for change and reform.'<sup>68</sup>

### *2.4 Nature and scope of the obligations owed*

As in Ireland, RCSI-Bahrain's medical programme is divided into two phases: a pre-clinical phase spent largely on a custom built campus and a clinical component during the 'senior cycle' of the course, spent largely on placements or 'rotations' in hospitals. RCSI-Bahrain operates from a purpose built university campus adjacent to the King Hamad General Hospital. Clinical tuition is provided here and in the Bahrain Defence Forces Hospital (BDF), the Cardiac Centre, the Ministry of Health Primary & Secondary Services (including health centres and the Salmaniya Medical Complex (SMC)) and other community clinics.<sup>69</sup> Consequently, the Medical Council's accreditation visit in 2014 to inspect RCSI-Bahrain involved a visit to these affiliated sites. In light of this situation, human rights violations at

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<sup>65</sup> In accordance with powers granted by Sections 88(1)(a), (88)(2)(a) and (88)(2)(b) of the Medical Practitioners Act 2007 the Medical Council adopted (on 9th September 2010) WFME 'Global Standards For Quality Improvement In Medical Education, European Specifications' at <http://www.medicalcouncil.ie/Education-and-Training/Standards-Guidelines/> (last accessed 20 May 2013).

<sup>66</sup> Irish Medical Council, 'Approval of Royal College of Surgeons in Ireland Graduate Entry Programme following Accreditation Visit 2010' at <http://www.medicalcouncil.ie/News-and-Publications/News/2010/Approval-of-Royal-College-of-Surgeons-in-Ireland-Graduate-Entry-Programme-following-accreditation-visit-2010.pdf> (last accessed 20 May 2013).

<sup>67</sup> WFME n 65 above; Basic Medical Education Standard 2.8 'Linkage with Medical Practice and the Health Care System'.

<sup>68</sup> WFME n65 above.

<sup>69</sup> RCSI-Bahrain website at <http://www.rcsiBahrain.edu.bh/index.jsp?n=135&p=131> (last accessed 16 March 2014).

these sites subsequent to the “Arab Spring” protests can be considered against Ireland’s administration of public functions in Bahrain and its obligations under the ECHR.<sup>70</sup>

As has been explored, the WFME Standards demarcate the role of the Medical Council in Bahrain and as a consequence they formally determine the scope of Ireland’s jurisdiction.<sup>71</sup> Ultimately this is a regulatory role, which evaluates an education programme. As a dualist state Ireland has incorporated the provisions of the ECHR into the European Convention on Human Rights Act 2003. Section 3(1) of the Act places a statutory duty on ‘organs of the State’<sup>72</sup> to ‘perform its functions in a manner compatible with the State’s obligations’ under the provisions of the ECHR unless there is a statutory provision stating that this is not required. This performative obligation on ‘organs of the state’ has practical consequences as noted by De Londras and Kelly:

Organs of State which come within the scope of s.3 should take measures to ensure compliance with the (ECHR), rather than simply wait for a negative court decision against them. At the very least these bodies would be expected to ‘proof’ their policies, strategies and decision making processes so as to ensure compatibility with the Convention.<sup>73</sup>

This interpretation reflects Article 1 of the ECHR requiring that contracting parties ‘shall secure to everyone within their jurisdiction the rights and freedoms’ defined within the Convention. However the Medical Council, although it conducts site visits, does not have control or authority over persons or territory in Bahrain. Nonetheless, as in *Al Skeini* and *X and Y v Switzerland*, the exercise of public functions producing effects in the Territorial State could bring those persons affected under Ireland’s jurisdiction within the meaning of Article 1 of the Convention.<sup>74</sup> The Medical Council’s assessment and site visit have the effect of approving the Bahraini clinical learning environment relative to Irish standards including compatibility with the ECHR. As will be explored determining the content of the obligations states should comply with in this context these can usefully be divided into negative and positive obligations circumscribed by jurisdictional limits and the extent each situation requires.

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<sup>70</sup> Redress n 41; Physicians for Human Rights ‘Under the Gun: Ongoing Assaults on Bahrain’s Health System’ (PHR, May 2012) at [https://s3.amazonaws.com/PHR\\_Reports/Bahrain-militarization-may-2012-under-the-gun.pdf](https://s3.amazonaws.com/PHR_Reports/Bahrain-militarization-may-2012-under-the-gun.pdf) (last accessed 16 March 2014); Physicians for Human Rights, ‘Weaponizing Tear Gas: Bahrain’s Unprecedented Use of Toxic Chemical Agents Against Civilians’ (PHR, 2012) at [www.physiciansforhumanrights.org](http://www.physiciansforhumanrights.org) (last accessed 16 March 2014); Bahrain Center for Human Rights n 48; Amnesty International, ‘Freedom has a price; Two years after Bahrain’s uprising’ (Amnesty International, February 2013) 9 at [http://www.amnesty.org.uk/uploads/documents/doc\\_23012.pdf](http://www.amnesty.org.uk/uploads/documents/doc_23012.pdf) (last accessed 16 March 2014).

<sup>71</sup> The Medical Council’s prescriptive and executive jurisdiction (see section 4.6).

<sup>72</sup> The ECHR Act 2003 defines an organ of the state as a body ‘which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised’.

<sup>73</sup> Fiona de Londras and Cliona Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall/Thomson Reuters, 2010).

<sup>74</sup> *X and Y v. Switzerland* n 33 above [76].



### Part III – The Bahraini Protests – human rights concerns related to the medical facilities

Under considerable international pressure, the Bahraini Government instituted an independent review to investigate and report on the events during and after the clamp down on the Arab Spring protests. The Bahrain Independent Commission of Inquiry (BICI) was mandated<sup>75</sup> to document and to report on incidents in a list of locations on the basis of international human rights norms, ‘in particular at the Salmaniya Hospital.’<sup>76</sup> Its report, delivered in November 2011, revealed a range of human rights abuses, including the widespread use of torture, committed by the Bahraini authorities. All 27 of its recommendations were accepted in their entirety by the Bahraini government these included: establishing an independent body to examine claims of torture and excessive use of force;<sup>77</sup> a review of all convictions involving instances of political expression;<sup>78</sup> and to ensure that public sector workers dismissed for exercising free speech or assembly were reinstated.<sup>79</sup>

More than 70 medical professionals were arrested, many of whom alleged they were tortured while in custody.<sup>80</sup> Human Rights Watch described that the Public Prosecutor ‘pursu[ed] other charges [against the medics] based solely on peaceful political activities protected under international law.’<sup>81</sup> A significant number were released following retrial in civilian courts. In the time after the protests numerous sources observed the militarization of the hospital administration system linking this to deterioration in standards of medical care.<sup>82</sup> Questions have since been raised over the Bahraini Government’s commitment to implementing the BICI-backed reforms.<sup>83</sup> The follow-up report issued by the BICI on 21 November 2012 found no meaningful change in the policies of the Bahraini authorities. Subsequently human rights organizations consistently documented numerous accounts

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<sup>75</sup> BICI n 42 above.

<sup>76</sup> *ibid*, 1.

<sup>77</sup> *ibid*, 1722(b).

<sup>78</sup> *ibid*, 1722 (h).

<sup>79</sup> *ibid*, 1723(a).

<sup>80</sup> Physicians for Human Rights ‘Government of Bahrain Charges Two Officers with Torture of Medics’ (PHR, 9 September 2012) at <http://physiciansforhumanrights.org/press/press-releases/government-of-bahrain-charges-2-officers-with-torture-of-medics.html> (last accessed 20 April 2013).

<sup>81</sup> Human Rights Watch, ‘No Justice in Bahrain – Unfair Trials in Military and Civilian Courts’ (HRW, February 2012) 20.

<sup>82</sup> Bahrain Centre for Human Rights n 48 above.

<sup>83</sup> Human Rights Watch ‘Bahrain: Promises Unkept, Rights Still Violated’ (HRW, 19 November 2012) at [www.hrw.org/news/2012/11/22/bahrain-promises-unkept-rights-still-violated](http://www.hrw.org/news/2012/11/22/bahrain-promises-unkept-rights-still-violated) (last accessed 20 November 2013).

of patient mistreatment, breaches of medical ethics and medical neutrality.<sup>84</sup> This paper will restrict its analysis to two key areas of the Irish Medical Council's accreditation process where Ireland's obligations under the ECHR and public international law are directly implicated, namely, torture and protections in freedom of expression.

### 3.1 Torture

Ireland's statutory rules<sup>85</sup> defining the scope of the accreditation process outline the laws and standards governing the accreditation process. These include the WFME Standards and re-iterate the EU standards upon which the entire statutory scheme is based: 'A programme must comply with the requirements in Article 24 of the EU Directive 2005/36/EC for programmes of basic medical education.' Article 24(d) of this directive provides that participants in programmes of basic medical education must acquire 'suitable clinical experience in hospitals under appropriate supervision.' Similarly the WFME Standard 6.2 demands that medical schools must ensure 'adequate clinical experience and the necessary resources, including sufficient patients and clinical training facilities'. In this regard 'facilities for clinical training should be evaluated regularly for their appropriateness.'<sup>86</sup>

Appropriateness relates to the suitability of the facilities to develop key competencies of students within medicine and medical practice. The WFME Standards require that this includes knowledge and understanding of the basic clinical sciences and medical ethics relevant to the practice of medicine; attitudes and clinical skills and the ability to undertake lifelong learning and professional development.<sup>87</sup> It is within this remit that relevant human rights considerations apply to relevant human rights concerns including the prohibition of torture contained in Article 3 of the Convention. In other words the determination what is 'adequate', 'suitable' experience and 'appropriate' training is not mutually exclusive of consideration of *positive* human rights obligations vis-à-vis this prohibition.

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<sup>84</sup> Redress n 41 above, 1. See also Physicians for Human Rights 'Under the Gun: Ongoing Assaults on Bahrain's Health System' (PHR, May 2012) 30 at [https://s3.amazonaws.com/PHR\\_Reports/Bahrain-militarization-may-2012-under-the-gun.pdf](https://s3.amazonaws.com/PHR_Reports/Bahrain-militarization-may-2012-under-the-gun.pdf) (last accessed 6 May 2013); BCHR n 48 above.

<sup>85</sup> Pursuant to its powers under section 11 of the Medical Practitioners Act and in satisfaction of its obligation under subsection 88(1)(a) thereof, the Council adopted the Medical Council Rules in Respect of the Duties of Council in Relation to Medical Education and Training by way of Statutory Instrument No. 528/2010 and 588/2012.

<sup>86</sup> WFME n65 above, Basic Medical Education Standard 6.2; Post Graduate Medical Education Standard 6.2.

<sup>87</sup> *ibid*, Basic Medical Education Standard 1.4 Educational Outcome.

Where violations in medical ethics are concerned such overlap would be difficult to dismiss normatively and substantively.<sup>88</sup>

The most credible allegations of torture relating to RCSI's clinical training facilities are found in the BICI report. It found that 'security services executed unlawful arrests on SMC premises, and attacked and mistreated some individuals, including medical personnel.'<sup>89</sup> The cases where patients were arrested and removed from hospital were found to be a direct consequence of their injuries being sustained at protests.<sup>90</sup> It was also established that the BDF took control of the entire hospital complex and placed some injured persons, whom it sought to keep under its control, on the sixth floor of SMC.<sup>91</sup> During this time the Commission heard testimonies that injured patients were beaten, insulted and made to stand for prolonged periods. It noted how the BDF did not deny that detention and interrogations occurred within this facility.<sup>92</sup> Other injured persons were forcibly moved; some to police stations, detention centres and the BDF Hospital which is also used by RCSI for teaching where further mistreatment is alleged to have occurred.

In interpreting what constitutes 'appropriate supervision'<sup>93</sup> consideration could include allegations by human rights organisations that health officials who supervise and manage the RCSI-affiliated hospitals were involved in torture and mistreatment of doctors and patients. The Bahrain Center for Human Rights produced a report identifying a number of senior figures, in medical administration, as being key players in human rights abuses. Among those listed were the head of the BDF hospital's administration, the Chief of Medical Staff and CEO of Salmaniya Medical Complex, all of whom are alleged to have a role in disappearances, torture and mistreatment of medical staff and patients on and off the premises of these RCSI-affiliated hospitals.<sup>94</sup> When Ireland's Medical Council conducted a site-visit Bahrain in October 2014<sup>95</sup> as part of its accreditation process all of these persons maintained their managerial or supervisory roles with one appearing on RCSI-Bahrain's website photographed tutoring students. None of issues relating to the torture or the links to the hospital administrators were mentioned by the Medical Council despite the annex of their report demonstrating that they had access to this information.

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<sup>88</sup> T. A. Faunce, 'Will international human rights subsume medical ethics? Intersections in the UNESCO Universal Bioethics Declaration' (2005) 31 *J Med Ethics* 173-178.

<sup>89</sup> BICI n 42 above, 847

<sup>90</sup> *ibid*, 842

<sup>91</sup> *ibid*, 847

<sup>92</sup> *ibid*, 797.

<sup>93</sup> Article 24 of the EU Directive 2005/36/EC.

<sup>94</sup> Bahrain Center for Human Rights n 48 above.

<sup>95</sup> Aidan Hanratty, 'Bahrain accreditation team is now identified' *Irish Medical Times* (Dublin August 29 2014)

Article 3 of the ECHR prohibits torture, and ‘inhuman or degrading treatment or punishment’ and a state’s obligations extend to torture or risk of torture occurring outside of the Member State.<sup>96</sup> Although, in formal terms, this is a negative obligation the Court has recognized that there exists a positive obligation requiring public authorities to take steps to prevent torture and ill-treatment, all in an effort to ensure the effectiveness of the prohibition. When an arguable claim of ill-treatment is made the Court has held that Article 3, read in conjunction with Article 1, gives rise to certain procedural obligations including a duty of effective, timely investigation<sup>97</sup> even in cases where non-State agents are involved.<sup>98</sup> The UN Human Rights Committee likens such obligations to a form of ‘due diligence’.<sup>99</sup> As accreditation requires making a determination on the appropriateness of supervision and the suitability of facilities to provide training in medical ethics the allegations of torture, mistreatment and violations of medical ethics involving the very same Bahraini medical sites and authorities suggests that the Medical Council has a positive obligation to take steps to consider and deter such conduct.<sup>100</sup>

Accreditation could also be refused or made conditional on the Bahraini authorities taking steps to investigate and demonstrate accountability and institute mechanisms for torture complaints. In considering how torture in Bahraini hospitals might further involve Ireland’s positive obligations under international law the obligation of non-recognition is significant given the legal status of the prohibition on torture as a *jus cogens* norm.<sup>101</sup> The ILC Draft Articles on State Responsibility provide in Art. 41(2) that ‘no State shall recognize as lawful a situation created by a serious breach’ of an obligation arising under a peremptory norm of general international law. In practice this includes the obligation not to recognize such things as illegal States, territorial annexation and even the outcomes of elections.<sup>102</sup>

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<sup>96</sup> *Soering v United Kingdom* (1989) 11 EHRR 439.

<sup>97</sup> *Assenov v Bulgaria* (24760/94) (1999) 28 EHRR 652.

<sup>98</sup> *MC v Bulgaria* (39272/98) (2003) 15 BHRC 627.

<sup>99</sup> *Velasquez-Rodriguez v Honduras* IACtHR Series C No. 4 (1988) [172].

<sup>100</sup> UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) Article 2(1).

<sup>101</sup> International Law Commission, ‘Report on the work of its fifty-third session (23 April - 1 June and 2 July - 10 August 2001)’ (2001) GA, Supplement No 10 (A/56/10) 238-284 [4,5]

<sup>102</sup> Stefan Talmon, ‘The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?’ in Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Brill, 2005) 102.

Similarly a practice or act committed in contravention of the prohibition of torture may not be 'legitimated by means of consent, acquiescence or recognition'.<sup>103</sup> While content of the duty of non-recognition is still not clear, at a minimum it requires States to refrain from actions implying recognition of the lawfulness of the situation in question. This is of significance for Irish accreditation as it amounts to a form of formal recognition asserting that Bahrain's clinical training sites live up to international standards and Irish law. It can be argued that the obligation of non-recognition requires non-accreditation where the prohibition on torture has been breached especially as factual, procedural and investigative shortcomings, integral to the respect of the prohibition, remain.

None of the allegations of torture by hospital management, the Bahraini Defense Forces and the hospital authorities were mentioned or addressed in the Medical Council's accreditation report. This is despite the accreditation team being provided numerous documents and articles detailing findings and allegations of torture in Bahrain's medical system. The Council's privileged access to Bahrain's clinical systems contrasts with Bahrain's refusal to allow a visit by the UN Special Rapporteur on Torture.<sup>104</sup> Then there is the issue of Bahrain's failure to fully investigate and deal with allegations of torture was noted following Bahrain's Universal Periodic Review by the UN Human Rights Council, when Human Rights Watch, stated:

Despite the fact that the BICI concluded that the abuses "could not have happened without the knowledge of higher echelons of the command structure" of the security forces, the investigations and prosecutions have so far not included any high-ranking officials.<sup>105</sup>

Bahrain's failure to investigate allegations of torture falling the supervision of security personnel involved in the administration of hospitals, not least the Bahrain Defense Forces Hospital, ought to be a matter of concern from an Irish perspective. Without satisfying itself that allegations of torture, such as those documented by the BICI, have been appropriately investigated and dealt with in

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<sup>103</sup> Jennings and Watts, *Oppenheim's International Law* (Oxford: OUP, Vol 1, 9<sup>th</sup> ed 1996) 8. See also *Advisory Opinion of the ICJ on the Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory* (2004) [159].

<sup>104</sup> UN Officer of the High Commissioner for Human Rights, 'Government effectively cancels UN Special Rapporteur on torture's visit' (Geneva 24 April 2013) at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13261&LangID=E> (last accessed 20 March 2015).

<sup>105</sup> Human Rights Watch, '[UN Human Rights Council: Adoption of the Outcome of Bahrain's UPR](http://www.hrw.org/news/2012/09/19/un-human-rights-council-adoption-outcome-bahrains-upr)' (HRW 19 September 2012) at <http://www.hrw.org/news/2012/09/19/un-human-rights-council-adoption-outcome-bahrains-upr> (last accessed 20 March 2015)

accordance with international and European standards accreditation by the Medical Council has provided formal approval of the suitability of supervision in clinical sites.

The Medical Council's failure to even address the issue of torture while declaring Bahraini medical sites to have "appropriate supervision" is at odds with Ireland's obligations under Article 3 of the ECHR and customary international law obligations including the obligation of non-recognition. Thus, we have argued that even in instance of considering the effect of the Medical Councils activities in Bahrain, positive obligations can arise within this narrow jurisdictional link.

### *3.2 Restrictions on free expression*

Compliance with WFME standards requires close attention to communicative pathways integral to the provision of medical education.<sup>106</sup> These include student/trainee feedback, complaints, programme evaluation, stakeholder involvement, linkages to the health sector, the evaluation of the needs and concerns of the local population, and needs assessment in graduate professional development. Thus, the accreditation standards operate on the assumption that there are no obstacles to stakeholders being able to freely express their opinions or impart information. Through these processes of communication the medical school is expected to have 'a *constructive interaction* with the health and health-related sectors of society and government'.<sup>107</sup>

The Medical Council is bound by Article 19 of the ICCPR and Article 10(1) of the ECHR, which hold that everyone has the right to freedom of expression, the freedom to hold opinions and to receive

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<sup>106</sup> WFME n 65 above. Standard 1.2 of BME, PME & CPD describe 'Participation in the Formulation of Mission and Outcomes' and require input from a variety of stakeholders. BME Standard 1.4 'Education Outcomes' describes feedback mechanisms for students; BME 2.8 'Linkage with Medical Practice and the Health Care System' states that '[t]he curriculum committee should seek input from the environment in which graduates will be expected to work and should undertake programme modification in response to feedback from the community and society' and that attention should be paid 'to the local, national, regional and global context'; BME Standard 7.1 'Mechanism for Programme Evaluation' focuses on the context of the educational process which 'would include the organisation and resources as well as the learning environment and culture of the medical school'; BME Standard 7.2 'Teacher and Student Feedback' states that 'teacher and student feedback must be systematically sought' when evaluating education programmes; BME Standard 7.4 'Involvement of Stakeholders' states that '[p]rogramme evaluation must involve the governance and administration of the medical school, the academic staff and the students' (emphasis in original); PME Standard 7.2 'Feedback from Trainer and Trainees' states that feedback would 'include trainee reports about conditions in their courses'; CPD Standard 5.3 'Feedback to Providers' states that '[s]ystems for systematic feedback would also include information about the quality of activities'; CPD Standard 7.2 'Feedback from CPD Activities' states 'CPD participants should be involved actively in CPD evaluation' (emphasis in original).

<sup>107</sup> *ibid*, Basic Medical Education Standard 8.5.

and impart information and ideas without interference by public authorities. While not unlimited, the right may only be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.<sup>108</sup> The protections contained in Article 10 of the ECHR also extend to the workplace in general<sup>109</sup> and is a crucial component in a doctor's capacity to behave ethically as they must be free to communicate on issues relating to health and mistreatment, even in context of violence.<sup>110</sup>

In their report published in April 2013 the anti-torture NGO REDRESS highlighted how the health facilities in Bahrain, which include all RCSI-Bahrain affiliated hospitals, became embedded in a securitised environment precipitating consistent violations undermining the conditions necessary for the respect of medical neutrality:

[F]earing questioning or arrest if [protesters] approach any government run hospital or clinic for treatment for any injury that might be construed as connecting them with demonstrations ... many of the individuals interviewed ... sought treatment in private clinics or in private homes .... There is a corresponding fear amongst health workers that they too may be questioned or arrested for providing treatment to individuals who may be construed as taking part in opposition to the regime.<sup>111</sup>

According to the President of the Bahrain Nursing Society, in the time after the Arab Spring protests patients with 'head traumas, broken bones or burns' were first interrogated by police and health professionals were only allowed to treat patients after police investigated and cleared them for treatment.<sup>112</sup> Arrests from hospitals (or immediately following discharge) of persons injured by pellets and tear gas canisters are alleged to continue.<sup>113</sup> Bahraini medical professionals and activists fear speaking out on these practices out of fear for personal safety and loss of employment. Physicians for Human Rights reported that medical personnel were 'extremely reluctant to document their patients' exposure to tear gas and frequently omitted 'writing in the medical record the patient's history, cause of injury, or any other information related to excessive use of force by Bahraini law enforcement officials, to protect these patients and their families'.<sup>114</sup>

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<sup>108</sup> Article 10(2) ECHR and Article 19(2) ICCPR.

<sup>109</sup> *Vogt v. Germany* (17851/91) Series A No 323, 26 September 1995, 4.

<sup>110</sup> World Medical Assembly's *Regulations in Times of Armed Conflict and Other Situations of Violence* (revised October 2012) at <http://www.wma.net/en/30publications/10policies/a20/> (last accessed 20 May 2013).

<sup>111</sup> Redress n 48 above, 53.

<sup>112</sup> Tula Connell, 'Bahrain: Medics, Patients Persecuted in Ongoing Repression' (AFL-CIO, 17 April 2013) at <http://www.aflcio.org/Blog/Global-Action/Bahrain-Medics-Patients-Persecuted-in-Ongoing-Repression> (last accessed 20 May 2013).

<sup>113</sup> BCHR n 48 above.

<sup>114</sup> Physicians for Human Rights n 84 above.

Official instructions have worked to improve the detection of patients injured by security forces. A document dated 16th July 2012 allegedly circulated by the CEO of Salmaniya Medical Complex urged the Heads of Department to provide unrestricted access of public prosecutors to all medical files.<sup>115</sup> The Ministry of Health also issued a circular to public and private health facilities requiring medics to report to ‘security authorities’ all incoming patients with injuries due to suspected ‘criminal activities’ or face prosecution.<sup>116</sup> Allegations that patients denied access to their own records<sup>117</sup> and death certificates being altered to hide evidence of abuse have been documented by human rights NGO’s.<sup>118</sup>

In addition to the fear of documenting the treatment of protesters in hospitals, many of the medics detained during the initial phase of the protests were apparently charged for activities relating to television interviews and online comments criticising of the authorities, including statements made on Twitter and Facebook.<sup>119</sup> Amnesty International repeatedly refuted these findings, claiming the medics had ‘been jailed solely for peacefully exercising their legitimate rights to freedom of expression’.<sup>120</sup> Dr Bart Janssens, Médecins Sans Frontières’s director of operations, after considering the cancellation of an event on medical ethics co-sponsored by RCSI-Bahrain stated: ‘we are forced to conclude that today in Bahrain, it is not possible for medical professionals and international impartial participants to have a conversation about medical ethics’.<sup>121</sup>

### 3.4 The accreditation

Similar to other transnational accreditation processes the aim is to evaluate a medical education programme and ensure it reaches a standard that is ‘at least equivalent’<sup>122</sup> to an Irish programme. On December 18 2014 the Irish Medical Council awarded unconditional accreditation to the RCSI-Bahrain

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<sup>115</sup> Ceartas – Irish Lawyers for Human Rights ‘Human Rights Law and the Accreditation of RCSI-Bahrain Submission to the Irish Medical Council’ Annex 2 at [www.ceartaslaw.org](http://www.ceartaslaw.org) (last accessed 20 May 2013).

<sup>116</sup> *ibid*, Annex 3.

<sup>117</sup> Physicians for Human Rights n 48 above, 29.

<sup>118</sup> Redress n 48 above.

<sup>119</sup> Freedom House ‘Divergence & Decline: The Middle East and the World after the Arab Spring, Countries at the Crossroads Report, 2012’ (London 2012) at <http://www.freedomhouse.org/report/countries-crossroads-2012/booklet> (last accessed 20 March 2013).

<sup>120</sup> Ann Harrison, ‘Six Bahraini medics arrested over pro-reform role’, *Amnesty International*, Deputy Programme Director for Middle East and North Africa, PRE01/466/2012. See also, Human Rights Watch, *No Justice in Bahrain – Unfair Trials in Military and Civilian Courts* (HRW, February 2012) 20.

<sup>121</sup> Robert Fisk ‘Bahrain hit by doctors’ desertion’ *The Independent* (London, 24 March 2013) at <http://www.independent.co.uk/voices/comment/Bahrain-hit-by-doctors-desertion-8547097.html> (last accessed 25 March 2015).

<sup>122</sup> Section 88(7) Medical Practitioners Act.



programme for 5 years without mentioning or considering any of the human rights issues raised by an independent commission of inquiry, activists and non-governmental organisations.<sup>123</sup> During their evaluation of clinical sites the Medical Council simply transplanted and applied methodologies designed to work in the far less restrictive environment of Ireland. RCSI-Bahrain staff had an opportunity to discuss the operation of the programme with the accreditation team. Students were assured of anonymity and were allowed to opt-in to meeting with the Medical Council. In all cases the interviews with staff involved current RCSI employees and student were spoken with inside the very hospitals under scrutiny. Speaking negatively about such sites is not risk free. A month prior to the visit of the Medical Council the women's rights activist Ghada Jamsheer was detained for tweeting about corruption, cronyism and falling medical standards at an RCSI-affiliated hospital that serves Bahrain's military.<sup>124</sup> She was promptly arrested and remained in detention throughout the Medical Council's visit and deliberation on the same clinical site.

In this context it is difficult to see how those with genuine concerns would be motivated to speak out, a situation that was widely anticipated in advance of the Medical Council's visit including an open letter by several Bahraini human right organisations.<sup>125</sup> In their final report no mention is made in the report of sectarianism, militarised administration, difficulties in treating protesters nor how the allegations of torture have been dealt with. Yet all of these issues were extensively referenced and explored in the human rights reports and articles provided to the accreditation team.<sup>126</sup> At best the Medical Council nominally accepted its human rights obligations under Irish law by furnishing reports to the visiting team but effectively excluded it by applying manifestly deficient methodologies. Furthermore the unconditional accreditation approved by the Irish authorities failed to address obstacle to the freedom to impart information and openly discuss issues pertaining to medical ethics

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<sup>123</sup> Irish Medical Council, 'Report on Accreditation Inspection of Royal College of Surgeons in Ireland - Bahrain Medical School' (IMC, December 2014); Mark Hillard, 'Royal College of Surgeons in Ireland medical campus in Bahrain is accredited' *The Irish Times* (Dublin, 18 December 2014) at <http://www.irishtimes.com/news/education/royal-college-of-surgeons-in-ireland-medical-campus-in-bahrain-is-accredited-1.2041679> (last accessed 9 March 2015).

<sup>124</sup> Amnesty International, 'Activist faces jail for 'defamation on Twitter': Ghada Jamsheer' (Amnesty International 7 November 2014) at <http://www.amnesty.org/en/library/info/MDE11/044/2014/en> (last accessed 25 March 2015).

<sup>125</sup> Mark Hillard, 'Critics claim Irish visit to Bahrain medical university will be stage-managed' *The Irish Times* (Dublin, 9 May 2014); Eoin O'Brien 'See no evil, hear no evil' *Irish Medical Times* (Dublin, 11 May 2014); Lloyd Mudiwa, 'Bahraini groups speak out ahead of IMC visit' *Irish Medical Times* (Dublin, 9 September 2014); Eoin O'Brien, 'Human rights delegate should accompany IMC' *Irish Medical Times* (Dublin, 16 September 2014).

<sup>126</sup> Documents listed in Appendix 5 of Report on Accreditation Inspection of Royal College of Surgeons in Ireland - Bahrain Medical School (October 2014) at <http://medicalcouncil.ie/Education/Career-Stage-Undergraduate/Quality-Assurance/Medical-School-Accreditation/Report-of-Inspection-Bahrain-Dec-2014.pdf> (last accessed 9 March 2015).

and neutrality. Irish approval serves to validate the current manner in which Bahraini militarised hospital system is administered, likewise the fruits of silencing dissent through public prosecutions.

Ultimately the legal manoeuvres contained with the accreditation report reflect an underlying political attitude. When questioned ahead of the accreditation visit about the situation in Bahrain Ireland's Deputy Prime Minister (Tánaiste) and Minister for Foreign Affairs and Trade, in contradistinction to Irish law, drew an arbitrary dividing line between the classroom and the hospital system where medical students are trained; 'I think that it is important to distinguish between the involvement of the Royal College of Surgeons in the training of Bahraini medical personnel ... and the detention of medical personnel by the Bahraini authorities'.<sup>127</sup> This pre-emptively signalled that it would be politically expedient to selectively ignore human rights issues simply because they occur within one of the two learning environments used by students. It also incorrectly implies that hospitals and local doctors are not a key parts of the Irish medical curriculum.

Finally, it is worth illustrating how accreditation is but one of a range of other, overlapping public oversight mechanisms that can extend and apply to transnational education programmes. In this instance RCSI is a 'recognised college' of the Irish federal education body, the National University of Ireland (NUI) giving RCSI degrees awarding powers.<sup>128</sup> In response to events in Bahrain and the controversies involving RCSI, NUI developed the 'Human Rights Principles and Code of Conduct for the National University of Ireland and its Member Institutions' (one of which is the Royal Council of Surgeons). Section 3 of the code provides that,

The National University of Ireland and its member institutions have a special responsibility to ensure that as far as lies within their capacity the human rights of their students, staff and associates are fully respected, regardless of the country where they are located. This includes but is not limited to freedoms that are necessary for the good functioning of a university, such as freedom of association, freedom of expression, and freedom from discrimination.<sup>129</sup>

During questioning by a parliamentary committee the Registrar of NUI revealed that the assessment of the human rights situation in Bahrain was largely limited to academic reports from external

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<sup>127</sup> House of the Oireachtas, 'Written Answers - Human Rights Issues: Dáil Éireann Debate Vol. 736 No. 1' (House of the Oireachtas, 21 June 2011) at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2011062100054?opendocument> (last accessed 9 March 2015).

<sup>128</sup> National University of Ireland, 'NUI Degrees Conferred in Bahrain' (NUI, 11 June 2012) at <http://www.nui.ie/news/2012/bahrainConferring.asp> (last accessed 10 May 2015).

<sup>129</sup> National University of Ireland (2013) *Human Rights Principles and Code of Conduct for the NUI*. However, as of now, there have been no criticisms of RCSI National University of Ireland and its Member Institutions, Principles (iii) at [http://www.nui.ie/about/pdf/gvrnce\\_docs/HumanRights.pdf](http://www.nui.ie/about/pdf/gvrnce_docs/HumanRights.pdf) (last accessed 9 March 2015).

examiners.<sup>130</sup> Given the events since 2011 it would be pertinent to ask whether due diligence principles and methods have been followed, both in terms of general principles and also those provided for in the Code of Conduct.

#### **Part IV – Ireland’s positive obligations**

In *Al Skeini* the Court diverged somewhat from *Bankovic* where it held that the Convention should apply *in toto* as Article 1 was indivisible in cases where a contracting state controlled another state’s territory. In the former case situations short of territorial control involving the custody of individuals were alluded to:

What is decisive in such cases is the exercise of physical power and control over the person in question.... the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’.<sup>131</sup>

When dealing with ‘State Agent Control or Authority’ where there is no control of persons, structures or territory Convention rights and corresponding obligations hinge on the nature and scope of the consent between the Contracting State and the Territorial. Bahrain consented to accreditation by the Irish Medical Council and the standards of the World Federation for Medical Education (WFME)<sup>132</sup> generating, to borrow a term from information technologies, the ‘bandwidth’ of their jurisdictional connection. What has been illustrated in this case study is that where there is the potential for transnational administrative effect, similar to *X and Y v Switzerland*, that the ‘divide and tailor’ approach of the Court gives rise to negative as well as positive obligations.

A state or its institutions are not under an obligation to assist another state in its public functions, including medical education. However, human rights law requires that when a state does engage in such collaboration upon ‘invitation, consent or acquiescence’ its jurisdiction is exercised and it is under an obligation to ensure that the substance of the cooperation respects and protects human rights. In such situations ‘effective control’ over persons or territory is not a pre-condition for the positive

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<sup>130</sup> Dr Attracta Halpin, ‘Accreditation for the Royal College of Surgeons in Ireland Facility in Bahrain: Discussion’ Joint Committee on Education and Social Protection Debate (2 April 2014) at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/EDJ2014040200013?opendocument> (last accessed 6 May 2015)

<sup>131</sup> *ibid* at [136-137].

<sup>132</sup> In accordance with powers granted by Section 11(2)(t) Medical Practitioners Act 2007.

Convention obligations to arise. This highlights a divergence between attribution and jurisdiction in this context – with the Medical Council its acts are attributable to the Irish State whereas, thanks to Bahrain’s invitation and consent, Ireland’s jurisdiction applies giving rise to positive obligations.

Positive obligations arising in the absence of territorial control have been considered tangentially in cases dealing a State’s involvement in legal proceedings abroad, usually along with the defence of sovereign foreign immunity. In *Treska v Albanian and Italy*<sup>133</sup> and *Manoilescu and Dobrescu v Romania and Russia*<sup>134</sup> the Court considered restitution proceedings with regards to property confiscated and transferred to another State. In *Treska* Italy used for its embassy a confiscated Albanian residence taken by the Albanian authorities without compensation. In determining whether Italy’s responsibility under Article 1 could be engaged for failing to secure Convention rights of the house owners the Court determined it did not arise, not because positive obligations did not apply, but because Italy ‘had no direct or indirect influence over decisions and judgments in Albania’.<sup>135</sup>

The Court’s view that extra-territorial jurisdiction could be exercised when it has “direct or indirect influence” over decision making processes is cited in other cases most notably in *McElhinney v. Ireland and the United Kingdom*<sup>136</sup> and *Kalogeropoulou and Others v. Greece and Germany*<sup>137</sup> where ‘sovereign power over the applicants’ was equated ‘no direct or indirect influence over the decisions and judgments’ wherever they are delivered.<sup>138</sup> Where a State actually exerts a degree of influence this, apparently, can give rise to positive obligations:

[E]ven in the absence of effective control of a territory outside its borders, the State 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>139</sup>

This marks quite a departure from the technical, territorialised view of jurisdiction and marks a responsiveness to claims relating to positive obligations wherever a State acts and exerts influence in an extra-territorial setting.<sup>140</sup> However support for a generalised positive obligation on the basis of merely exerting influence outside of a State’s territory remains scarce.<sup>141</sup> Nonetheless some

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<sup>133</sup> Application no. 26937/04.

<sup>134</sup> Application no. 60861/00.

<sup>135</sup> *ibid* at [101].

<sup>136</sup> (dec.) [GC], no. 31253/96, 9 February 2000.

<sup>137</sup> App no. 59021/00, ECHR 2002-X.

<sup>138</sup> *ibid* D 2.1.

<sup>139</sup> *Manoilescu and Dobrescu v Romania and Russia* (60861/00) 3 March 2005, [101].

<sup>140</sup> Especially considering the Courts treatment of the *espace juridique* in *Al-Skeini* n25.

<sup>141</sup> Maarten den Heijer, *Europe and Extra-territorial Asylum* (Oxford: Hart Publishing 2011) 82.

commentators have gone as far to say it could mark the beginning of shift towards requiring states to take a general duty of 'due diligence' in their external dealing with other states.<sup>142</sup>

Either way the ability of the Medical Council to impact the governance of medical facilities in Bahrain amounts to direct influence on these settings. Under Irish Law - where a medical education programme is deemed to have failed to live up to Irish standards - the Medical Council has the power, through consultation with the Irish Minister for Education and Science and Skills, to approve, approve subject to conditions, or remove approval for a programme of medical education.<sup>143</sup> This amounts to something beyond mere influence as Bahrain has actively invited this regulatory mechanism and subscribed to Irish standards thus providing a foothold for positive obligations of the Medical Council. Should this direct influence prove to be illusory and Ireland finds itself in a situation where it is presiding over situations involving breaches of Convention rights and customary international law an obligation may arise on Ireland 'to refuse their cooperation' with other States if it emerges that an act of the other State is 'the result of a flagrant denial of justice'.<sup>144</sup>

#### **Part V – Conclusion: Transnational public activity and extraterritorial obligations**

Recognising that transnational education exports public oversight mechanisms from contracting states' sovereignty becomes blurred in the provision of this public good. The branch campus, as the epitome of transnational education, operates not in a vacuum but is deeply connected to local governance systems. Scenarios where a state exerts no direct control over people and territory, but performs a public function has not generated many cases in front of the Strasbourg Court. Nonetheless the case law shows that this activity has jurisdictional consequences requiring human rights scrutiny by the exporting State, a legacy of tertiary education's distinctly public origins. The contours of extra-territorial obligations in this context are shaped by two features; the nature of the function being exported and the local interface with this operation of said function.

In this paper it has been established that the accreditation of medical education in Bahrain falls within the jurisdiction of Ireland and its obligation to 'secure to everyone within their jurisdiction the rights and freedoms' of the Convention, thus including a positive obligation to *secure*. Therefore, *within* this exercise of authority, Irish public bodies should do whatever they can to influence the

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<sup>142</sup> Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge: CUP 2014) 220-224.

<sup>143</sup> Section 88(2)(a)(i)(l) Medical Practitioners Act, 2007.

<sup>144</sup> *Drozd And Janousek v France And Spain* n29 at [110].

situation and to improve the human rights conditions for people connected to Bahrain's medical facilities used for the delivery of Irish education. Due to the close relationship between the two countries in medical education, Ireland should at least acknowledge and address the relevant violations taking place in Bahrain and utilise accreditation, itself a tool for reform, when upholding its own national standards. Furthermore accreditation should be contingent on clear conditions aimed at ensuring respect for human rights processes and standards expected under Irish human rights law.

Ultimately, the issues facing RCSI and Ireland's system of oversight is common to most actors engaged in the provision of transnational education: the question whether the classroom is ever divorced from the context of the host country. The Irish authorities have attempted to disrupt these entanglements with domestic human rights machinery by artificially constructing a conceptual barrier at the branch campus gate. This wilful and strategic deflection is an attempt to circumvent the legal connections wherein the evaluation of the local setting in the Territorial State falls under Ireland's jurisdiction. However transnational education should be conditional on respect for human rights, not only in terms of academic content or outcomes, but also in the processes surrounding programme delivery. As this field grows in commercial significance the relevance of human rights obligations for universities and their public oversight mechanisms ought to be considered.