Extraterritoriality between a rock and hard place

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1. *Extraterritoriality and different fora: Diverging directions of travel*

International human rights law (or at least instruments forming part of this category) is applied by many different entities. An increasing number of these entities have dealt more specifically with extraterritorial human rights obligations. This includes the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*,[1] UN treaty bodies interpreting discrete international human rights instruments,[2] regional courts applying regional human rights conventions,[3] and national courts taking into account international human rights law.[4] While it is wise to

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[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 112.

[2] Eg, Committee on Economic, Social and Cultural Rights, 'Concluding Observations: China' UN Doc No E./C.12/CHN/CO/2 (13 June 2014) para 13; Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' UN Doc CCPR/C/GC/36 (30 October 2018) para 63; Human Rights Committee, *AS et al v Italy* UN Doc CCPR/C/130/D/3042/2017 (27 January 2021) paras 7.4-7.5.

[3] Eg, *Al-Skeini et al v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) paras 130-139; *Georgia v Russia (No 2)* App no 38263/08 (ECtHR, 21 January 2021) paras 109-144; Inter-American Court on Human Rights, *Medio Ambiente y Derechos Humanos (Environment and Human Rights)* Opinión Consultativa (Advisory Opinion) OC-23/17, 15 November 2017 paras 72-82.

[4] (In)famous examples from the UK include *R (on the application of R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 and *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 [2008] 1 AC 332. For an analysis of recent examples in Belgian and Dutch courts concerning the repatriation of children from camps in Syria (similar to the communication to the CRC

be cautious about speaking of established case law in an area of law applied by so many different bodies, it is nevertheless becoming more obvious that the European Court of Human Rights (ECtHR or Court) and UN bodies in particular are adopting differing approaches to the problem of extraterritorial human rights obligations. The ECtHR continues to resist the expansion of extraterritorial application of the European Convention on Human Rights (ECHR or Convention), whereas UN treaty bodies seem more willing to broaden the scope of human rights treaties.

The present paper addresses recent developments in litigating extraterritorial human rights obligations before UN bodies and compares their direction of travel to the established case law as well as recent judgments of the ECtHR. UN treaty bodies, both in General Comments[5] and decisions regarding individual communications,[6] increasingly opt to broaden the extraterritorial application of the treaties they are responsible for. The Court's judgments concerning the ECHR, on the other hand, are – if anything – starting to restrict the extraterritorial application again.[7] Some argue this represents an unfortunate resurfacing of the now infamous *Banković*[8] decision.[9] Others limit the significance of the ECtHR's cautious approach to the facts of specific cases, arguing that the Court's apparent caution is a result of litigation concerning armed conflicts, and active hostilities in particular.[10] Notwithstanding the more recent case

discussed below) see A Spadaro, 'Repatriation of Family Members of Foreign Fighters: Individual Right or State Prerogative?' (2021) 70 ICLQ 251.

[5] See, eg, Human Rights Committee, 'General Comment No 36: The Right to Life' (n 2) para 63.

[6] See, eg, Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No 79/2019 and No 109/2019' UN Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (2 November 2020) (cited as 'CRC, Decision of 2 November 2020').

[7] See in particular *Georgia v Russia (No 2)* (n 3), relying significantly (and somewhat surprisingly) on *Banković v Belgium* App no 52207/99 (ECtHR, 12 December 2001).

[8] *Banković v Belgium* (n 7).

[9] M Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' EJIL:Talk! (25 January 2021) <www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/>.

[10] A Moiseieva, 'The ECtHR in Georgia v. Russia – A Farewell to Arms? The Effects of the Court's Judgment on the Conflict in Eastern Ukraine' EJIL.Talk! (24 February

law, however, even the ECtHR's earlier approach in *Al-Skeini v United Kingdom*[11] was more restrictive than the approaches employed by UN bodies.[12]

At first glance, therefore, it is tempting to think that the ECtHR is no longer a forum that is particularly friendly to human rights. And as far as litigants of cases involving extraterritoriality are concerned, my advice would indeed be that they are more likely to be successful if they opt for individual communications to UN bodies over bringing a case before the ECtHR. However – and this is what I want to argue in this paper – while broadening our interpretation of jurisdiction has clear advantages for individual litigants, at least some of the arguments in favour of this approach are on closer inspection problematic. I want to raise the possibility that the ECtHR may be right (to an extent) to resist the urge to broaden extraterritorial human rights obligations of states. That said, I also want to leave space for the worry that not all restrictive reasoning employed by the ECtHR is sound or convincing. My argument will be that stances on jurisdiction perceived to be overly broad or hopelessly narrow in fact share an important weakness: they lack a solid foundation in principled reasoning.

I will proceed as follows. Section 2 introduces recent decisions and statements by UN treaty bodies. It surveys two popular arguments in favour of broadening extraterritoriality based on the nationality of applicants and the capacity of respondent states to assist. It further addresses the strengths and (in particular) the potential weaknesses of arguments based on nationality and capacity, respectively. I argue that both points are weaker than they appear because they do not take into account what international human rights law is and is not for. Section 3 looks at the ECtHR's more restrictive readings of jurisdiction, particularly those based on the concept of active hostilities. I show that the Court's reasoning in this case is a missed opportunity, but that it is overall more plausi-

2021) <www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/>.

[11] *Al-Skeini v United Kingdom* (n 3) paras 130-149.

[12] For a summary and the same view, see H Duffy, 'Communications No. 79/2019 and 109/2019 L.H. et al v. France and 77/2019 F.B. et al v. France, Case Note 2021/3' Leiden Children's Rights Observatory (18 February 2021) <https://childrensrightsobservatory.nl/case-notes/casenote2021-3#discussions>.

ble than arguments based on nationality and capacity. Section 4 illustrates how at least some arguments surveyed could be altered and strengthened by relying on principled reasoning and offers a brief conclusion.

2. *UN Bodies: Nationality, capacity and jurisdiction*

At the UN, one of the recent examples of the broadening pull concerns European nationals held in camps for suspected supporters of terrorism in northern Syria. This example is all the more interesting as it is now clear that the ECtHR will have to concern itself with the same situation.[13] The factual background is as follows.[14] During the ascendency and continued existence of the Islamic State in Iraq and Levant (ISIL), European nationals travelled to the Middle East to become part of or support the organisation.[15] Following the (almost complete) collapse of ISIL, thousands of family members of former fighters – including children – are detained in camps in northern Syria.[16] The conditions of their detention are widely reported to be deplorable, lacking basic goods and services, including clean water, safe shelter, and medical care.[17] Some of these European collaborators left their homes with their children, while others became parents abroad. This means that some of the children held in these camps are European nationals. It is on behalf of such children that their relatives in Europe authored individual communications to the Committee on the Rights of the Child (CRC).

The authors of these communications – all relatives of the children concerned – allege that France – the respondent state – did not take measures to assist and/or repatriate French children held in these camps.

[13] Jurisdiction in *HF and MF v France* and *JD and AD v France* App No 24384/19 and 44234/20, has been relinquished to the ECtHR's Grand Chamber on 16 March 2021. A hearing is scheduled for 29 September 2021. See Press Release, ECHR 097 (2021) (22 March 2021).

[14] Unless otherwise stated, the factual background is based on CRC, Decision of 2 November 2020 (n 6) paras 1.1-2.6.

[15] 'Thousands of Foreigners Unlawfully Held in NE Syria' Human Rights Watch (23 March 2021) <www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria>.

[16] ibid.

[17] CRC, Decision of 2 November 2020 (n 6) para 2.9.

They further contend that this refusal to act constitutes a violation of several provisions of the UN Convention on the Rights of the Child (UNCRC). The claim is that France's omissions violated the children's rights to non-discrimination (Article 2), life and development (Article 6), the highest attainable standard of health (Article 24), and freedom from torture and cruel and inhumane treatment (Article 37) among others.[18] In a decision on procedural aspects of the two communications in *LH et al v France* and *LB et al v France*, the CRC found that France had jurisdiction under the UNCRC over the rights of children held in camps in northern Syria.[19]

At the outset, it should be noted that the Committee did so in the form of a list of what it deems 'relevant considerations', rather than by elaborating a test of jurisdiction as such. This is itself problematic because it is not possible to judge if a consideration is relevant unless we already know what jurisdiction means.[20] Saying that a factual consideration is relevant presupposes a normative concept of jurisdiction that makes this particular fact relevant.[21] It is this normative concept of jurisdiction that tells us if and when a fact is relevant for determining if a state has jurisdiction for the purposes of international human rights law. For example, if we think that jurisdiction ought to capture control over territory different facts are relevant than if we think jurisdiction captures control over a person. The case law of the ECtHR bears this out as it draws on different facts depending on whether it applies the territorial or personal model of effective control.[22] To illustrate this further, consider the following example: if we think voting rights ought to be conferred on all adult citizens of a state (because nationality represents a meaningful link

[18] ibid para 1.1.

[19] ibid paras 9.5-9.7.

[20] Similar, but for different reasons: Duffy (n 12).

[21] Generally: GA Cohen, 'Facts and Principles' (2003) 31 Philosophy & Public Affairs 211-45. On how this plays out regarding jurisdiction in international human rights law, see L Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020) 130-131.

[22] *Al-Skeini v United Kingdom* (n 3) paras 133-137 (on the personal model) and 138-140 (on the territorial model). This is also why it matters which one is applied and why it is problematic when the Court is silent on the matter: L Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers' [2016] Eur Human Rights L Rev 161.

to the political community, say), then the nationality of a person is a relevant consideration for this purpose while, for example, their hair colour is not. As such, the CRC – even though it did not make its general thoughts on jurisdiction explicit – nevertheless necessarily implies at least some aspects of the jurisdictional test it is employing. This is why it is both possible and important to unpack the CRC's considerations and what they say about the Committee's understanding of jurisdiction.

The CRC explicitly acknowledged that France did not have effective control over the camps in question[23] – which according to what was just said – implies that it was distancing itself from the notions usually relied upon by the ECtHR. The Committee further did not draw any distinctions between negative and positive human rights obligations, or between actions and omissions as violations. While these distinctions are sometimes discussed in the literature in the sense that jurisdiction should only be required for positive obligations, but not for negative ones,[24] this has not entered the case law to date. It is also worth pointing out here that the applicants are alleging that France's violations of the UNCRC consist of omissions as opposed to actions. The implication is that this communication is about the existence of positive obligations. Seeing as jurisdiction is required to be met with regard to positive obligations in any event and on any account, the lack of engagement on the Committee's part is not surprising.

Of the Committee's 'relevant considerations' in favour of broadening the notion of jurisdiction two were particularly important. To support its finding that France had jurisdiction, the Committee relied on notions of France's capacity to assist as well as on nationality as a basis for said jurisdiction.[25] On one hand, this decision represents a departure from what is usually thought to be established case law that bases extraterritorial jurisdiction on either territorial or personal control.[26] On the other hand,

[23] CRC, Decision of 2 November 2020 (n 6) para 9.7.

[24] See M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 209-22.

[25] See CRC, Decision of 2 November 2020 (n 6) para 9.7.

[26] The most authoritative summary can be found in ECtHR, *Al-Skeini et al v United Kingdom* (n 3) 2011 paras 130-139. For discussion of the models see Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 24); S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden J Intl L 857; Raible, 'The Extraterritoriality of the ECHR' (n 21).

it follows two UN Special Rapporteurs[27] as well as the UN Human Rights Committee (HRC)[28] in arguing (in variations) that as soon as a state has the capacity to influence a given situation this fact should be sufficient to find it has jurisdiction for the purposes of international human rights law. Both arguments on nationality and jurisdiction as capacity may potentially enter – and influence – present and future litigation of extraterritorial human rights obligations and thus warrant some consideration. I will analyse each of these arguments in turn.

2.1. *Nationality*

On the relevance of the children's nationality, the CRC noted the following:

> 'In the circumstances of the present case, the Committee observes that the State party, *as the State of the children's nationality*, has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses.'[29]

To my mind, this means that the children's French nationality was a necessary but not a sufficient condition to finding that France had jurisdiction. The reference to 'the circumstances' at the beginning of the quoted passage pertains to the other considerations the CRC thought relevant to its findings. They include the risk that detention conditions will harm them, that France had full knowledge of their existence and their plight, and that the local authorities seemed to expect the states of nationality to repatriate their citizens whenever possible.[30] Following the CRC's own words, I will next look at the problems and prospects of nationality as a necessary (as opposed to a sufficient) condition of jurisdiction in the circumstances.

[27] 'Extra-territorial Jurisdiction of States over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic' available at <https://www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf>. The authors are Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights while countering terrorism, and Agnès Callamard, UN Special Rapporteur on extrajudicial, summary or arbitrary executions.

[28] HRC, 'General Comment No 36' (n 2).

[29] CRC, Decision of 2 November 2020 (n 6) para 9.7 (emphasis my own).

[30] ibid para 9.7.

I will consider some prospects and advantages first. The CRC was clearly motivated by the factual background of the communication: It concerns vulnerable individuals – children – in a desperate situation. Detention conditions in these camps are squalid and there are aspects of arbitrariness in who is held and why. In short, these camps constitute a moral and political failure and are not going to solve the security issues in the region either.[31] Against this background, it is understandable and even tempting to say that whenever individuals are citizens of European (read: relatively powerful and certainly developed) states these countries ought to take responsibility by repatriating them. Even authors who are sceptical about whether this can be construed as a human rights obligation (necessitating, as it would, a prior finding of jurisdiction) are in favour of this outcome.[32] And I agree with them. We might argue, then, that the CRC was justified in relying on nationality because it was the only way to even hear the communication and to potentially find that France owes obligations to French children in these circumstances.

It is further worth pointing out that nationality is sometimes relevant to jurisdiction in international human rights law. I argue elsewhere that jurisdiction ought to be understood as political power and that what has to be under the effective control of a state are human activities made relevant by human rights treaties.[33] We could imagine situations where aspects of our existence are undoubtedly in the jurisdiction of a state so understood because of our nationality as a necessary (but not sufficient) condition in a purely factual (as opposed to justificatory) sense. Think, for example of the renewal of travel documents of citizens who reside abroad – an encounter between an individual and authorities that could be subject to procedural guarantees.[34] Another example would be the withdrawal of citizenship of ISIL supporters as in the case of Shamima

[31] On the contrary, they have turned out to (re-)radicalise detainees: Dan Sabbagh, 'Kurdish forces enter detention camp in Syria to eliminate Isis cells' *The Guardian* (28 March 2021) <www.theguardian.com/world/2021/mar/28/kurdish-forces-enter-refugee-camp-in-syria-to-eliminate-isis-cells>.

[32] Spadaro (n 4) 265; M Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' EJIL:Talk! (10 November 2020) <www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/>.

[33] Raible, *Human Rights Unbound* (n 21) ch 5.

[34] See, eg, the facts of HRC, *Loubna El Ghar v Libyan Arab Jamahiriya*, Communication No 1107/2002 UN Doc CCPR/C/82/D/1107/2002 (5 November 2004) para 2.1-2.4.

Begum.[35] In these cases the specific areas of life of the individuals concerned are under the political power of their state of origin – precisely because of their nationality.

However, such cases differ dramatically from the situation before the CRC because of the justificatory role nationality occupies in the latter. In the case of children held in the camps in northern Syria, nationality is relied upon by the CRC to assign responsibility for some children as opposed to others. Had they not been French, France would not have had jurisdiction. Compare this to the cases above, where jurisdiction is premised on nationality only because the problems at hand could not arise without it in a factual, rather than normative sense. Milanovic[36] lists four concerns with this particular way of relying on nationality, which I share. First, nationality is a poor foundation for rights that are not political in nature. Second, Milanovic is worried about relying on nationality as a criterion of burden sharing: There are numerous people in these camps, the camps are morally and politically unsustainable, the problem needs to be solved, but suffers from the fact that it would require collective action. Third, nationality laws differ widely, and individuals can be deprived of their nationality. If it were used as a general basis of jurisdiction, this would offer a route to states to rid themselves of inconvenient human rights obligations.[37] Fourth, Milanovic argues that the nationality of applicants is not at all linked to the capacity of a state to assist a particular individual. There is nothing in principle that would stop France from also assisting, say, German, British or Syrian nationals in the same situation. We will come back to the specific problems reliance on capacity creates in the first place below.

[35] For a summary of Begum's story and the ensuing litigation see D Sabbagh, 'Shamima Begum loses fight to restore UK citizenship after supreme court ruling' *The Guardian* (26 February 2021) <www.theguardian.com/uk-news/2021/feb/26/shamima-begum-cannot-return-to-uk-to-fight-for-citizenship-court-rules>. For the latest development in the litigation at the time of writing see *R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7.

[36] He raises all of these concerns in: Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters' (n 32).

[37] Which is, in my view, precisely what European states are doing when they deprive ISIL supporters of their citizenship. Shamima Begum's treatment is a case in point, and it is not the only one: D Sabbagh, 'Watchdog steps in over secrecy about UK women in Syria stripped of citizenship' *The Guardian* (29 March 2021) <www.theguardian.com/world/2021/mar/29/watchdog-steps-in-secrecy-uk-women-syria-stripped-of-citizenship>.

These worries about nationality as a basis for jurisdiction are well-founded. They illustrate that citizenship is problematic when it takes on a normative or justificatory role in establishing extraterritorial human rights obligations. Whenever this occurs, it becomes apparent that nationality is, at its core, an arbitrary criterion for jurisdiction in international human rights law. Approaches to jurisdiction ought – at the very least – not be arbitrary and should be based on the nature of international legal human rights.[38] But nationality fails on both of these accounts. Using it in the way the CRC did, is thus in my view not a price worth paying – even when it broadens the scope of international human rights in a particular case.

2.2. *Capacity*

As mentioned above, the CRC did not only rely on nationality to establish jurisdiction, but also linked it to France's 'capability and power'[39] to assist the children in need. Capacity or capability is usually relied upon to broaden the extraterritorial scope of international human rights law.[40] And if taken seriously, it would expand in particular the human rights obligations of developed states – because most iterations treat economic and financial resources as part of a state's capacity. Building an account of extraterritorial human rights obligations on capacity would also mean that developed states owe positive duties to protect and fulfil (particularly in the form of direct assistance) to individuals outside their territory. The broadest approaches were (to my mind) first developed regarding economic and social rights – an area in which such obligations are often seen as the most important aspect of international human rights law.[41] While capacity to discharge human rights obligations is on most accounts

[38] Raible, *Human Rights Unbound* (n 21) 80-82. For a different view on jurisdiction that also demands consistency see V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Power, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 German L J 385.

[39] CRC, Decision of 2 November 2020 (n 6) para 9.7.

[40] Raible, *Human Rights Unbound* (n 21) 42.

[41] ibid 41-43. For a relevant statement on socioeconomic rights see Committee on Economic, Social and Cultural Rights, 'Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights' UN Doc No E/C12/2001/10 (10 May 2001) para 16.

related to jurisdiction,[42] it is at best a necessary condition for jurisdiction to obtain. Importantly, it is not in and of itself a sufficient one.

At times, broad approaches to jurisdiction are also connected to the standard of due diligence in international law and it seems this is at least one reason for the introduction of capacity as a criterion for jurisdiction in international human rights law.[43] Due diligence requires that a state that is in control of a source or risk of harm to the right-holder take reasonable measures of care and prevent said harm or risk from actualising.[44] There are two conditions for due diligence to apply: reasonable foreseeability of the harm and reasonable *capacity* to intervene.[45] For this capacity to obtain, however, the state needs a link with the source of harm (whatever it may be). Jurisdiction in international human rights law, however, qualifies a state's relationship with the right-holder, not the source of harm. This being so, I will not further address the implications of due diligence in the context of extraterritorial human rights obligations. However, the connection to the standard of due diligence explains some of the conflations I address in this section.

Arguments relying on capacity tend to overlook or downplay in particular that capacity – while it may be sufficient to ground the application of due diligence – is not a sufficient condition for jurisdiction to obtain. This is particularly true of reasoning of the following structure. First, a situation is described as detrimental to an individual or their interests. Next, evidence is considered that would suggest a state is in a position to assist or to otherwise change or alleviate the harmful situation. The latter is then taken to be sufficient to say that the state in question has human rights obligations to change the situation and these duties are owed to the individual identified to be in harm's way. The CRC's reasoning is no exception. The decisive paragraph describes the detention conditions as

[42] See, eg, Besson (n 26) 863, referring to jurisdiction as a 'practical condition for human rights'.

[43] S Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' ESIL Reflections 9:1 (2020) <https://esil-sedi.eu/wp-content/uploads/2020/04/ESIL-Reflection-Besson-S.-3.pdf>.

[44] ibid 4. See more generally V Stoyanova, 'Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women' in J Niemi, L Peroni, V Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020).

[45] Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (n 43).

'deplorable' and thus harmful to the children on whose behalf the communication is brought.[46] It notes that France knew about the situation, had (and presumably continues to have) good rapport with the Kurdish authorities, and has already repatriated 17 other children. The Committee takes this to mean that France has 'the capability and the power to protect the rights of the children in question'[47] and concludes further that France has jurisdiction in the case before the CRC.[48]

This comes close to implying that capacity is a sufficient normative condition for jurisdiction in international human rights law – too close to be defensible. To explain why, we need to take a brief step back to think about what it means to say that a state has human rights obligations. Human rights involve individuals making claims on other actors, usually (but not necessarily) states. [49] That is, human rights when found applicable because jurisdiction is established require a state to do something to further the interests of that individual. But the interests of that individual are not in and of itself sufficient to justify a human rights obligation.[50] It is, in other words, not enough *that* something must be done, but it is also necessary to say *who* has to do it. In our example, to anchor a claim based on human rights it is not enough to say that the children involved need to be protected against the harmful conditions of their detention. It is in addition necessary to say why it is France that has to do something. Recall what we said above about France also and equally being capable of assisting, for example, German nationals in the camps. The opposite is also true: Germany has the capacity in principle to assist French nationals. I suspect this is the real reason why nationality was relied upon by the CRC at all.

Another way of putting this is to say that jurisdiction based on capacity turns on its head the principle of 'ought implies can' – which warns against placing on someone duties they cannot fulfil – and instead asks

[46] CRC, Decision of 2 November 2020 (n 6) para 9.7.

[47] ibid para 9.7.

[48] ibid 2020 para 10.

[49] I build here on the Hohfeldian notion of claim rights. For an excellent overview see L Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202. For an argument on how it matters for jurisdiction see Raible, *Human Rights Unbound* (n 21) 46-50.

[50] My view is that interest theories of rights are sound, but interest theories of human rights are not: Raible, *Human Rights Unbound* (n 21) 51-55.

us to accept that 'can implies ought'.[51] It transforms capacity to act in a certain way from a necessary condition into a sufficient one. I do not think this is a good argument, much less a bullet worth biting. 'Capacity' on its own does not say much about why it is a good idea, and even less about why it would be required that a particular state carry out a particular action. But this is precisely what jurisdiction understood as a threshold criterion ought to do. It should offer principled justification on why certain duties are allocated the way they are, as well as plausible guidance as to when this is the case.[52]

The idea that jurisdiction is a threshold criterion is neither new nor controversial.[53] And I argue elsewhere that a principled account of jurisdiction based on values underpinning international human rights fares best in this regard.[54] But one need not share this view to see that capacity offers too little in terms of substance to be a sufficient condition for jurisdiction to obtain. At the very least, some concretisation on what kind of capacity is considered the basis for jurisdiction would be needed. Again, the example of the CRC's reasoning is instructive. It considers all the contextual factors – knowledge, resources, relationships – that lead it to conclude that France has capacity to assist and (accordingly) jurisdiction.[55] But the CRC does not say why it is these factors or this kind of capacity that are decisive when that would be the crux of the matter. Capacity is, to my mind, a necessary by-product of jurisdiction when it is already established, taking it as the reason for jurisdiction's establishment puts the cart before the horse.

[51] ibid 42. For the same concern see A Ganesh, *Rightful Relations with Distant Strangers: Kant, the EU and the Wider World* (Hart 2021) 169-75.

[52] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 26); Raible, *Human Rights Unbound* (n 21) 80-82.

[53] M Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 Netherlands Intl L Rev 349, 352; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 24) ch 2; Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 26); L Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' (2018) 31 Leiden J Intl L 315.

[54] L Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80 Modern L Rev 510, 520-24; Raible, *Human Rights Unbound* (n 21) 74-82.

[55] CRC, Decision of 2 November 2020 (n 6) para 9.7.

This is true even before we get to the most striking and problematic consideration of the CRC in relation to capacity. The CRC takes into account that France has already repatriated children as a factor to establish its capacity.[56] This has obvious drawbacks as it provides the perverse incentive on other states not to do the same, and thus potentially exacerbates rather than solves the collective action problem the existence of these camps pose.[57]

Capacity as a sufficient condition for jurisdiction, then, does not fare well. We have seen that the problem is not so much that capacity does not matter – it does – but that it is not a good reason in and of itself to allocate human rights obligations. This latter aspect, however, is exactly the function of jurisdiction in international human rights law. Broadening its scope by relying on capacity may look promising, but as with nationality we should be mindful of what bullets we are willing to bite. This section suggests that capacity focused approaches to jurisdiction ought not to be one of them.

3. *ECtHR: Difficult distinctions and restrictive reading*

Recent case law of the ECtHR seems to have contracted the Court's interpretation of the extraterritorial scope of the ECHR. This is particularly true for cases involving armed conflicts. Perhaps the most prominent example is the judgment in *Georgia v Russia (No 2)*.[58] The result of an interstate complaint, the findings centre around the 2008 armed conflict in Abkhazia and Ossetia between the two parties.[59] Georgia alleged Russia had breached a number of ECHR provisions, among them articles 2 on the right to life and 3 on the prohibition of torture through indiscriminate attacks on civilians on Georgian territory.[60] Because Russia's obligations are at issue but the conflict occurred outside its territory, the question whether Russia had jurisdiction according to Article 1 of the Convention is central to the case. In what follows I will outline the main

[56] ibid para 9.7.

[57] Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' (n 32).

[58] (n 3).

[59] For a summary of the facts see ibid paras 30-44.

[60] ibid para 8.

features (for our purposes) of the Court's findings, following the structure the ECtHR employed. I will argue that the judgment is disappointing because of the quality of its reasoning and, in that sense, a missed opportunity.

The Court divided its analysis and findings regarding Russia's jurisdiction by distinguishing events during active hostilities from their aftermath.[61] Active hostilities lasted from 8 to 12 August 2008. On 12 August 2008 Russia and Georgia concluded a ceasefire agreement under the auspices of the EU and in October 2008 Russia withdrew its troops from Georgian territory.[62] Between 12 August 2008 and October of the same year, the Court treated Russia as an occupying power in the separatist entities of Abkhazia and South Ossetia, as well as in the 'buffer zone' established by Russian troops. It applied its longstanding spatial model of jurisdiction. That is, it relied on the principles first outlined in *Al-Skeini*[63] and found that Russia had effective control over the areas it was occupying. Accordingly, the ECtHR held that Russia had jurisdiction and thus owed human rights obligations to the individuals present in these areas. This is an unsurprising finding as belligerent occupation is the situation that gave rise to the spatial notion of jurisdiction in the first place.[64]

The Court's reasoning and findings regarding the five days of active hostilities, on the other hand, are both new and more complex. Georgia's complaint was that Russian military operations during that time breached the right to life according to Article 2 of the ECHR.[65] The ECtHR did not think that either the spatial or the personal model were applicable, holding instead that military operations such as bombing and shelling were similar to the facts in *Banković*[66] and accordingly fell outside Russia's jurisdiction.[67] It is important to add that here the Court also held that for certain other purposes – such as the treatment of persons arrested during, but continuously detained after the hostilities, and the obligation

[61] ibid paras 105-144, and 145-175 respectively.

[62] For the 'chronology of the conflict' see ibid paras 34-44.

[63] *Al-Skeini et al v United Kingdom* (n 3) paras 138-140.

[64] Raible, 'The Extraterritoriality of the ECHR' (n 22) 163. For a more in-depth look at the earlier development of the spatial model see R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel L Rev 503. See also the explicit acknowledgement in *Georgia v Russia (No 2)* (n 3) para 196.

[65] ibid para 105.

[66] *Banković v Belgium* (n 7).

[67] *Georgia v Russia (No 2)* (n 3) paras 133-134, 144.

to investigate under Article 2 ECHR – Russia did have jurisdiction and some of the Convention's provisions were thus applicable.[68] This is a departure from *Banković* owed to the evolving case law[69] following that decision, as the ECtHR noted itself.[70] What the Court insisted on, however, is that bombing, shelling, and similar uses of force during hostilities are not – in and of themselves – sufficient to bring affected individuals under the jurisdiction of a state for the purposes of Article 1 of the ECHR.

It was this 'categorical'[71] divide between active hostilities and occupation that made the judgment controversial. Milanovic calls it 'exemplary only in its arbitrariness' and 'a retrograde step, putting the Court firmly against the overarching trend in international jurisprudence and underscoring its position as an outlier when compared to other human rights bodies.'[72] I agree the judgment is disappointing regarding the quality of the reasoning and, as I point out above, it is also clear that the Court's insistence on reading jurisdiction restrictively puts it against the grain of wider trends. I will analyse the Court's reasoning on the spatial model first, followed by the personal one, adding my own thoughts to both.

The Court quoted *Al-Skeini*[73] at length (as it tends to do in cases involving jurisdiction), and reached its conclusion by considering – and then denying the applicability of – the spatial and the personal model of jurisdiction. Regarding the spatial model, the ECtHR found that Russia lacked effective control over the areas in question during active hostilities because:

> '... it can be considered from the outset that in the event of military operations – including, for example, armed attacks, bombing or shelling –

[68] ibid paras 326-332, citing the 'special features' approach developed in *Güzelyurtlu v Cyprus and Turkey* App no 36925/07 (Judgment, 29 January 2019) paras 191-197. Confirmed in *Hanan v Germany* App No 4871/16 (ECtHR, 16 February 2021) paras 134-145.

[69] Most notably (and cited by the ECtHR): *Al-Skeini et al v United Kingdom* (n 3) para 137.

[70] *Georgia v Russia (No 2)* (n 3) para 114.

[71] Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (n 9).

[72] ibid.

[73] *Georgia v Russia (No 2)* (n 3) para 81, citing *Al-Skeini et al v United Kingdom* (n 3) paras 133-140.

> carried out during an international armed conflict one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area *in a context of chaos* means that there is no control over an area.'[74]

It is hard to disagree with some aspects of the paragraph. For example, intense and protracted violence is undoubtedly evidence not of control, but the lack thereof.[75] If two parties are shelling each other's positions, this is usually done because one has lost control, while the other has not yet gained it. It is this absence of control during hostilities but the presence of it during occupation that, in the past, allowed the Court to distinguish cases like *Jaloud* from its decision in *Banković* – although it has never explicitly employed this analysis before.[76]

In a situation of protracted and intense violence, it also makes sense to speak of a context of chaos. But the Court did not explain why this is important. It did not need to refer to chaos to establish that hostilities usually signify the absence of control. One explanation could be that this additional characteristic of hostilities is meant to emphasise the fact that there are significant epistemic hurdles to discharging human rights obligations on the battlefield.[77] We could say that knowledge of certain facts is necessary for control and jurisdiction to be held and that the circumstances of hostilities mean that this knowledge (or parts of it) are not obtainable. And this would be a valid point: after all, the question of whether and how international human rights law applies to which aspects of armed conflict is one that has no settled answer.[78] Engagement of this sort would at least be plausible. But the Court contents itself with a hint. I would like to suggest that the introduction of such a clear and crucial distinction between active hostilities and their absence would have warranted a more sustained explanation.

[74] *Georgia v Russia (No 2)* (n 3) para 126 (emphasis my own).

[75] J Dill, 'Towards a Moral Division of Labour between IHL and IHRL During the Conduct of Hostilities' in Z Bohrer, J Dill, H Duffy (eds), *The Law Applicable to Armed Conflict* (CUP 2020) 246; Raible, *Human Rights Unbound* (n 21) 148.

[76] For an analysis that makes this point see Raible, *Human Rights Unbound* (n 21) 146-49.

[77] Dill (n 75).

[78] For an illustration how rich and complex the debate is see Z Bohrer, J Dill, H Duffy (eds), *The Law Applicable to Armed Conflict* (CUP 2020).

In its reasoning regarding the personal model of jurisdiction, the Court missed an opportunity to do better where it was even more important. It referred to its finding on the spatial model and added that it 'attaches decisive weight' to the context of chaos prevailing during the active hostilities.[79] It then found that this same context of chaos also prevented Russia from exercising state agent authority or control and that – accordingly – Russia did not have jurisdiction based on the personal model either.[80] The Court distinguished the present case from others – including *Issa v Turkey*[81] and *Pad v Turkey*[82] in which it found (lethal) uses of force to bring an individual within a state's jurisdiction based on such state agent authority or control.[83] It did so by pointing out these killings had been 'isolated and specific acts involving an element of proximity'[84] (Issa and Pad involved Iraqi and Iranian nationals, respectively, who were killed by Turkish armed forces close to the border) and that, by contrast, the violence in South Ossetia and Abkhazia 'in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling by Russian armed forces seeking to put the Georgian army hors de combat and to establish control over areas forming part of Georgia.'[85] That is, again, the Court distinguished between active hostilities and occupation, or indeed active hostilities and military exercises outside of it.

The problem the Court is trying to solve here – I think – is that violence is not only evidence of the absence of control. Violence directed against an individual in a killing is the opposite: the individual is overcome by control over their very existence.[86] This means that a gunshot can signify the lack of control overall – if it is fired as part of active hostilities – or it can signify the ultimate control over the individual at the receiving end. Kinetic uses of force are thus, really, neither here nor there

[79] *Georgia v Russia (No 2)* (n 3) para 137.
[80] ibid para 137.
[81] *Issa v Turkey* App no 31821/96 (ECtHR, 30 March 2005) para 71, but see paras 72-81 where the Court finds jurisdiction did not obtain.
[82] *Pad v Turkey* App no 60167/00 (ECtHR, 28 June 2007) paras 53-54.
[83] *Georgia v Russia (No 2)* (n 3) para 131.
[84] ibid para 132.
[85] *Georgia v Russia (No 2)* (n 3) para 133.
[86] Dill (n 75) 243-46.

when it comes to jurisdiction. Their meaning depends on factual and normative context. Concerning the factual context, the Court thus had a point when it distinguished *Georgia v Russia* from *Pad* and *Issa* by insisting that they concerned isolated incidents. The fact that the incidents were isolated is precisely the context needed to turn violence from a signifier of chaos into evidence of control. But it is also true that in the normative context of jurisdiction based on state agent authority and control, the argument from the factual context of hostilities loses some of its strength because – from an individual perspective – the violence still signifies control. This means the Court needed another argument. And it had one in the form of the (factual) context of chaos. But the ECtHR never utilised it.

If we follow the explanation I field above, the Court could (and should) have said more about *why* it thought a context of chaos was important. It could have said, for example, that it ought not to impose human rights obligations on states that are impossible to comply with – recall the principle of 'ought implies can'.[87] It could have said that the substantive part of the right to life – and in particular both negative and positive obligations to be discharged on the spot – is best understood to be impossible to comply with on the battlefield, while the procedural part is not and so justified the distinctions it made.[88] Such a pronouncement on the operative distinction and its reasons would also have taken care of potential criticisms that it is illogical for (positive) procedural obligations to carry a seemingly lower jurisdictional threshold than negative ones, when the opposite is more intuitive.[89] The Court could also have said, as I argue elsewhere, that jurisdiction is best understood as political power and so requires the choice and application of rules and principles to individuals that direct their action, which is not usually the case during active hostilities because the necessary knowledge is absent.[90] But the Court did none of this.

[87] See section 2.2 above.

[88] What it actually did was to rely on the – in my view rather disorderly – 'special features' approach without fully disclosing which factors were how important: *Georgia v Russia (No 2)* (n 3) para 131-132.

[89] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 24) 209-22. I should add that I disagree: Raible, *Human Rights Unbound* (n 21) 82-88.

[90] See on the general approach to jurisdiction Raible, *Human Rights Unbound* (n 21) ch 5 and for this specific aspect ibid 147-148.

The outcome of the judgment can be explained by the fact that the Court was guided by political considerations.[91] The ECtHR made this clear for everyone to see when it noted the following:

> '... having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date'.[92]

The Court does not want to get involved for fear of backlash and while this is not ideal from the perspective of litigants, it is nevertheless a defensible position.[93] And I agree with Milanovic's point that a good way of putting this is as a tension between universality and effectiveness.[94] But I also think this case illustrates that the true weakness of the judgment is not the outcome, but the reasoning. It suggests, in other words, that as long as a Court does not bring to light the principles it applies and its reasons for doing so it will make nobody happy – not the litigants, not academics, and most likely not even governments even if they are the main audience. The final section of this paper argues that the lack of principled reasoning is the real problem facing both the ECtHR and UN bodies alike.

4. *Conclusion: The role of principled reasoning*

So far, this paper has addressed two recent examples of litigation that involved jurisdiction in international human rights law – one at the CRC and one at the ECtHR. Broadly speaking, the UN body sought to expand

[91] Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (n 9).

[92] *Georgia v Russia (No 2)* (n 3) para 141.

[93] For a different view see Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHLand Human Rights in an Age of Adjudication' in Ziv Bohrer, Janina Dill and Helen Duffy (eds), *The Law Applicable to Armed Conflict* (CUP 2020).

[94] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 24) ch 3.

the extraterritorial scope of the Convention on the Rights of the Child while the ECtHR arguably aimed to contract the scope of the ECHR, and with it its ability and responsibility to decide inconvenient cases. I would like to think that it is not a coincidence that a semi-judicial body such as the CRC found it easier to expand extraterritorial human rights obligations than the ECtHR, which imposes binding judgments (and thus obligations) on the states parties concerned. What I want to argue here, however, is that these different bodies and their divergent approaches face the same problem: their reasoning is unconvincing because it does not address the underlying principles. Whether this state of affairs is harmful overall, for example because it undermines international human rights law as an institution, is beyond the scope of this paper.[95] For now, I am going to assume that principled reasoning is in any event preferable to the lack thereof, regardless of the outcome.[96]

Each of the arguments surveyed in the paper faces challenges on precisely such principled grounds. Take the CRC's reliance on nationality, first. In addition to the concrete problems addressed above, we could also complain that international human rights law is based at least in part on strong egalitarian notions. Basing jurisdiction on citizenship thus threatens to fly in the face of the very purpose of international human rights and this internal inconsistency is grating. Capacity as a sufficient condition does not fare much better. We have seen that it fails to identify the duty bearing state and is thus what brings us into the uncomfortable discussions on citizenship in the first place. Again, the reason for this is that capacity can only identify who is owed what and by whom if it is coupled with principles of priority. The latter are not supplied by international human rights law. The ECtHR hinted at 'contexts of chaos', but did not explain why they mattered.

[95] On the connection of reasoning and authority in international human rights law see A Zysset, A Scherz, 'Proportionality as Procedure: Strengthening the Legitimate Authority of the UN Committee on Economic, Social and Cultural Rights' GCILS Working Paper No 9 (February 2021) <https://gcils.org/wp-content/uploads/2021/02/9-Zysset-Scherz.pdf>. For a more general view on content dependent authority see J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) ch 5.

[96] Principled reasoning is also important if we expect domestic courts to follow international jurisprudence when new fact patterns arise: Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office' (n 54).

The CRC and the ECtHR were able to rely on multifactor analyses without making clear which factor was how important and why because they shied away from outlining a principled approach to jurisdiction. While the ECtHR at least has a list of factors it regularly relies on, the CRC did not even have that. In any event, neither body explains why particular factors are important. This, however, does not mean their approaches are equal in quality. Arguments based on capacity and nationality find no basis in principles that are important in international human rights law.[97] The ECtHR's distinction, however, can be linked to the idea that jurisdiction tracks conditions in which it is in fact possible to discharge human rights obligations. Or we could say that human rights are best understood to apply in contexts where a state is able to guarantee individuals' equality, and that control is important in the sense that it gives us evidence of such a situation obtaining.[98]

To ask why neither body discloses the principles it relies on is speculation. A plausible explanation would be to doubt whether the CRC or the ECtHR even have them. Given that – it seems – both bodies face negative reactions regardless of what they decide, I would like to suggest that they have nothing to lose by reflecting on and making explicit what normative approach to jurisdiction they are taking. It would at the very least allow us to debate the actual merits of their decisions, rather than forcing us to speculate what any hints may mean.

Where does this leave us? I hope to have highlighted some of the problems of the CRC's and the ECtHR's recent findings, and in particular of the reasoning (rather than the outcomes). And I hope the conclusion is twofold. First, broader readings of jurisdiction in international human rights law are not necessarily more attractive than narrower ones. The difficulties in salvaging the CRC's reasoning have shown this. Sec-

[97] Raible, *Human Rights Unbound* (n 21) 93-100. See for a critical view of nationality: Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 24) 80-83.

[98] See generally Raible, *Human Rights Unbound* (n 21) ch 2, 4, and 5. To my mind this is not so different from what has been called the 'control of rights'-view. See on this: Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn' EJIL:Talk! (21 June 2020) <www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/>; Duffy, 'Communications No. 79/2019 and 109/2019 L.H. et al v. France and 77/2019 F.B. et al v. France, Case Note 2021/3' (n 12).

ond, the frustration unconvincing arguments cause suggests that judgments on extraterritoriality should be evaluated at least in part based on the quality, and potential legacies of their reasoning. Outcomes are undoubtedly important to applicants who have been subjected to immense suffering. But there is more at stake in adjudication. Bad arguments are at best a source of frustration for participants in the legal practice and, at worst, disrespectful to the applicants in the case in question and as well as future cases.