ZOOM IN

The question:

Litigating jurisdiction before the ECtHR: Between patterns of change and acts of resistance

Introduced by Alice Riccardi, Alice Ollino and Diego Mauri

Some ten years ago, one author described the notion of jurisdiction under Article 1 of the European Convention of Human Rights (ECHR) to embed a 'sufficiently flexible definition to be able, over time, to evolve outwards further, as European signatories expand not only the nature and number of their extraterritorial acts but their degree of involvement in other countries' (italics added).[1] When this idea was conceptualized – ie shortly before the era of seminal judgments such as *Al-Skeini* (2011) and *Hirsi Jamaa* (2012) – it might have (at least partially) been accurate in describing the cultural approach of the European Court of Human Rights (ECtHR or the Court). Ten years later, however, whether this opinion still reflects the reality of extraterritorial jurisdiction before the Court shall be up to debate.

Indeed, narratives of thick borders, sovereignty and nationalism seem at present predominant in Strasbourg. This trend is epitomized by both the current in-court attitude of respondent governments and recent decisions of the Court. As to the former, they are advancing a conservative understanding of extraterritorial jurisdiction strongly rooted in the *Banković et al* precedent, abundantly invoked qua the set-in-stone authority on jurisdiction.[2] As to the position of the Court, it recently resuscitated the viewpoint that extraterritorial jurisdiction is constrained by sovereign rights of territorial States.[3] This position not only backtracks

[1] S Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 Eur J Intl L 1223, 1245.

[2] Cf States' arguments in the webcast of the hearing of *Hanan v Germany* App no 4871/16 (ECtHR, 26 February 2020).

[3] See eg *M.N. et al v Belgium* App no 3599/18 (ECtHR, 5 March 2020) para 99.

from more progressive accounts adopted by the Court as of late (eg *Jaloud v the Netherlands*), but it also looks as a form of resistance against more expansionist understandings proposed in recently submitted applications (eg *S.S. et al v Italy* and *Hanan v Germany*). The overall impression is that the Court itself is striving to adopt variant tactics either for establishing or denying jurisdiction, which complicates matters for applicants and also for third parties.

Recent applications before the Court build on the foundations of its previous case-law, yet they move forward by invoking a more 'functional' notion of jurisdiction grounded on empirical reality. At micro-level, these 'newest' accounts may be categorized into two groups, depending on the applicant's litigation strategy.

The first group includes cases in which the applicants justify the exercise of extraterritorial jurisdiction by the respondent State(s) by arguments falling within the limits of the Court's 'bounded argument space'.[4] Notably, in such cases the applicants are asking the Court to dribble the well-run dichotomy between 'spatial' and 'personal' models of jurisdiction and to fully endorse the newer but quite-known-already 'third way' to extraterritorial jurisdiction, understood as the control exercised by the State over an individual's enjoyment of human rights, although the individual is located outside the State's territory.[5] This 'third way' builds upon some of the recent jurisdictional accounts elaborated by other regional human rights courts[6] and monitoring bodies,[7] as well as upon the 'grey areas'[8] left by the binary model developed by the ECtHR in *Al-*

[4] C Mallory, *Human Rights Imperialists. The Extraterritorial Application of the European Convention on Human Rights* (Hart 2020) 112.

[5] See the applicants and some third-party interveners in *Hanan v Germany* quoted above (n 2).

[6] Including Inter-American Court of Human Rights: *The Environment and Human Rights* (2017) OC-23/17; *The institution of asylum and its recognition as a human right in the inter-American system of protection* (2018) OC-25/18.

[7] Including: Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No 3042/2017* (27 January 2021) UN Doc CCPR/C/130/D/3042/2017; Human Rights Committee, *General Comment No 36* (2018) UN Doc CCPR/C/GC/36.

[8] D Steiger, '(Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate' EJIL:Talk! (25 February 2020) <www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/>.

Skeini.[9] Those applications rely heavily on scholarship that has taken a critical stance towards too narrow conceptions of jurisdiction, pushing for a re-appraisal of existing 'ways'.[10] Essentially, the aim of this strategy is to complement, rather than subverting, the Court's understanding of jurisdiction.

The second group includes cases in which the applicants are advancing a 'principled' approach to jurisdiction. Alongside a current trend in international legal scholarship,[11] applicants of this group are asking the Court to uphold a 'coherent construction of jurisdiction that is applicable across the board, within and beyond borders, … non-contingent on levels of physical control or the legal characterization of the nature of obligations (as positive or negative)'.[12] In other words, applications falling into this group are asking the Court to leave the two- or three-layered models of jurisdiction presented above and elaborate on existing case-law to formulate a novel, all-encompassing paradigm of jurisdiction integrating the universal scope of human rights law with the exercise of States' power.

In sum, we are currently witnessing a turbulence around the notion of extraterritorial jurisdiction before the ECtHR, which is cultural in the first place. Crucial cases are in the making, amid expansionist and deconstructive approaches advanced by the parties. Against this backdrop, QIL asked three authors to reflect on this phenomenon of openness and resistance.

A first and more theoretical question is whether and to what extent arguments meant to expand the notion of jurisdiction before the ECtHR are sustainable and satisfactory in the long run. Any interpretation of (extraterritorial) jurisdiction and its outer limits comes in fact with certain assumptions about the factual and normative grounds that harness this notion. Although the Court is, more often than not, silent on the factual and theoretical foundations guiding its interpretative reasoning, unpacking these assumptions is crucial for understanding the strengths and

[9] See eg *Stephens v Malta (no 1)* App no 11956/07 (ECtHR, 21 April 2009); *Güzelyurtlu and others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019).

[10] P De Sena, *La giurisdizione statale nei trattati sui diritti dell'uomo* (Giappichelli 2002).

[11] L Raible, *Human Rights Unbound. A Theory of Extraterritoriality* (OUP 2020).

[12] V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v Italy*, and the "Operational Model"' (2020) 21 German L J 385, 386.

weaknesses of expansive jurisdictional arguments and their chances of success in adjudication.

A second issue touches upon strategic litigation and the enduring role of the ECtHR as a 'laboratory for the understanding of the evolving notion of jurisdiction in the era of globalization'.[13] First, there is the question of how far applicants and their lawyers can foster new cultural approaches in Strasbourg and effectively ensure a shift in the Court's attitude towards jurisdiction. Second, and in light of recent developments, there is room to question whether the ECtHR is still the best forum in which applicants can seek redress for their human rights violations. Over the past few years, general comments and decisions regarding individual communications by United Nations (UN) treaty bodies have indeed been much keener on being imaginative and adopting broader interpretations of jurisdiction going well-beyond the current approach of the ECtHR. An attentive observer may even argue that the results of this shift are already visible first-hand; views like *A.S. and others v Italy* by the UN Human Rights Committee indicate that applicants are challenging the monopoly of the Court over (European) human rights issues and opting for more receptive institutions. While this change may ultimately prompt the ECtHR to revisit its conservative stand in order to 'regain' its authority, the question remains as to how far expansive arguments on jurisdiction can stretch the concept without triggering backlash and crippling the very possibility to obtain redress.

Lea Raible addresses these questions by inviting us to reflect upon the Court's (missed) opportunity to ground jurisdictional interpretations on solid theoretical foundations. Through a comparative approach that contrasts a recent decision by the UN Committee on the Rights of the Child with the newest *Georgia v Russia (II)* judgement before the ECtHR, Raible argues that a principled reasoning is at least as important as the interpretative outcome. Accordingly, both restrictive approaches used by the ECtHR as well as overly broad understandings of jurisdiction risk being equally problematic when they build upon weak foundations in principled reasoning. Conall Mallory instead adopts a more practical perspective and explores critically the boundaries of the Court's cultural approach to jurisdiction. His argument is that the lively debate on

[13] O De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic YB Intl L 183.

jurisdiction unfolding across different international human rights fora may ultimately drive an effective change in the Court's current approach. Finally, Mariagiulia Giuffré joins in the discussion by exploring the content of jurisdiction especially in cases of 'contactless control'. She notably explores the recent UN Human Rights Committee case *A.S. and others v Italy* where the Committee held that the 'special relationship of dependency' tying persons in distress at sea and the State with knowledge of the circumstances is sufficient to trigger extraterritorial jurisdiction. In a perspective of cross-fertilization, she asks whether and to what extent the ECtHR might be 'contaminated' by the development in the interpretation of extraterritorial jurisdiction stemming from other human rights bodies.