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HOW CAN THE HUMAN RIGHTS LEGAL FRAMEWORK ADDRESS THE VIOLATION OF HUMAN RIGHTS EXTRATERRITORIALLY?

ЯКИМ ЧИНОМ МІЖНАРОДНЕ ПРАВО ПРАВ ЛЮДИНИ ВИРІШУЄ ПИТАННЯ ЕКСТРАТЕРИТОРІАЛЬНОГО ПОРУШЕННЯ ПРАВ ЛЮДИНИ?

КАКИМ ОБРАЗОМ МЕЖДУНАРОДНОЕ ПРАВО В ОБЛАСТИ ПРАВ ЧЕЛОВЕКА РЕШАЕТ ВОПРОС ЭКСТРАТЕРРИТОРИАЛЬНОГО НАРУШЕНИЯ ПРАВ ЧЕЛОВЕКА?

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Abstract. *The armed conflict in Ukraine has been ongoing since 2014. As to date, the total number of recorded deaths has exceeded ten thousands civilians and combatants. Every day, i.e. during the present research, this number has been increasing. As outlined above, the European regional system of human rights protection, epitomised by the ECtHR, addresses this challenge within two interrelated tracks: individual and inter-State applications. The research focuses on landmark decisions of international, regional, and domestic courts in terms of human rights extraterritorially by way of establishing human rights duty-bearer jurisdiction outside states' boundaries based on effective control test. It scrutinizes the jurisprudence of the ECtHR in terms of inconsistency between Bankovic and Aj-Jedda cases. In turn, the paper aims to model extraterritorial application of human rights law in Ukraine v. Russia inter-State applications (re Crimea and re Eastern Ukraine) based on Loizidou precedent as well as describes new forms of Russia's violations of human rights in Crimea.*

Key words: *extraterritorial jurisdiction, inter-State applications, human rights violations in Crimea, effective control test, armed conflict*

Анотація. *Збройний конфлікт в Україні триває з 2014 року. На сьогодні загальна кількість зафіксованих смертей перевищила десять тисяч цивільних осіб та учасників бойових дій. Щодня, тобто під час цього дослідження, ця кількість збільшується. Європейська регіональна система захисту прав людини, зокрема ЄСПЛ, вирішує цю проблему двома взаємопов'язаними напрямками: індивідуальними та міждержавними заявами. Дослідження фокусується на ключових рішеннях міжнародних, регіональних та національних судів в контексті екстратериторіального застосування прав людини у спосіб визначення суб'єкта відповідальності за порушення прав людини поза межами кордонів держави на основі ефективного контролю. Дослідження критично оцінює невідповідність позицій ЄСПЛ у рішеннях Bankovic та Aj-Jedda. Водночас, дослідження моделює застосування екстратериторіальної юрисдикції у міждержавних заявах України проти Росії (щодо Криму та щодо Східної України) на основі прецеденту Loizidou, а також окреслює нові форми порушення прав людини у Криму.*

Ключові слова: *екстратериторіальна юрисдикція, міждержавні заяви, порушення прав людини у Криму, ефективний контроль, збройний конфлікт*

Аннотация. *Вооруженный конфликт в Украине продолжается с 2014 года. На сегодняшний день общее количество зарегистрированных смертей превысило десять тысяч гражданских лиц и военных. С каждым днем, т.е. в ходе настоящего исследования, это число увеличивалось. Как указано выше, Европейская региональная система защиты прав человека, в частности ЕСПЧ, решает эту проблему в двух взаимосвязанных направлениях: индивидуальные и межгосударственные заявки. Исследование фокусируется на ключевых решениях международных, региональных и национальных судов в контексте экстратерриториального применение прав человека посредством определения субъекта ответственности за нарушение прав человека за пределами границ государства на основе эффективного контроля. Исследование критически оценивает несоответствие позиций ЕСПЧ в решениях Bankovic и Aj-Jedda. В то же время, исследования моделирует применение экстратерриториальной юрисдикции в межгосударственных заявлениях Украина против России (по Крыму и Восточной Украине) на основе прецедента Loizidou, а также определяет новые формы нарушений прав человека в Крыму.*

Ключевые слова: *экстратерриториальная юрисдикция, межгосударственные заявления, нарушения прав человека в Крыму, эффективный контроль, вооруженный конфликт*

The current problem. As a presumption, human rights apply to a subject situated within the territorial boundaries of the state. However, in some circumstances, the state remains its status of human rights duty-bearer outside its boundaries and, thus, human rights should apply. As outlined by Besson, extraterritorial application of human rights raises, at least, *seven* theoretical issues, namely as to the: (1) human rights imperialism; (2) human rights coherence; (3) human rights pluralism; (4) international legal pluralism; (5) human rights to self-determination; (6) *erga omnes* effect of extraterritorial case law; (7) margin of appreciation [*Besson*, 2021:880]. For the reason of scope, this paper focuses only on the three of them: (2), (3), and (6).

The aim of the research. The present paper attempts to analyse these circumstances and critically rethink both theoretical and practical issues arising from extraterritorial application of human rights framework with a focus on the later.

The analysis of latest publications. In case certain human rights duties would apply at home only, while others abroad, albeit pertaining to the same human rights, one may argue double standards take place [*Besson*, 2021:881]. Besson suggests, as a solution to this problem, to reason domestic judgments about extraterritorial cases the way domestic judges would about territorial cases. In turn, she later objects to this solution by way of stating it would imply leveling down of domestic human rights protection [*Besson*, 2021:881]. Eventually, Besson leaves the issue at hand unresolved.

With reference to the European Commission of Human Rights, Schabas states that the inter-State compliant mechanism established by the Convention is a 'vehicle' for the 'collective enforcement' of rights contemplated by the Convention [2]. As stated by the Council of Europe Steering Committee on Human Rights through its inter-State case-law the Court has played a prominent role in guaranteeing a peaceful public order in Europe. In turn, exploring the purpose of Inter-State applications, Risini stated that travaux préparatoires had never been scrutinised from the angle of the mechanism in question. She, therefore, challenged Schabas's thesis by posing a question: 'whether the Inter-State application is a mechanism of collective enforcement of human rights or one of international dispute settlement?' To this end, Risini observes that many Inter-State proceedings were driven by interests other than the safeguarding of human rights but a combination of collective enforcement and dispute resolution [*Risini*, 2018:60].

The key findings. To address this issue, the research argues that coherence is not at risk when human rights apply extraterritorially. This is because the state's acts or/and omissions taking place outside its territory shall be considered as specific circumstances of the case. In turn, such circumstances shall not automatically trigger decreasing in human rights protection level. At the same time, international/regional judges (and not only domestic judges as mentioned by Besson) shall still enjoy a certain level of flexibility to render fair and enforceable decisions in specific circumstances of each extraterritorial case.

Another portion of the critique of extraterritorial application roots in the possibility of conflicts between an interpretation of human rights duties by international and domestic courts [*Besson*, 2021:880]. In turn, two solutions are offered to address this issue: one is to apply most beneficial for human rights interpretation, while the other one is to privilege most democratic determination [*Besson*, 2021:881].

However, this paper argues that neither of the suggested solutions is justified. First, interpretation of international/regional courts shall prevail on domestic interpretation in accordance with international/regional human rights law. Second, such characteristics as "*beneficial for human rights*" and "*privilege to democratic determination*" will vary depending on evaluating authority. Accordingly, contrary to the Besson's considerations, this paper states international/regional courts' interpretation shall prevail.

As a matter of principle, the present research disagrees with the statement that *erga omnes* effect of extraterritorial case law on extraterritoriality shall be deemed as a problem [*Besson*, 2021:882]. On the contrary, problems arise when the case law of international/regional/domestic courts, i.e. on extraterritorial human rights application, is not consistent and coherent. This logically brings the reader to the next section that analyses jurisprudence on extraterritorial application on international, regional, and domestic levels.

The case Loizidou v. Turkey (1995*)* concerned Turkey's occupation of parts of Northern Cyprus. Ms Loizidou, who had been forced out of her home during the invasion, alleged a violation of her right to property under Article 1 Protocol 1 of the European Convention of Human Rights [4].

Eventually, the Court found that Turkey violated human rights outside its territory based on the following "*effective control test*" for extraterritorial application of human rights:

"*Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises* ***effective control*** *of an area outside its national territory…*"

The precedent of *Loizdou case* subsequently influenced intestate application *Cyprus v. Turkey* [5] and become decisive for the ECtHR jurisprudence that is described below.

In six years, the Court decided a case regarding NATO bombing during the Kosovo conflict. The complaint was filed against seventeen states NATO Member States which were also the ECHR Contracting States.

In a nutshell, in *Bankovic* the Court mentioned "*effective control test*", stated that extraterritorial jurisdiction applies only in exceptional circumstances and, finally, observed that the Convention was a multi-lateral treaty operating in the *legal space* of the Contracting States within

which Federal Republic of Yugoslavia clearly *did not fall*. Thus, the Court declared the application inadmissible [6]. If to compare with Loizidou, one may refer to *Bankovic* as to the illustration of the ECtHR jurisprudence's inconsistency (see Section II (C) of the research) or incoherency (see Section II (A) of the research). However, the difference in circumstances in *Loizidou* and *Bankovic* cases (as stated by the Court) was decisive: Cyprus ratified the ECHR (enter into force in 1953) and Federal Republic of Yugoslavia did not. Nevertheless, in ten years the Court had changed its approach while considering the results of military action of the United Kingdom and the United States in Iraq that is outlined below.

The case *Al-Jedda v. the United Kingdom (2011)* concerned the internment of an Iraqi civilian for more than three years (2004-2007) in a detention centre in Iraq, run by British forces [7]. The Court referred to the fact that the United Kingdom, having displaced the previous regime, assumed control over the provision of security in Iraq. Accordingly, based on "*effective control test*", the Court confirmed the United Kingdom's effective control over the territory of Iraq notwithstanding the fact that Iraq (in the same degree as Federal Republic of Yugoslavia in *Bankovic*) was not "*territory ... that would normally be covered by the Convention*". Thus, although the Court in *Al-Jedda* had changed the approach adopted in *Bankovic*, this shall be deemed as beneficial development for extraterritorial human rights protection as it implies its wider application.

In 2014, Russia annexed Crimea while pro-Russian self-proclaimed republics established control over the part of Eastern Ukraine. It has triggered more than *4,000 individual applications* before the Court as well as a several interstate applications (re Crimea and re Eastern Ukraine) [8]. All the cases are pending now.

In both cases, Ukraine alleges numerous violations of human rights in Crimea and Eastern Ukraine. By doing so, Ukraine refers to the *"effective control test"* to prove that Russia is human rights duty-bearer in both cases [9]. On the contrary, Russia denies its effective control over Crimea (until the annexation) and over Easter Ukraine through all the alleged period. As far as the prediction of the outcomes in mentioned cases is concerned, this paper assumes that the ECtHR will establish Russia's extraterritorial jurisdiction in both cases based on *Loizidou* precedent. At the same time, while the ECtHR has been deciding the case (during the years), violations of human rights in Crimea are taking new form. In March 2020, Russia adopted the law which *prohibits land ownership in the Crimea for non-Russian citizens* [10]. This recent example indeed suggests a rhetorical question: *how this particular (and many more others) violations can be addressed if not by extraterritorial application of human rights framework?*

As far as jurisprudence of the ICJ is concerned, the illustrative case with the same human rights duty-bearer outside its territory (Russia) is given below.

In *Georgia v. Russian Federation* case, Georgia instituted proceedings relating to Russia's actions on and around the territory of Georgia (Abkhazia and South Ossetia) in breach of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) [*Hathaway,* 2015: 416]. The Court has applied "effective control" test based on Articles 2 and 5 of the CERD. Although, the Court eventually concluded that neither requirement contained in Article 22 of the CERD had been satisfied, thus, the Court did not have a jurisdiction over the case, one may still consider this case as a landmark precedent for extraterritorial application of the CERD.

In *Al-Jedda case* (mentioned above in the Section II (A)), the House of Lords confirmed extraterritorial application of the ECHR as the UK exercised effective over foreigners abroad [11]. As mentioned above, this conclusion was eventually confirmed by the ECtHR. In turn, in *Al-Skeini v the United Kingdom* case, the House of Lords had to assess killing of six persons by British troops in Basra. Eventually, it applied the UK extraterritorial jurisdiction only to the death that had happened in a British detention facility [12].

Conclusions. As the present paper has analysed more than ten landmark decisions of international, regional, and domestic courts, it concludes that human rights framework addresses violations of human rights extraterritorially by way of establishing human rights duty-bearer jurisdiction outside its boundaries based on *"effective control test"*.

As the paper mostly focused on the jurisprudence of the ECtHR (as on the most solid one as to date), it defined inconsistency between *Bankovic* and *Aj-Jedda* cases, namely both Federal Republic of Yugoslavia (*Bankovic*) and Iraq (*Aj-Jedda*) did not fall within the *'legal order'* of the Convention, nevertheless, the extraterritorial jurisdiction was defined only in the *Aj-Jedda* case.

In turn, the research also refers to recent cases of extraterritorial application in Ukraine v. Russia interstate application (re Crimea and re Eastern Ukraine). By way of doing so, the paper predicts establishing extraterritorial jurisdiction in both cases based on *Loizidou* precedent. This resolution, however, takes time during which Russia's violations of human rights are taking new forms (as in the case with the land ban for non-nationals in Crimea adopted in March 2020).

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