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DISCUSSION

Extraterritoriality and lowering the exceptional circumstances threshold

Beyond the prevailing extraterritoriality case-law

HETA HEISKANEN — JUKKA VILJANEN — 22 June, 2015

European Convention on Human Rights (ECHR) provides in Article 1 that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I". However, this does not relieve Contracting Parties from their responsibility for consequences taking place outside their territorial jurisdiction. The contemporary human rights discourse has approached the jurisdiction doctrine with consistent but cautious evolution.

In the *Bankovic v. Belgium and 16 other states (12 December 2001)* decision the European Court of Human Rights held that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of their jurisdiction within the meaning of Article 1 of the Convention. This is the case when the State, through the effective control of the relevant foreign territory and its inhabitants as a consequence of military occupation or through the consent, invitation or acquiescence of the competent Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. The Court added that the extra-territorial exercise of jurisdiction by a State includes cases involving the activities of its diplomatic or consular agents abroad as well as activities committed on board aircrafts and vessels registered in or flying the flag of that State.

This jurisprudence has subsequently been reinvented and many scholars are describing the current interpretation as *the **post-Bankovic era*** in the extraterritoriality continuum. In our recent article Reforming the Strasbourg Doctrine on Extraterritorial Jurisdiction in the Context of Environmental Protection we continued the discussion over the extraterritorial doctrine.

One of the focus areas was the level of intention of the State in question and how it influences the threshold in applying the extraterritoriality criteria. This post endeavors to highlight some of the findings that are contributing to the lowering of the exceptional circumstances threshold, which is typical for the prevailing extraterritoriality doctrine.

Object and purpose: Preventing circumvention of the Convention obligations

The extended extraterritorial liability is connected to the use of the doctrine of the "Convention as a living instrument". The "living instrument" doctrine ensures that the case-law is dynamic and the Court takes into account the dialogue between the ECtHR and the network of human rights law. This network of law refers to variety of sources, such as domestic legislation, national case-law, international law, international jurisprudence and statements of experts. The strategic litigation and involvement of NGOs has also been crucial in pointing out the essential questions.

For example *Human Rights Watch* and *Minority Rights Group International*, interveners in *Chagos Islanders v. the United Kingdom (11 December 2012)* have stated:«The *drafters* of the Convention had never intended that States should not be responsible for their extraterritorial actions. It would be unconscionable to permit States to commit acts overseas which they could not perpetrate on their home territory, whether within or outside the regional space of the Council of Europe. Article 1 should be interpreted in line with jurisdiction provisions of other international human rights instruments».

The position of these NGO´s summarizes, how the effective protection of human rights requires an interpretation of the relevant provisions in light of the object and purpose of the Convention, namely the effective protection of human rights. This effectiveness principle obviously requires that activities in violation of human rights standards are not knowingly conducted in countries, where the human rights standards are lower in order to prevent a circumvention of treaty obligations. The case-law in relation the CIA-flights and secret detention sites (black sites) are prime examples of

infringements where the key aspect is to avoid human rights obligations that are binding on domestic authorities.

Similarly, other types of mechanisms intended to circumvent human rights obligations could be considered incompatible with the object and purpose of the Convention. An analogous situation could be constructed in the context of positive obligations to supervise private corporations, when such supervision concerns the supervision of private corporations operating abroad.

Intention or prior knowledge lowering the threshold for extraterritorial liability

The high threshold for applying extraterritorial responsibility is linked to the requirement of exceptional circumstances. The current doctrine of extraterritoriality requires, that the obligations can be established only in exceptional circumstances. These exceptional circumstances have been defined in the case-law and refer for example to an occupation of a territory (*Loizidou* (1996): Northern Cyprus) or a separatist regime supported by a state party (*Ilascu and others* (2004): Transdniestria). In *Al-Skeini and others* (2011), the Strasbourg Court's more flexible Post-Bankovic approach to exceptional circumstances can be identified. According to the Court in *Al-Skeini*, the United Kingdom (together with the United States of America) exercised in Iraq some of the public powers normally exercised by a sovereign government. In particular, the United Kingdom assumed for example authority and responsibility for the maintenance of security in south-east Iraq.

One of the elements that could provide a lower threshold for the application of extraterritoriality doctrine is focusing on the intention or the prior knowledge of the state authorities. The established jurisprudence on extraterritoriality imposes requirements on States to act with special care. States may infringe the Convention whether they are ignorant of the facts or consciously breach their obligations. In recent judgments, such as *El-Masri v. the Former Yugoslav Republic of Macedonia* (2012), *Al-Nashiri v Poland* (2015) and *Hirsi Jamaa and others v Italy* (2012), the ECtHR has applied «particularly thorough scrutiny» considering that the negligent or wilful behaviour of a State where it ought to have known of a serious risk of ill-treatment leads to full responsibility, even beyond the traditional conception of State liability. In these cases the ECtHR once again referred to the *prior knowledge of the authorities.*

In its examination in *El-Masri*, the ECtHR attached importance to the reports and relevant international and foreign jurisprudence. In addition, given the specific circumstances of the case, media articles which showed that prohibited interrogation methods had been used in Guantanamo Bay and Bagram (Afghanistan) were used as evidence of the State's negligent ignorance of easily available information. Furthermore, no assurances from the US authorities were sought to avert the risk of the applicant's ill-treatment. An identical argumentation is present in *Al-Nashiri*. The ECtHR found that, «given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, [Poland] ought to have known that, by enabling the CIA to detain such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention». The ECtHR described that «the

Polish State, on account of its «acquiescence and connivance» in the [High-Value Detainees] Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention».

The argumentation used in *El-Masri* and *Al-Nashiri* is extremely relevant to the methodology of examining major human rights violations. It is in fact *essential to use unconventional methods* when the facts cannot be gathered and established through official documents. The «emerging widespread public information about ill-treatment» was the vital link in the argumentation. The authorities' complete denial of the events did not prevent the ECtHR from using other material that showed their clear knowledge of the risk of ill-treatment and conditions of detention that would violate the rights under Article 3 of the Convention.

Concluding remarks

International developments *support the stretching of current extraterritorial case-law into new fields*. Together with the object and purpose oriented approach focusing on the prevention of circumvention of treaty obligations, this doctrine makes a convincing argument for reforming the established extraterritorial doctrine.

One of the issues that could provide a breakthrough from obsolete elements of the extraterritorial doctrine is related to the fundamental question whether there is bad faith on the side of authorities rather than a normal presumption that states are operating in good faith and not acting deliberately against their human rights obligations. For years the European human rights supervision could be described as fine-tuning rather than scrutiny over gross human rights

violations. The readiness to acknowledge deliberate infringements and take tougher measures in order to prevent circumvention of treaty obligations marks a departure from the prevailing extraterritoriality doctrine. However, it is a necessary step for the Strasbourg Court to take.

A *response to this post can be found here.*

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