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Exporting Privacy

A Study on the Extraterritorial Application of the European Convention on Human Rights to Foreign Mass Surveillance

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

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Semester of graduation: Period 1 Spring semester 2020

Contents

Summary

The foreign mass surveillance of communications conducted by states is no longer a secret, but rather openly discussed and often regulated in law. The European Court of Human Rights (ECtHR) has established that mass surveillance without adequate safeguards can violate individuals' right to privacy under Article 8 of the European Convention on Human Rights (ECHR). According to Article 1 ECHR, individuals located within the territory of an intercepting state who is a contracting party to the ECHR can enjoy the ECHR's protection against mass surveillance. However, individuals located outside the territory of an intercepting state must rely on the extraterritorial application of the ECHR. The ECtHR has previously dealt with cases concerning foreign mass surveillance, in which the ECtHR assumed that the ECHR applied. By examining how the ECHR can be applied to transnational and extraterritorial surveillance, this dissertation provides clarity regarding the legal basis for the applicability of the ECHR to foreign mass surveillance.

There is no agreed interpretation of the ECHR's extraterritorial applicability. Therefore, the study uses a doctrinal research method, as well as treaty interpretation to establish the meaning of the threshold criterion 'jurisdiction' under Article 1 ECHR. The ECtHR has established that jurisdiction is primarily territorial and that the ECHR can be applied extraterritorially in two exceptional situations: Either when a state exercises effective control over an area (the spatial model) or when a state exercises effective control over an individual (the personal model). Contrary to the ECtHR, this thesis concludes that jurisdiction is not primarily territorial, but rather a relationship of factual power. This interpretation of jurisdiction would allow for a more extensive application of the ECHR than the ECtHR's models initially enables.

By examining the applicability of the two existing and three alternative models of extraterritorial application, this thesis concludes that the studied models are inadequate. The study therefore offers a fourth alternative model, an adjusted personal model here called the normative model. The normative model is based on the definition of jurisdiction as the exercise of factual authority and control. A state has authority and control when it can prescribe and enforce its rules. This study suggests that jurisdiction contains a normative element, meaning the state must impose its will, appeal for compliance or apply its rules. This study argues that the normative model would apply to foreign mass surveillance and remedy some of the shortcomings in the ECtHR's interpretation of the ECHR's extraterritorial applicability.

Sammanfattning

Staters användning av utländsk massövervakning är idag öppet diskuterat och ofta reglerat i lag. Europeiska domstolen för de mänskliga rättigheterna (Europadomstolen) har fastställt att massövervakning utan tillräckliga säkerhetsgarantier kan innebära en kränkning av individers rätt till privatliv enligt artikel 8 Europeiska konventionen om skydd för de mänskliga rättigheterna (EKMR). Enligt artikel 1 EKMR skyddas individer av EKMR mot massövervakning utförd av den fördragsslutande part vars territorium individen befinner sig på. Personer som befinner sig utanför den övervakande statens territorium måste istället förlita sig på konventionens extraterritoriella tillämpning. I mål om utländsk massövervakning som Europadomstolen tidigare avgjort, har Europadomstolen antagit att EKMR är tillämplig. Genom att besvara hur EKMR kan tillämpas i fall av transnationell och extraterritoriell övervakning, tydliggör uppsatsen den juridiska grunden för EKMR:s extraterritoriella tillämplighet i mål om utländsk massövervakning

Det finns ingen bestämd tolkning av hur EKMR tillämpas extraterritoriellt på utländsk massövervakning. Genom en rättsdogmatisk metod och principer för traktatstolkning fastställer uppsatsen innebörden av tröskelkriteriet ”jurisdiktion” i Artikel 1 EKMR. Europadomstolen har fastställt att jurisdiktion enligt Artikel 1 EKMR primärt är territoriellt. Europadomstolen har vidare fastställt att EKMR kan tillämpas i två undantagssituationer: När en stat utövar effektiv kontroll över ett område (territorium-modellen) eller effektiv kontroll över en individ (individ-modellen). Uppsatsen argumenterar däremot att jurisdiktion under artikel 1 EKMR inte är territoriellt. Jurisdiktion är istället en relation av faktiskt utövad makt. EKMR kan därmed tillämpas mer extensivt än tidigare erkänt av Europadomstolen.

Genom att undersöka både befintliga och föreslagna modellers tillämplighet fastställer uppsatsen att samtliga modeller innehåller brister. Uppsatsen föreslår därför en ny modell. Modellen är en utvecklad variant av individ-modellen, här kallad den normativa modellen. Modellen grundar sig i definitionen av jurisdiktion som faktiskt utövad auktoritet och kontroll. Auktoritet och kontroll utövas i sin tur när staten kan föreskriva och tillämpa sina regler. Uppsatsen hävdar att jurisdiktion innehåller ett normativt kriterium, vilket innebär att en stat måste syfta till att införa sin vilja, uppmana till efterlevnad eller tillämpa sina regler. Den normativa modellen kan tillämpas på utländsk massövervakning samt åtgärda vissa av de brister som återfinns i Europadomstolens tolkning av EKMR:s extraterritoriella tillämpning.

Preface

Efter alldeles lagom många terminer var det äntligen min tur. För det finns det många att tacka.

Tack Karol för att du från start varit övertygad om att detta skulle bli ett kanonarbete, för kloka insikter under terminens gång och för framtida karriärråd. Jag hoppas att vi blir kollegor så småningom!

Tack Julia, Kajsa och Victoria för era nitiska – och guld värda – genomläsningar. Jag lovar att ni aldrig ska behöva läsa något jag skrivit igen.

Tack Outdoorklubben för att ni förgyllt den här våren. Lycka är att vi kan fortsätta med våra vandringar, sim- och cykelturer i Stockholm i höst.

Tack Kioskvältarna för att jag fick gå igenom de här åren, med allt vad det innebar, med er.

Men det största tacket går till dig, Kajsa. Tack för att du tvingade mig att flytta till Lund för sex år sedan, för att du övertalade mig att välja juristprogrammet och för ditt villkorslösa hejande längs med vägen. Utan dig hade det aldrig blivit jurist av mig. Utan dig hade juristprogrammet, och livet för den delen, dessutom varit hälften så kul och dubbelt så svårt.

Lund, maj 2020

Erica Wide

Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber
HRC	Human Rights Council
HR Committee	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IPT	United Kingdom Investigatory Powers Tribunal
SIGINT	Signals Intelligence
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
Venice Commission	European Commission for Democracy Through Law
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

Imagine that you are in Sweden, and just as most people you communicate with your family, friends and colleges by using your phone. You make phone calls, send text messages and browse social media. Since Sweden is a contracting party to the European Convention on Human Rights (ECHR), you have a right not to have these calls and messages intercepted. Article 8 ECHR states that everyone has the right to respect for his or her private and family life, home and correspondence. The European Court of Human Rights (ECtHR) has on several occasions concluded that mass surveillance is allowed, but that surveillance systems without adequate safeguards can be an intrusion of individuals' rights under Article 8 ECHR.[1] Thus, if the Swedish government read your emails or listened to your phone calls, Sweden could be held responsible for a violation of Article 8 ECHR, and you could be entitled to effective remedies.

Now, suppose that you would leave Sweden, or that you never were in Sweden to begin with. While being outside of Sweden, Sweden intercepts your communications. When you send a message using an electronic device, that message is forwarded in the form of electronic signals through cables that can be located anywhere in the world. A sender cannot choose the route the communication will take to its recipient. Instead, the route is determined by financial incentives, which does not always result in the shortest route. For example, Sweden could intercept your communications on Swedish territory because the message is routed through Sweden. Another possibility could be that Sweden intercepted your communications on, for example, the United Kingdom's territory, where Sweden had tapped a cable.[2] Would you in these scenarios have a right not to have your communications interfered with by Sweden under Article 8 ECHR?

[1] *Weber and Saravia v Germany* No 54934/00 (ECtHR, 29 July 2006) paras 77–78; *Liberty and Others v the United Kingdom* No 58243/00 (ECtHR, 1 July 2008) para 56; *Roman Zakharov v Russia* [GC] No 47143/06 ECHR 2015, para 232; *Centrum för rättvisa v Sweden* No 35252/08 (ECtHR, 19 June 2019) para 113; *Big Brother Watch and Others v the United Kingdom* No 58170/13, 62322/14, 24960/15 (ECtHR, 13 September 2019) para 308.

[2] Electronic Frontier Foundation, 'Rampart-A, Project Overview' (EFF, 23 June 2014) <https://www.eff.org/files/2014/06/23/rampart-a_overview.pdf> accessed 25 May 2020; Scarlet Kim, 'How Bulk Interception Works' (Medium, 30 September 2016) <https://medium.com/privacy-international/how-bulk-interception-works-d645440ff6bd> accessed 25 May 2020.

Article 1 ECHR obliges contracting parties to the ECHR to secure the rights of the Convention to everyone within their jurisdiction. The ECtHR has interpreted jurisdiction as primarily territorial. Accordingly, an individual has to be located within an intercepting state's territory to have rights under the ECHR against that state.[3] As a consequence, a contracting party could, theoretically, conduct surveillance on individuals who are located outside its territory, which the state would not be allowed to conduct on individuals located within its territory. Thus, states can circumvent the regulatory framework which protects individuals' right to privacy by gathering intelligence when they are located abroad, by asking a foreign intelligence agency to do so or by sharing intelligence with each other. In the revelations made by Edward Snowden in 2013, it was revealed that states engage in such conduct.[4]

At its core, the issue of foreign surveillance and the right to privacy is a question of whether governments are allowed to conduct surveillance on foreign territory, which they are not allowed to conduct on their own. Although the ECtHR previously has dealt with cases where an applicant located outside the territory claimed that a contracting party's surveillance activities violated his or her rights under the ECHR, the court has not yet examined the question of extraterritorial application of the ECHR in cases of foreign mass surveillance. In *Big Brother Watch v the United Kingdom*, three applicants where located in the United States while their communications were intercepted in the United Kingdom.[5] Similarly, in the case *Liberty and Others v the United Kingdom*, the applicants where located in Ireland, while the interception occurred in the United Kingdom.[6]

To this date, it remains unresolved how the ECHR can be applied to foreign mass surveillance, since the question of jurisdiction has simply been assumed in previous cases.[7] This study sets out to help solve this issue by analysing the legal basis for the extraterritorial applicability of the ECHR in cases of foreign mass surveillance.

[3] *Banković and Others v Belgium and Others* [GC] No 52207/99 ECHR 2001-XII, para 59.
[4] Asaf Lubin, '"We Only Spy on Foreigners": The Myth of a Universal Right to Privacy and the Practice of Foreign Mass Surveillance' (2014) 18 Chicago Journal of International Law 502, 537; David Lyon, *Surveillance After Snowden* (Polity Press 2018) 45, 57.
[5] *Big Brother Watch v the United Kingdom* (n 1) appendix.
[6] *Liberty v the United Kingdom* (n 1).
[7] Marko Milanovic, 'ECtHR Judgement in Big Brother Watch v UK' (Blog of the European Journal of International Law: Talk, 17 September 2018) <https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/> accessed 25 May 2020.

1.2 Purpose and Research Question

The territorial interpretation of jurisdiction under the ECHR and foreign mass surveillance poses the question whether individuals located outside the territory of an intercepting state has a right to privacy under Article 8 ECHR. In the cases of foreign mass surveillance that the ECtHR previously has dealt with, the ECtHR simply assumed that the applicants were within the intercepting states' jurisdiction, despite that the court could have tried the issue *motu proprio*. Furthermore, it has been extensively argued in academia[8] and concluded by the UN General Assembly (UNGA), the UN Human Rights Council (UN HRC) and the UN Human Rights Committee (UN HR Committee) that states' human rights obligations apply equally to foreign and domestic surveillance.[9] Therefore, this thesis is built on the presumption that the ECHR *should* apply to foreign mass surveillance. However, neither the ECtHR nor any other international court have examined the question of the extraterritorial applicability of human rights treaties on cases of foreign mass surveillance. Consequently, there are still uncertainties with regards to *how* the ECHR can be applied. Therefore, the purpose of this thesis is to bring clarity regarding the legal basis for the applicability of the ECHR to foreign mass surveillance. In light of this, the aim of this thesis is to answer the following research question:

How can the ECHR be applied when a party to the ECHR intercepts an individual's communications, when the individual is located outside the territory of the intercepting state?

The aim of this thesis is concerned with the extraterritorial reach of the ECHR. The threshold criteria for the applicability of the ECHR is whether a violation occurs within a state's jurisdiction, as stated in Article 1 ECHR. A definition of the notion of jurisdiction is therefore pertinent. The ECtHR has established two situations, so called models of application, in which extraterritorial jurisdiction can be established; When a state exercises effective control over a territory (the spatial model) and when a state exercises effective

[8] See for example, Peter Margulies, 'The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism' (2014) 82 Fordham Law Review 2137; Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 Harvard International Law Journal 82.

[9] UNGA Res 68/167 'The Right to Privacy in the Digital Age' (21 January 2014) UN Doc A/RES/68/167; UN HR Committee, 'Concluding Observations on the Fourth Periodic Report of the United States' UN Doc CCPR/C/USA/CO/4 (23 April 2014) para 22(a); UN HRC, twenty-seventh session, 'The Right to Privacy in the Digital Age, Report of the Office of the United Nations High Commissioner for Human Rights' (30 June 2014) UN Doc A/HRC/27/37, paras 33–35.

control over a person (the personal model).[10] Furthermore, three alternative models of extraterritorial application – the virtual model, the 'third model' and the functional model – have been suggested in academia. Followingly, it becomes interesting to analyse which model is the most appropriate for the purpose of applying the ECHR to foreign mass surveillance.

The research question will be examined in relation to two scenarios of foreign surveillance; Transnational surveillance and extraterritorial surveillance. Transnational surveillance refers to the situation when the victim is located outside the territory of the intercepting state, but the interference occurs within the territory of the intercepting state. Extraterritorial surveillance refers to the situation when the victim is located outside the territory of the intercepting state, and the interference occurs outside the territory of the intercepting state. Accordingly, a scenario of transnational surveillance could be as follows. Person A is, permanently or temporarily, located in state X, who may or may not be a Contracting party to the ECHR. A can, but must not necessarily, be a citizen of a contracting party to the ECHR. While in state X, person A sends a text message to person B, who can be located anywhere in the world. A's text message is intercepted by State Y, who is a contracting party to the ECHR, on the territory of state Y. In a scenario of extraterritorial surveillance, A's message to B is instead intercepted by Y on the territory of state X, who may or may not be a contracting party to the ECHR, either with or without X's consent.[11]

1.3 Limitations

The applicability of other human rights treaties protecting the right to privacy in cases of foreign surveillance is worthy of discussion, not the least the International Covenant on Civil and Political Rights (ICCPR). Nevertheless, this thesis only examines the applicability of the ECHR. The ECHR provides an interesting treaty to study since the ECtHR has delivered more judgements on extraterritorial application and government surveillance than any other international court.[12] However, the ICCPR will be touched upon due to its similarities with the ECHR, and as the interpretation of the ECHR requires an outlook to international law.[13]

[10] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2013) 118.
[11] Craig Forcese, 'Spies Without Borders: International Law and Intelligence Collection' (2011) 5 Journal of National Security & Law Policy 179, 184.
[12] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 111.
[13] *Banković v Belgium* (n 3) para 53.

This study is not concerned with cases where a state is conducting mass surveillance on territories for which international relation the state is responsible for. States may, according to Article 56 ECHR, extend the applicability of the ECHR to territories for whose international relation it is responsible for. This study is not concerned with cases where such an extension has been made. The ECtHR has previously explained that the extraterritorial application of the ECHR following Article 1 and Article 56 ECHR are two separate issues, with the former one not replacing the latter one.[14] The study will focus on the principles for extraterritorial application under Article 1 ECHR, leaving Article 56 ECHR un-dealt with.

This thesis examines how the ECHR can be applied to foreign surveillance, not the legality or appropriateness of any particular surveillance legislation or procedure. Consequently, no substantial examination of any surveillance legislation or procedure and its accordance with the right to privacy as stated in Article 8 ECHR will be conducted. This dissertation is instead based on the fact the interception of communications in certain circumstances *can* constitute a violation of Article 8 ECHR.[15] Hence, this thesis strictly examines the legal possibilities of applying the ECHR extraterritorially to foreign mass surveillance.

Surveillance is the conduct of monitoring peoples' behaviors, activities or communications. Surveillance can be conducted in many different ways. It ranges from the physical search of a person or a person's property, residency and electronic devices, to the virtual interception of a person's electronic communications, to name a few. For the purpose of streamlining this thesis, and in an attempt to capture the core issue of the extraterritorial applicability of the ECHR, the study has been limited to signals intelligence (SIGINT). SIGINT is the conduct of intelligence gathering by the interception of signals from the cable carrying the information.[16] The choice of SIGINT was based on two considerations. Firstly, SIGINT is conducted without a criminal object and thus concerns the mass collection of communications. The technological advancement has resulted in most communication being carried by cable, such as phone calls, text messages, internet traffic and emails. SIGINT therefore affects a large amount of people. Secondly, SIGINT is performed entirely

[14] *Chagos Islanders v the United Kingdom* No 35622/04 (ECtHR, 11 December 2012) paras 67–75.
[15] *Weber and Saravia v Germany* (n 1) paras 77–78; *Liberty v the United Kingdom* (n 1) para 56; *Roman Zakharov v Russia* (n 1) para 232; *Centrum för rättvisa v Sweden* (n 1) para 113; *Big Brother Watch v the United Kingdom* (n 1) para 308.
[16] UN HRC, twenty-third session, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (17 April 2013) A/HRC/23/40, 2.

virtual and therefore allows for a disconnect between the victim, the intercepting state and the violation. Consequently, SIGINT can be conducted from a distance, causing jurisdictional issues.

1.4 Method and Material

This thesis sets out to study how the ECHR can be applied to foreign mass surveillance. Consequently, individuals' protection under the Convention is dependent on the territorial reach of the ECHR. The threshold criteria for the applicability of the ECHR is whether the violation occurred within the intercepting state's jurisdiction, following Article 1 ECHR.[17] This dissertation uses a doctrinal research method to establish the extraterritorial reach of ECHR, and foremost to establish the notion of jurisdiction. The doctrinal research method consists of a critical examination of sources of law such as legislation, preparatory work, case law and doctrine in order to establish an arguably complete conclusion on established law.[18]

As the ECHR is an international treaty, it is governed by international principles. In the attempt to define jurisdiction, the traditional primary sources of international law – international conventions, international customary law and general principles – are used, Article 38(1) of the Statue of the International Court of Justice (ICJ).[19] However, the extraterritorial application of human rights treaties to foreign mass surveillance is rather un-dealt in the primary sources of law. Therefore, the ECtHR's case law and legal doctrine is the main material. The existing case law from the ECtHR on extraterritorial application is rather extensive. To this date, the ECtHR has not dealt with the extraterritorial application of the ECHR in cases of foreign mass surveillance. Consequently, the general case law on extraterritorial application of the ECHR is the main source to establish the underlying principles of the ECHR's extraterritorial application. Apart from the ECHR, the ICCPR is of foremost interest for this thesis. For the interpretation of the ICCPR, judgments from the ICJ and the HR Committee, and statements by the HRC is used.

The doctrinal research method is complemented with the rules of treaty interpretation. As the court found in *Golder v the United Kingdom*, Article 31–33 of the Vienna Convention on the Law of Treaties (VCLT) are considered guidelines in the interpretation of the ECHR because they express generally

[17] *Ilaşcu and Others v Moldova and Russia* [GC] No 48787/99 ECHR 2004-VII, para 311.
[18] Terry Hutchinson, 'Doctrinal research – Researching the jury', in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge 2013) 9–10.
[19] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press) 24.

accepted principles of international law.[20] According to Article 31(1) VCLT, the interpreter should seek to ascertain the ordinary meaning in the context and in the light of the object and purpose of the treaty. The paragraph's conventional meaning should be considered before the object and the purpose of the Convention.[21] As stated in article 31(3b–c) VCLT, the interpreter should consider subsequent practice between the parties. Moreover, any relevant rules of international law applicable in the relations between the parties may be considered. Preparatory works can also be considered if the interpretation under Article 31 VCLT leads to a result that is 'ambiguous or unreasonable' or 'manifestly absurd or unreasonable', Article 32 VCLT.

In *Tyrer v the United Kingdom*, the ECtHR clarified that 'the [ECHR] is a living instrument, which must be interpreted in the light of present-day conditions'.[22] In *Soering v the United Kingdom,* the court further held that 'the object and the purpose of the [ECHR] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective'.[23] When interpreting the ECHR, the interpreter therefore needs to be mindful of the Conventions special character.[24] However, this does not require for a special method of interpretation. Rather, the interpretation in the light of the ECHR's object and purpose gives the VCTL rules flexibility.[25]

Building on the findings of the extraterritorial applicability of the ECHR, chapter three and four applies different models of extraterritorial application to the scenarios of foreign mass surveillance. Both the acknowledged models in the ECtHR's case law and suggested models in academia are applied and evaluated. To my knowledge, there are no other models suggested than those analysed in this thesis. A critical argumentative method is used to impartially evaluate the models' strength and weaknesses.[26]

Further, an evaluative legal scholarship is applied using an external standard.[27] Although a universal application would ensure that the ECHR applies

[20] *Golder v the United Kingdom* No 4451/70 (1975) Series A no 18, para 29.
[21] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 203–204.
[22] *Tyrer v the United Kingdom* (1978) No 5856/72 Series A no 26, para 31.
[23] *Soering v the United Kingdom* (1989) No 14038/88 Series A no 161, para 87.
[24] Bernadette Rainey and others, *Jacobs, White & Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 77.
[25] Michal Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 39–40.
[26] Douglas N Walton, *Informal Logic: A Handbook for Critical Argumentation* (Cambridge University Press 1989) 1.
[27] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 9.

to all foreign mass surveillance, such an interpretation of jurisdiction would make the threshold criterion obsolete. In this regard, two statements made by the court must be kept in mind. Firstly, as the court stated in *Issa and Others v Turkey*, jurisdiction cannot 'be interpreted as to allow a State Party to perpetrate violations of the [ECHR] on the territory of another State, which it could not perpetrate on its own territory'.[28] Secondly, as the court stated in *Banković and Others v Belgium and Others*, jurisdiction cannot be interpreted as 'anyone adversely affected by an act imputable to a state, wherever in the world that act may have been committed or its consequences felt, is […] brought within the jurisdiction of that State for the purpose of Article 1 of the [ECHR]'.[29]

1.5 Current Research Situation

The extraterritorial application of the ECHR has been duly examined in academia, notable in Marko Milanovic's *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*[30] and Michal Gondek's *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties.*[31] Through an examination of the notion of jurisdiction and the ECtHR case law, the authors have noted that the ECtHR's definition of jurisdiction is incorrect and that the ECtHR's extraterritorial application of the ECHR is inconsistent. They argue that the ECtHR's interpretation of jurisdiction has resulted in a more restrictive application of the ECHR than the threshold criterion facilitates, and that the inconsistencies in the ECtHR's case law makes it difficult to predict the ECHR's extraterritorial applicability.

The literature on the extraterritorial application of human rights treaties to foreign surveillance is scarce, although the issue is not un-dealt with. A few scholars such as Marko Milanovic[32], Holly Huxtable[33], Peter Margulies[34] Francesca Bignami and Giorgio Resta[35] and Eliza Watt[36] have, with varied

[28] *Issa and Others v Turkey* No 31821/96 (ECtHR, 16 November 2004) para 71.
[29] *Banković v Belgium* (n 3) para 75.
[30] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10).
[31] Gondek, *The Reach of Human Rights in a Globalizing World* (n 25).
[32] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8).
[33] Holly Huxtable, 'ET Phoned Home… They Know: The Extraterritorial Application of Human Rights Treaties in the Context of Foreign Surveillance' (2017) 28 Security and Human Rights 92.
[34] Margulies (n 8).
[35] Francesca Bignami and Giorgio Resta, 'Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance' in Eyal Benvenisti and George Nolte (eds) *Community Interests Across International Law* (Oxford University Press 2018).
[36] Eliza Watt, 'The Role of International Human Rights Law in the Protection of Online Privacy in the Age of Surveillance' (2017) 9th International Conference on Cyber Conflict, NATO Publications.

approaches, examined the applicability of human rights treaties on foreign surveillance. When attempting to apply the ECHR to foreign mass surveillance, all but Milanovic have used the principles established in the ECtHR's case law. They have all, Milanovic included, concluded that the ECHR's models of application are unsuitable for capturing foreign mass surveillance. For the purpose of capturing such violations, they have suggested alternative models of extraterritorial application, such as the virtual model, the 'third model' and the functional model. Therefore, this thesis sets out to (re)define the notion of jurisdiction, allowing for an analysis not limited by the principles in the ECHR case law. Furthermore, to date, there is no comprehensive evaluation and comparison of the existing models in the ECtHR case law and the suggested methods in academia. This thesis sets out to bridge the gap in the existing literature by providing for such an examination.

1.6 Terminology

Extraterritorial application refers to the application of a human rights treaty when the individual at the moment of the violation was physically located outside the territory of the state respondent state.[37]

Foreign surveillance can be divided into two categories; Transnational surveillance and extraterritorial surveillance. *Transnational surveillance* is defined as the interception occurring within the territory of the intercepting state while the victim is located outside it. *Extraterritorial surveillance,* on the other hand, is defined as both the interception taking place and the victim being located outside the intercepting state's territory.[38] When *foreign surveillance* or *foreign mass surveillance* are used, which are used interchangeably, both transnational and extraterritorial surveillance are included.

The conduct of surveillance can be divided into several different steps. A violation can occur both from the existence of a surveillance regime, the collection, the storage, the process and the use of the information. *Foreign surveillance*, *foreign mass surveillance* and *interception* are used when no particular step of the conduct of surveillance is referred to. When a specific stage of the conduct is referred to, that step will be specified.

The term *communications* encompass both the content of communications and so-called metadata. Metadata is the information about the communica-

[37] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 8.
[38] Forcese (n 11) 184.

tion, namely the location, time and duration of a communication. A distinction between these have been argued to no longer be necessary, as an intrusion in content data and metadata are to be considered equally severe.[39]

1.7 Outline

Following this introduction, chapter two lays out the legal framework for this thesis by examining the underlying principles for the extraterritorial applicability of the ECHR. Contrary to the ECtHR's interpretation of jurisdiction, chapter two establishes that jurisdiction is not territorial. Rather, jurisdiction is a relationship of factual power between a state and an individual. Therefore, chapter two argues for a more extensive application of the ECHR than previously acknowledged by the ECtHR. Thereafter, chapter three and four examines whether any of the existing or alternative models of extraterritorial application can be applied to foreign mass surveillance. Chapter three applies and evaluates the existing models under the ECHR (the spatial model and the personal model) as they are defined in the ECtHR's case law. Chapter four applies and evaluates alternative models (the virtual model, the 'third model' and the functional model). Chapter three and chapter four concludes that both the existing and alternative models are inadequate. Therefore, chapter four also introduces a new model, here called the normative model. Lastly, chapter five concludes this thesis by arguing that the normative model can be applied to foreign mass surveillance and remedy some of the shortcomings in the ECtHR interpretation of the ECHR's extraterritorial applicability. However, an analysis of the findings is offered continuously throughout this thesis.

[39] *Malone v United Kingdom* (1984) No 8691/79 Series A no 82, para 84; Necessary and Proportionate Coalition, 'Necessary and Proportionate: International Principles and the Application of Human Rights to Communications Surveillance' (Necessary and Proportionate, 10 July 2013) <https://necessaryandproportionate.org/principles> accessed 25 May 2020; *Big Brother Watch v United Kingdom* (n 1) paras 299–302.

2 Extraterritorial Application of the ECHR

2.1 Introduction

In order to answer if individuals located outside the territory of the intercepting state can enjoy the protection of the ECHR in cases of foreign mass surveillance, the extraterritorial reach of the ECHR needs to be studied. Article 1 ECHR states that:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*

Thus, for a state to be held responsible for an act or omission under the ECHR, the state's exercise of jurisdiction is a necessary requisite.[40]

However, the notion of jurisdiction has proved to be a homonym causing confusion. Two clarifications are therefore useful. Firstly, jurisdiction under Article 1 ECHR refers to the jurisdiction of a state, not a court. While the latter is concerned with whether a court has the competence to try a claim, state jurisdiction within the meaning of Article 1 ECHR determines whether an individual has a human right against a state. The threshold criterion is therefore not concerned with whether the ECtHR is competent to try the case, but whether a state has an obligation towards an individual. However, the court will lack jurisdiction if the violation is found not to be within a state's jurisdiction, and the issues are therefore often examined simultaneously by the ECtHR.[41] Nonetheless, this analysis is not concerned with the jurisdiction of the ECtHR, but the jurisdiction of the intercepting state.

Secondly, state jurisdiction needs to be separated from attribution of conduct. While jurisdiction is concerned with the applicability of the ECHR, attribution of conduct is concerned with whether a state is responsible for an act or omission. However, a confusion between the two is understandable; They are both established by using an effective control test and the ECtHR uses the terms interchangeably.[42] In the situation at hand, the question of attribution

[40] *Ilaşcu v Moldova and Russia* (n 17) para 311.
[41] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 19–20.
[42] Marko Milanovic, 'Jurisdiction and Responsibility' in Anne van Aaken and Iulia Motoc (eds) *The European Convention on Human Rights and General International Law* (Oxford Press University 2018) 103–105.

of conduct would be whether the interception should be considered conduct of the state or, for example, the individual who put the tap on the cable. The question of jurisdiction, on the other hand, is if the intercepting state exercised jurisdiction over the alleged victim, and thus whether or not the state owes that individual a right to privacy under the ECHR. The issue of attribution is not subject for examination in this thesis.

The ECtHR has been widely criticised for its case law on the extraterritorial application of the ECHR, namely because of its interpretation of the notion of jurisdiction. The case law has been described as inconsistent, as well as characterized by the courts unwillingness to extend the ECHR's territorial applicability.[43] The question remains whether the ECtHR, when confronted with a case of foreign mass surveillance, will apply its previous practices, or attempt to redefine jurisdiction. Therefore, this chapter will study both jurisdiction as defined in the ECtHR's case law (chapter 2.2), as well as interpreting jurisdiction under Article 1 ECHR (chapter 2.3).

2.2 The ECtHR's Understanding of Jurisdiction

2.2.1 The Territoriality of Jurisdiction

In the case of *Banković,* the ECtHR established that jurisdiction under Article 1 ECHR is primarily territorial, making a reference to international law:

> *'As to the "ordinary meaning" of the relevant term in Article 1 of Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial.'*[44]

Thus, since jurisdiction under public international law, meaning the jurisdictional competence of a state, was territorial, so should jurisdiction under the ECHR be.[45] Consequently, for an individual to be within a state's jurisdiction, the individual has to be located within the territory of the state in question.[46] Jurisdiction is thus a question of whether an individual is within a specific contracting party's territory, not the ECHR's territory. Furthermore, the applicant does not need to be a citizen or a national of the respondent state to be

[43] See for example Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 55–57; Lea 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 The Modern Law Review 510, 526.
[44] *Banković v Belgium* (n 3) para 59.
[45] *Banković v Belgium* (n 3) para 61.
[46] *Banković v Belgium* (n 3) para 59.

within the state's jurisdiction.[47] Conversely, an individual is not within a state's jurisdiction merely because he or she is a national of that state.[48]

However, the ECHR is not restricted to the territory of a state. In *Banković*, the court held that the ECHR can be applied extraterritorially in exceptional situations. For extraterritorial application of the ECHR, special justification in the particular circumstances of the case is required.[49] The ECtHR has established that a state is considered to have exercised its jurisdiction when it can be established that the state at the time of the violation exercised effective control over a territory (the spatial model) or effective control over an individual (the personal model). In the following, the underlying principles of the ECHR's extraterritorial applicability is ascertained by the examination of these two exceptions.

2.2.2 Extraterritorial Jurisdiction under the Spatial Model

The least controversial model of extraterritorial application of the ECHR is the spatial model. Under the spatial model, a state is considered to exercise its jurisdiction if it holds effective, overall control over a foreign territory. Thus, if it can be concluded that the state exercised effective, overall control over a territory in which an individual whose rights have been violated was located, the state is considered to have exercised its jurisdiction. Consequently, the state can be held responsible for the violation. This is known as the effective control test. The effective control test, which stands at the heart of the ECHR's extraterritorial application, and the spatial model was first developed in the cases regarding the Turkish occupation of Northern Cyprus.

In *Loizidou v Turkey* the applicant complained that the Turkish government denied her access to her property in Northern Cyprus. The continual denial, she argued, amounted to violations of Article 8 ECHR and Article 1 Protocol No 1 ECHR. The court noted that the concept of jurisdiction under Article 1 ECHR was not restricted to the national territory of the contracting parties. Rather, acts performed by states' that produces effects outside their respective territories can engage the responsibility.[50] The court then continued:

> *'Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may arise when as*

[47] Keon Lemmens, 'General Survey of the Convention' in Peter van Dijk and others (eds) *Theory and Practice of the European Convention on Human Rights* (7th edn, Intersenta Ltd 2018) 11.
[48] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 99.
[49] *Banković v Belgium* (n 3) para 59.
[50] *Loizidou v Turkey* (Preliminary Objections) [GC] (1995) Series A no 310, para 62.

> *a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly through its armed forces, or through a subordinate local administration.'*[51]

Accordingly, the court developed a practice where jurisdiction in cases involving military occupation of a territory should be based on the actual, effective control over the territory. Whether it was a consequence of lawful or unlawful occupation was irrelevant for the establishment of jurisdiction. Turkey's responsibilities of securing the rights and freedoms set out in the Convention could therefore be extended to the occupied area. On the merits, the court considered the large number of troops located in the occupied area enough to determine that the Turkish army exercised effective control over the territory, without in detail examining the exercised control.[52] In the subsequent case of *Cyprus v Turkey*, the court found that Turkey was responsible the entire range of substantive rights as set out in the Convention. Hence, the responsibilities of the occupying state were extended.[53]

The most famous, and undoubtedly most controversial, judgement is the already mentioned *Banković.* The case concerned the bombing of a Serbian TV station in Yugoslavia in 1999, performed by the NATO members. In *Banković*, the court was confronted with the question whether the bombing gave rise to extraterritorial jurisdiction or not. The most important rule established in *Banković* was the court's definition of jurisdiction as primarily territorial, and extraterritorial jurisdiction as exceptional.[54] By examining its own case law, the court summarized the acceptance of extraterritorial application to cases 'when a respondent state, through the effective control over the relevant territory and its inhabitants aboard as a consequence of military occupation or through the consent, invitation, or acquiescence of the Government of that territory, exercises all or some of the public powers normally exercised by that Government.'[55]

The applicants argued that the bombing was an extraterritorial act that brought the deceased within the NATO states' jurisdiction. They maintained that the effective control test developed in *Loizidou* could be adjusted, meaning the respondent states' positive obligations to secure the rights under the

[51] *Loizidou v Turkey* (Preliminary Objections) (n 50) para 62.
[52] *Loizidou v Turkey* [GC] No 15318/89 ECHR 1996-VI, para 56.
[53] *Cyprus v Turkey* [GC] No 25781/94 ECHR 2001-IV, para 77.
[54] *Banković v Belgium* (n 3) paras 59, 61.
[55] *Banković v Belgium* (n 3) para 71.

Convention would be proportionate to the level of exercised control. The applicants consequently argued that even if the NATO states did not exercise effective control over the area, the applicants were within the states' jurisdiction as the states had control over their right to life. Thus, the respondent states would not be responsible for the entire range of rights and freedoms under the Convention, but those rights that the state controlled in the situation.[56] The court found that the ECHR's rights could not be 'divided and tailored' like the applicants suggested. Such an interpretation of Article 1 ECHR would, the court argued, result in every victim of a state's acts, regardless of the individual's location, to be brought under a state's jurisdiction. The drafters, the court argued, had not intended for the ECHR to apply that extensively.[57]

The court did not consider it sufficient that an act, the bombing in this case, committed by contracting parties to the ECHR had brought the individuals within the jurisdiction of the bombing states.[58] The *Banković* judgment meant that contracting parties do not have to respect individuals' rights, in this case the right to life, unless they are located in an area which the state effectively controls. Consequently, a personal model was rejected on the basis that it would make the ECHR universal. Thus, a state was required to exercise control over the territory in which an alleged victim was located to be considered to exercise its jurisdiction. Although much of the relevant principles, such as the requirement of territorial control, have been superseded since the judgement in *Al-Skeini and others v the United Kingdom* and other subsequent cases, the ECtHR still makes consistent references to *Banković* regarding the ordinary meaning of jurisdiction.[59]

The spatial model poses two questions; 1) What constitutes an area, and 2) what degree of control is necessary for jurisdiction under the spatial model. These questions, and thus the limits of the spatial model, will be addressed in chapter 3, where the existing models under the ECHR are applied to foreign mass surveillance.

2.2.3 Extraterritorial Jurisdiction under the Personal Model

The personal model has, contrary to the spatial model, evolved with some unease. Despite the court's rejection of jurisdiction based on control over an individual in *Banković*, a personal model was developed in subsequent cases. In *Öcalan v Turkey*, the arrest of a Turkish national by Turkish authorities in

[56] *Banković v Belgium* (n 3) para 46.
[57] *Banković v Belgium* (n 3) para 75.
[58] *Banković v Belgium* (n 3) para 82.
[59] *Al-Skeini and Others v the United Kingdom* [GC] No 55721/07 ECHR 2011, para 74.

Kenya was considered to be within Turkey's jurisdiction, despite that Turkey did not exercise effective control over the territory. Instead, the court found that the Turkish authorities exercised authority and control over Öcalan by arresting and physically forcing him to return to Turkey.[60] In *Issa*, the court expressively articulated the personal model. The court stated that a person is under a state's jurisdiction if the state exercises authority and control over that person through its agents operating in an area outside its national territory. Article 1 ECHR, the court stated, was not to be interpreted so that accountability in such situations allowed states to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own.[61] Consequently, the court parted from the principle of jurisdiction only arising extraterritorially in the event of effective control over an area, as set out in *Banković*. In several subsequent cases, the court found that individuals were within the respondent states' jurisdiction because of the use of force conducted by state agents operating outside the states' territory.[62]

The discrepancies between the principles in *Banković* and subsequent cases were clarified in *Al-Skeini*. The case concerned the deaths of six Iraqi nationals who were killed during the British occupation of Iraq. Four of the applicants where shot by British soldiers, one drowned after being beaten and forced into the river by British soldiers and one died in British detention. The court reiterated that jurisdiction was primarily territorial and normally exercised throughout a state's territory, and that extraterritorial application exceptionally could be justified.[63] The court then clarified that both the control over an *area* and control over a *person* could justify an exception from the territoriality principle. The existing case law was divided into two categories; 1) 'State agent authority and control', and 2) 'effective control over an area'.[64]

Consequently, an individual can be brought within a state's jurisdiction if the state's agents exercise authority and control over the individual. Thus, the personal model was acknowledged. The court found that extraterritorial acts of a state could amount to jurisdiction under the personal model in three situations; 1) Through the acts of diplomatic and consular agents, 2) when a state through the consent, invitation or acquiescence of a state exercised all or some of the public powers normally exercised by the latter state, and 3) through the use of force conducted by a state outside its territory. [65] In this regard, the court held:

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[60] *Öcalan v Turkey* [GC] No 46221/99 ECHR 2005-IV, paras 93–94.
[61] *Issa v Turkey* (n 28) para 71.
[62] *Pad and Others v Turkey* (dec.) No 60167/00 (ECtHR 28 June 2007); *Al-Saadoon and Mufdhi v the United Kingdom* [GC] No 61498/08 ECHR 2010.
[63] *Al-Skeini v the United Kingdom* (n 59) paras 131–132.
[64] *Al-Skeini v the United Kingdom* (n 59) paras 134–136.
[65] *Al-Skeini v the United Kingdom* (n 59) paras 134–136.

> *'It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" […].'*[66]

Hence, even if a state does not control the area, a state is responsible for securing an individual's rights and freedoms under the Convention if it exercises control over the individual. Furthermore, a state is not obliged to secure the individual all the rights under the ECHR, but only the rights that are relevant to the situation.[67]

On the merits, the court found, with a reference to *Banković,* that a jurisdictional link existed as the United Kingdom, together with the United States, had taken over the responsibilities normally exercised by the Ba'ath regime. The United Kingdom had, through their soldiers in the area, exercised authority and control over the deceased.[68] Notable, the jurisdictional link was based on the control over the individuals because the United Kingdom had occupied the area and thus exercised some of the public powers. In other words, although the court did extend the applicability of the Convention, the applicability was limited by the reference to the control over the area.[69]

The personal model poses the questions of what amounts to authority and control. These questions, and consequently the limits of the personal model, will be further examined in chapter 3.3 and 4.5.

2.3 Interpreting Jurisdiction Under Article 1 ECHR

2.3.1 The (Non)Territoriality of Jurisdiction

As first stated in *Banković,* and continuously reiterated by the ECtHR in its subsequent cases, the notion of jurisdiction within the meaning of Article 1

[66] *Al-Skeini v the United Kingdom* (n 59) para 137.
[67] Işıl Karakaş and Hasan Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions Extraterritorial Jurisdiction and State Responsibility' in Anne van Aaken and Iulia Motoc (eds) *The European Convention on Human Rights and General International Law* (Oxford Press University 2018) 130.
[68] *Al-Skeini v the United Kingdom* (n 59) paras 149–150.
[69] Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 118.

ECHR is primarily territorial. By interpreting the notion as primarily territorial, the court have restrictively acknowledged a state's responsibility for violations committed extraterritorially. If jurisdiction was to be considered territorial, a restrictive application is a correct consequence. The ECtHR established jurisdiction as territorial because the jurisdictional competence of a state under public international law was considered territorial. This conclusion, and consequently the restrictive application of the Convention, can however be questioned.

State jurisdiction under public international law can be described as follows. Jurisdiction is defined as the exercise of judicial authority.[70] Rules about jurisdiction in public international law defines a state's legal competence by regulating when a state may prescribe and enforce its rules. In academia, it has been described as the allocation of competence between states.[71] By regulating when a state may or mot not exercise its jurisdiction, and by prescribing legal consequences for wrongful exercise of jurisdiction, the legal competence can be allocated in a globalized world.[72] Jurisdiction is, as the ECtHR noted in *Banković*, linked to state's sovereignty; A sovereign state may prescribe and enforce its rules on its territory. Subsequently, principles regarding international law of jurisdiction concerns to which extent a state may prescribe, apply and enforce its domestic rules upon persons. Conversely, public international law regarding jurisdiction defines whether a state's exercise of its legal competence is lawful or unlawful.[73]

There are further several types of jurisdiction; The jurisdiction to prescribe rules (prescriptive jurisdiction), the jurisdiction to enforce rules (executive jurisdiction) and the jurisdiction for a state's courts to settle disputes (adjudicative jurisdiction). The basis for jurisdiction, that is *how* jurisdiction emerge, is also plural. The territorial principle, meaning a state may prescribe and enforce rules on its territory, is one basis for jurisdiction. However, the territoriality principle is not the only basis for jurisdiction. Although it is correct that a state may only enforce its rules on its territory, making executive jurisdiction primarily territorial, so is not the case with prescriptive jurisdiction.[74] Rather, prescriptive jurisdiction may emerge from the active personality principle – allowing a state to regulate a national's actions when located abroad,

[70] Oxford English Dictionary Online, entry 'jurisdiction <https://www.oed.com/view/Entry/102156?rediirectedFrom=jurisdiction#eid> accessed 25 May 2020.
[71] Rosalyn Higgins, *Problems and process: international law and how we use it* (Oxford Clarendon Press 1994) 56; Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2017) 483.
[72] Gondek, *The Reach of Human Rights in a Globalizing World* (n 25) 48.
[73] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 10; Shaw (n 71) 483 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2018) 441.
[74] Gondek, *The Reach of Human Rights in a Globalizing World* (n 25) 52; Shaw (n 71) 843.

the passive personality principle – allowing a state to regulate or prohibit a person's activities that affects a national's interests, the protective principle – allowing a state to exercise jurisdiction over a person who poses a threat to a state's security and vital interests, and the universality principle – allowing a state to criminalize serious crimes of international law no matter where the perpetrators are located in the world.[75]

None of the basis for prescriptive jurisdiction is subordinate, meaning prescriptive jurisdiction may be established on multiple, equal basis. It is not incorrect to say that jurisdiction is primarily territorial in the sense that a state is presumed to exercise jurisdiction within its national borders. Furthermore, states have primarily exercised jurisdiction within their respective territories historically. However, that does not mean that jurisdiction equals territory, or that territory equals jurisdiction. Rather, it is the connection between a state and an extraterritorial situation, and a state's legitimate interest to regulate that situation that allows a state to prescribe or enforce its rules.[76]

In *Banković*, the court defined jurisdiction as primarily territorial without distinguishing the different types of jurisdiction nor the basis for it.[77] It is difficult to argue, and an odd conclusion by the ECtHR to draw, that jurisdiction within the meaning of Article 1 ECHR is primarily territorial by reference to public international law, since there are multiple, equal basis for jurisdiction.[78] Since human rights violations can be perpetrated both by enforcing laws, prescribing laws and exercising adjudicative jurisdiction, it should be considered highly unlikely that the court only meant executive jurisdiction – the only jurisdiction solely based on territoriality – to be the only type of jurisdiction included under Article 1 ECHR.[79]

When establishing the notion of jurisdiction as primarily territorial, the court further relied heavily on the preparatory works of the Convention. The court argued that the replacement of the wording 'all persons within their territories' with 'within their jurisdiction' in the original draft of the ECHR was for the purpose of expanding the scope to persons who were within the territory but not residents, but nevertheless within the territory of the states. While noting that the Convention is a living instrument, the court found that the

[75] Shaw (n 71) 489–501.
[76] Gondek, *The Reach of Human Rights in a Globalizing World* (n 25) 55; Ryngaert, *Jurisdiction in International Law* (n 73) 38–39.
[77] *Banković v Belgium* (n 3) paras 59–60.
[78] Gondek *The Reach of Human Rights in a Globalizing World* (n 25) 366; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 25.
[79] Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 Netherlands International Law Review 349, 367.

preparatory works constituted a 'clear confirmatory evidence' of a territorial interpretation.[80] Similar to what O'Boyle argues, the drafters could have chosen wordings similar to the Geneva Conventions, which states that states are obliged to 'respect and to ensure respect to the present Convention in all circumstances' if the drafters intended for a universal application of the ECHR.[81]

On the other hand, the preparatory work could likewise result in the opposite conclusion. For example, it is possible to argue that the terms 'territory' or 'nationals' could have been chosen if a territorial restriction was the drafters' intention. For the purpose of widening the categories of persons who would benefit from the Convention, the drafters instead chose the wording 'within its jurisdiction'.[82] Hence, the choice of wording in the preparatory can facilitate a conclusion both in favor of and against extraterritoriality. Consequently, the preparatory works can therefore not be considered a 'clear confirmatory evidence'.

As stated in the VCLT, preparatory works are a supplementary means of interpretation and should therefore not be given a decisive role. Academia have argued that if preparatory works are invoked, which they perhaps should not be to begin with, they should serve as a guide to the general intentions behind the Convention, not to limit the scope of application.[83] Especially considering that the concept of jurisdiction was not discussed in the preparatory works, the preparatory works should not have been given a decisive importance as it was in *Banković*.[84] Evidently, the conclusion drawn from the preparatory works is substantially incorrect and facilitated by methodological mistakes.

Consequently, it is not permissible to argue that jurisdiction under Article 1 ECHR is territorial either by a reference to public international law nor to the preparatory works. Jurisdiction is rather a functional notion, and territory a consequence of the function of jurisdiction.[85]

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[80] *Banković v Belgium* (n 3) paras 63–65.
[81] Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life After Banković"' in Fons Coomans and Menno T Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 133.
[82] For a similar reasoning, see *Loizidou v Turkey* (Preliminary Objections) (n 50) para 71; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 863.
[83] Rainey and others (n 24) 66–67.
[84] Gondek, *The Reach of Human Rights in a Globalizing World* (n 25) 92; Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinius Nijhoff 2013) 95.
[85] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 863.

2.3.2 Jurisdiction under Human Rights Treaties

Jurisdiction under public international law regulates whether an act committed by a state is permitted or prohibited under public international law. Or as Besson describes it; Public international law on jurisdiction does not seek to define when jurisdiction exists, but to regulate its implications.[86] Jurisdiction under human rights treaties, on the other hand, serve to do the former. Consequently, the notion of jurisdiction in human rights treaties is not concerned with determining whether an act was illegal or not under public international law or allocating competences. Rather, jurisdiction under human rights treaties defines whether a state is responsible for securing an individual's human rights. Thus, while jurisdiction under public international law regulates the relationship between states, jurisdiction under human rights treaties regulates the relationship between a state and an individual.[87] Accordingly, jurisdiction in public international law and jurisdiction within the context of human rights treaties serve different purposes.[88]

If jurisdiction under human rights treaties were given the same meaning as jurisdiction under public international law, the ECHR would in many cases apply neither extraterritorially nor territorially. Given that jurisdiction under public international law means the exercise of jurisdiction by prescribing or enforcing domestic rules, only violations committed by a state through the prescription or enforcement of rules would fall under the Convention. Consequently, only legal acts would amount to jurisdiction. However, human rights violations are rarely committed in accordance with domestic laws. If the notion was given the same meaning as jurisdiction under public international law, violations not committed in accordance with domestic law – both within and outside the state's territory – would fall outside the ECHR's scope.[89] Interpreting jurisdiction under Article 1 ECHR conformably with public international law would therefore lead to absurd results territorially as well. Jurisdiction under Article 1 ECHR is consequently not tied to the legality of state conduct, which the court rightly acknowledged in *Loizidou*.[90]

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[86] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 869.
[87] Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2012) 159.
[88] Gondek, 'Extraterritorial Application of the European Convention on Human Rights' (n 79) 367; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 27; Crawford (n 73) 441.
[89] Gondek, *The Reach of Human Rights in a Globalizing World* (n 25) 56; Milanovic *Extraterritorial Application of Human Rights Treaties* (n 29) 29–30; Michael Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (2012) 30 Netherlands Quarterly of Human Rights 137, 139.
[90] *Loizidou v Cyprus* (Preliminary Objections) (n 50) para 62.

If the ordinary meaning of a word is vague or ambiguous, such as jurisdiction has proved to be, Article 31(1) VCLT also calls for a teleological approach in relation to the literal approach.[91] As previously shown, jurisdiction have several meanings. When confronted with a term where the ordinary meaning is ambiguous, the court should have considered the object and the purpose of the treaty.[92] Considering the special character of the Convention, academia has argued that the object and purpose of the ECHR should be given a significant role in the interpretation.[93]

In *Loizidou*, the court considered the object and purpose when it established that the responsibility of a state may arise when it exercised effective control over an area outside its national borders.[94] However, in its interpretation of the term in *Banković*, which to this day is the courts reference to the definition jurisdiction as primarily territorial, the court gave little attention to the object and the purpose of the Convention.[95] The ECtHR have on several occasions emphasized that the Convention is a living instrument which should be interpreted in the light of present-day conditions. The court did not take into account the Convention as a living instrument and therefore failed to interpret the Convention in the light of present-day conditions. As countries to a larger extent act through their agents abroad, an interpretation in the light of present day-conditions rather supports an extraterritorial application of the Convention for the purpose of accomplishing an effective human rights protection.[96]

Jurisdiction under Article 1 ECHR should instead be described as a relationship of factual power over a territory or an individual.[97] Under the spatial model, factual power is the factual effective control over a territory. Under

[91] Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 The International and Comparative Law Quarterly 318, 319.
[92] Linderfalk (n 21) 203–204.
[93] Alain Zysset, *The ECHR and Human Rights Theory, Reconciling the Moral and the Political Conceptions* (Routledge 2017) 120.
[94] *Loizidou v Turkey* (Preliminary Objections) (n 50) para 62.
[95] Gondek, 'Extraterritorial Application of the European Convention on Human Rights' (n 79) 361.
[96] Gondek, 'Extraterritorial Application of the European Convention on Human Rights' (n 79) 362.
[97] Rick Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights', in Fons Coomans and Menno T Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 86; Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 76; Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 Michigan Journal of International Law 739, 798; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 33; Christopher Grabenwarter, *European Convention on Human Rights: Commentary* (Hart Publishing 2014) 7.

the personal model, factual power is the factual exercise of authority and control over an individual. Put differently, jurisdiction under Article 1 ECHR is a somewhat autonomous concept. Given this, violations that occur within the territory falls within the jurisdiction of a state because they exercise effective control over their territory, or rather: Effective control is presumed to exist when a violation occurs within the national borders of the state in question.[98] The authority and control that is to be exercised is consequently not the legal competence (de jure), but factual (de facto).[99] It can be described as de facto control entails de jure control, rather than that jure control establishes jurisdiction, as mistakenly assumed in Bankovic.[100]

This somewhat autonomous meaning of jurisdiction can be found within other human rights treaties which also has jurisdiction as the threshold for applicability. One example is the ICCPR. Article 2(1) of the ICCPR states:

> *'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant […]'*

The wording 'territory *and* jurisdiction' has by the ICCPR's interpretive body, the UN HR Committee, been interpreted as a disjunction. Consequently, the ICCPR applies both to people within the territory as well as individuals located outside the territory but who are still within the jurisdiction of a state. The UN HR Committee has further interpreted the notion of jurisdiction as the relationship of a state's effective power or control over a territory or a person, both in its General Comment and in its opinion in *Sergio Euben Lopez-Burgos v Uruguay*. In *Lopez-Burgos*, jurisdiction was described as 'the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'.[101] Likewise, the ICJ found the ICCPR applicable due to the exercise of effective control in occupied areas in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the case of *Armed Activities on the Territory of the Congo*.[102]

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[98] Besson 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 870–871.
[99] Duttwiler (n 89) 138.
[100] Scheinin (n 97) 80.
[101] UN Huma Rights Committee, General Comment No 31: The Nature of the General legal Obligation Imposed on States Parties to the Covenant, 10; *Sergio Euben Lopez-Burgos v Uruguay* (1979) Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979, para 12.2.
[102] *Legal Consequences of the Construction of a Wall in the Occipied Palestinian Territory* (Advisory Opinion) [1990] ICJ Rep 92; *Case Concerning Armed Activities on the Territory of the Congo* (19 December 2005) (Merits) [2005] ICJ Rep 168

2.4 Concluding Remarks

The purpose of this chapter was to identify when the ECHR can be applied extraterritorially by examining the threshold criterion jurisdiction. Apart from jurisdiction being primarily territorial, which this chapter has argued is incorrect, the ECtHR case law gives little guidance regarding how jurisdiction under Article 1 ECHR is defined. To this date, the court maintains the view that extraterritorial jurisdiction requires special justification in the particular circumstances of each case. Thus, an examination of the general practice of the ECtHR implies that the court does not seem to have been striving towards formulating general principles beyond the territoriality principle. The courts case law is rather an expression of factual exceptions to the one principle established by the court.

The ECtHR interpretation of the notion jurisdiction, which resulted in the conclusion that jurisdiction is primarily territorial, is faulty: Both the conclusion itself and the method of reaching that conclusion is incorrect. That is, most likely, not a consequence of a lack of knowledge on treaty interpretation, but a conscious attempt to limit the applicability of the ECHR. Bearing in mind that a too extensive interpretation might be ill-received by the contracting parties and considered an intrusion that goes beyond the court's competence, the court's legal considerations can still be subject to criticism. Essentially, the object and purpose have been overshadowed by the term's ordinary meaning. The court has further taken into account the wrong set of rules of public international. This has led to a narrow interpretation of the extraterritorial application of the Convention.

Although the court continuously describes jurisdiction as primarily territorial with reference to public international law, such description of the notion is misleading. Even though the base for executive jurisdiction is primarily territorial, so is not the case with other types of jurisdiction. Rather, jurisdiction has multiple, equal basis. Furthermore, it would be incorrect to state that one basis, such as the territorial, has precedence. Jurisdiction is instead to be considered functional, and territorial aspects a mere consequence of the exercise of jurisdiction. While it is correct that a state mostly exercises jurisdiction over its territory, it is not correct that territorial jurisdiction is a rule and that extraterritorial jurisdiction only should be applied as an exception. Accordingly, by not establishing the ordinary meaning of jurisdiction as territorial, a more extensive application is possible. I therefore argue that in the application of the ECHR on foreign mass surveillance, Article 1 should not be interpreted narrowly.

The underlying principles in the ECtHR's case law can therefore instead be summarized as follows. For a state to be responsible for a violation of the Convention, the violation has to occur within the jurisdiction of the respondent state. The recurrent examination of the exercise of factual power in the ECHR case law proves that the meaning of jurisdiction under Article 1 ECHR concerns the establishment of a relationship of effective control between the victim and the respondent state. Such interpretation of the notion is more in line with the words ordinary meaning in the light of the object and the purpose of the Convention, as well as how jurisdiction has been interpreted under the ICCPR. This somewhat autonomous meaning of jurisdiction within human rights treaties is not concerned with whether a state prescribes or enforces its domestic rules. Rather, the central element is whether a state exercises factual power. Although the exercise factual power should be considered the basis for jurisdiction both within and outside the territory, jurisdiction is presumed to exist within the territory. As clarified in *Al-Skeini*, a person can be brought within the jurisdiction of the respondent state because it exercises effective control over a territory or authority and control over an individual.

However, a simplification of jurisdiction so that it equals factual control, meaning a state has jurisdiction over a person as soon as it has the power to affect that individual's human rights, would make the jurisdiction threshold obsolete and the ECHR universal. The court has thus, for well-founded reasons, rejected a cause-and-effect definition of jurisdiction. It is understandable that the court, in an attempt to maintain the contracting parties trust and its own legitimacy, is reluctant to adopting a definition of jurisdiction that extends the Conventions applicability to all extraterritorial state conduct. As this chapter is concerned with the underlying principles of the Conventions extraterritorial application, the limitations of the models, such as what constitutes an area, what amounts to effective control over an area and what authority and control means under the personal model, will be discussed further in chapter three and four.

After examining the underlying principles for the extraterritorial applicability of the ECHR, the subsequent chapter studies in depth how the ECHR can be applied for foreign mass surveillance. It is impossible to foresee whether the court will continue with its territorial definition of jurisdiction or attempt to redefine jurisdiction. Therefore, the application of existing models as understood by the court, and the application of alternative models are separated in the following. Followingly, chapter three applies and evaluates the existing models as understood under the ECHR case law. Thereafter, chapter four applies and evaluates the alternative models.

3 Applying Existing Models of Extraterritorial Application

3.1 Introduction

Chapter two examined the extraterritorial application of the ECHR in the ECtHR's case law and provided a redefinition of the notion of jurisdiction. The chapter highlighted the inconsistency between the courts understanding of jurisdiction and the meaning of jurisdiction under human rights treaties. Therefore, a separation based on the ECtHR's understanding of jurisdiction and alternative models' understanding of jurisdiction in the application of the ECHR to foreign mass surveillance proved necessary.

The ECtHR has established two models of extraterritorial jurisdiction in their case law; The spatial model and the personal model. This chapter applies the two acknowledged models of extraterritorial application as defined by the ECtHR on foreign mass surveillance in order to examine if any of the existing models under the ECHR can function as the legal basis for the ECHR's applicability in cases of foreign mass surveillance. This chapter commences with the spatial model (chapter 3.2), and thereafter proceeds to the personal model (chapter 3.3).

3.2 The Spatial Model

3.2.1 Transnational Surveillance

As previously shown, jurisdiction based on the spatial model means de facto control over an area in which the individual who claims to be a victim is located. If a state has factual control over a territory, lawful or unlawfully claimed, that state bears responsibility for the individual's rights.[103] In purely territorial scenarios of mass surveillance, in which the victim is located within the intercepting state's territory, the state's jurisdiction will be assumed and the ECHR accordingly apply. Likewise, if the victim is located in an area which is occupied and effectively controlled by the intercepting state, the individual will be within the intercepting state's jurisdiction by applying the ECHR extraterritorially using the spatial model. Thus, the state is obliged under Article 1 ECHR to secure the individual's right to privacy under the

[103] *Loizidou v Turkey* (Preliminary Objections) (n 50) para 62.

ECHR. Any violation committed through the use of foreign mass surveillance would therefore fall under the ECHR.[104]

However, the situation is more complicated when the victim is not located in an area controlled by the intercepting state, as is the case with transnational and extraterritorial interception. Modern technologies allow for a separation between the victim, the intercepting state and the interference. By using technologies such as SIGINT, an individual does not need to be physically available to a state for the state to intercept that individual's communications. Thus, the violation can be tied to several locations, and therefore difficult to retain within a territory. This is the case when an individual is located outside the intercepting state's territory, but the collecting, process, storage or communication of the data are conducted on computers and servers within its national territory. Therefore, in cases of transnational interception, the spatial model is more difficult to apply.[105]

The spatial model can in cases of transnational surveillance be applied in two different ways. One way is to base the examination of jurisdiction on the location of the individual. Another way is to base the examination of jurisdiction on the location of the interference.[106] If applying the spatial model on transnational interception and using the location of the individual as the basis, the individual will not be under the interfering state's jurisdiction. If applying the spatial model on transnational interception using the interference as the basis, the victim will be under the interfering state's jurisdiction and enjoy the protection of the ECHR. Consequently, if using the latter method, the surveillance would be territorial.

Evidently, the application of the spatial model is dependent on whether the individual or the interference function as the basis for the examination. In the cases where the ECtHR has considered the extraterritorial application of the ECHR using the spatial model, such as *Loizidou*, *Cyprus* and *Banković,* the inquiry has been whether the respondent state exercised control over the area in which the applicant was located. Similarly, using the victim as the basis for jurisdiction is the most common approach under the ICCPR.[107] Accordingly, the base under the spatial model has, so far, been the location of the individual.[108] Furthermore, as Milanovic argues, if jurisdiction under the spatial

[104] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 122.
[105] *Big Brother Watch v the United Kingdom* (n 1) para 420.
[106] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 122; Huxtable (n 33) 9.
[107] Scheinin (n 97) 73.
[108] Ashely Deeks, 'An international Legal Framework for Surveillance' (2015) 55 Virginia Journal of International Law 291, 300; Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 125; Huxtable (n 33) 97–98.

model equals an area under a state's control, and the question is whether an individual is subject to that state's control, the location of the interference should be irrelevant. Hence, the definition of jurisdiction under the spatial model makes it logical to focus on the location of the individual.[109]

However, not using an interference-based jurisdiction can lead to an individual having a right to privacy when that individual is within a state but losing that right as soon as he or she leaves the territory, which the United Kingdom Investigatory Powers Tribunal (IPT) found in the case of *Human Rights Watch and Others v Secretary of State for the Foreign and Commonwealth Office and Others*. The applicants claimed that their right to privacy under Article 8 ECHR had been violated as the United Kingdom had intercepted, stored and used information from their communications. Two applicants had never resided in the United Kingdom and the IPT was therefore confronted with the question of whether the two applicants were within the United Kingdom's jurisdiction. The IPT found that the applicants did not have a right to privacy in the United Kingdom since they were located outside the United Kingdom's territory at the time of the intercepting, as such conclusion could not be supported by the ECtHR jurisprudence.[110] To avoid this scenario, an interference-based jurisdiction could be a solution to accomplish a non-discriminatory protection of individuals' right to privacy.[111]

According to the European Commission for Democracy Through Law's (the Venice Commission) report 'Democratic oversight of Signals Intelligence', the processing, analysis and communications of the data is 'clearly within national jurisdiction, and is governed both by national law and states' applicable human rights obligations.'[112] Hence, if the collection of signals occurs partly or wholly extraterritorially, the interference still falls within the interfering state's jurisdiction if the processing, analysis and communication takes place within that state's territory. Similarly, Wrange and Trachtman states that a country has jurisdiction over all servers and computers located within

[109] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 124–125.
[110] *Human Rights Watch and Others v Secretary of State for the Foreign and Commonwealth Office and Others* IPT/15/165/CH (16 May 2016) paras 58, 60.
[111] Carly Nyst, 'Interference-Based Jurisdiction Over Violations of the Right to Privacy (EJIL: Talk, 21 November 2013) <ejiltalk.org/interference-based-jurisdiction-over-violations-of-the-right-to-privacy/> accessed 25 May 2020.
[112] European Commission for Democracy Through Law, *Report on the Democratic Oversight of Signals Intelligence Agencies* (The Venice Commission 15 December 2015) Study No 719/2013, para 6.

their territory.[113] Consequently if the information was collected, stored, processed or analyzed using a server or computer based on the territory of the interfering state, the interference would be within the state's jurisdiction.

The statement by the Venice Commission can, I argue, be interpreted in two ways. Firstly, it can be interpreted as stating that the location of the interference should function as the basis for the examination under the spatial model. Secondly, it can be interpreted as stating that the process, analysis and communications of data amounts to authority and control under the personal model. The Venice Commission did not clarify whether the Convention is applicable using the spatial model or the personal model. Thus, I will examine the validity under both models, starting with the spatial model. However, the Venice Commissions' reference to which countries 'soil' the interference was committed, implies that the Venice Commission meant for an interference-based examination under the spatial model.

The conclusion that an interference is within a state's jurisdiction if the violation occurs on the territory of the intercepting state was drawn by a reference to the aforementioned *Weber and Saravia*. In *Weber and Saravia*, the court did not address the jurisdiction issue, and the case was dismissed on other grounds.[114] The conclusion in the report was made with a reference to the court's reasoning regarding if the interception was 'in accordance with law'. The reasoning concerned whether an infringement of Article 8 ECHR was justified, which requires that the interferences were in accordance with German law according to Article 8(2) ECHR.[115] The applicants claimed that there were no statutory basis because Germany had illegally interfered with Uruguay's sovereignty through the monitoring of the applicants' communications.[116] In that regard, the ECtHR held:

> *'Signals emitted from foreign countries are monitored by interception sites situated on German soil and the data collected are used in Germany. In the light of this, the Court finds that the applicants have failed to provide proof in the form of concordant interferences that the German authorities, by enacting and applying strategic monitoring measures, have acted in a manner which interfered with the*

[113] Joel P Trachtman, 'Global Cyberterrorism, Jurisdiction and International Organization' in Mark F Grady and Franscesco Parisi (eds) *The Law and Economics of Cybersecurity* (Cambridge University Press 2005) 10; Pål Wrange, 'Intervention in National and Private Cyberspace and International Law' in Jonas Ebbesson and others (eds) *International Law Changing Perceptions of Security: Liber Amicorium Said Mahmoudi* (Brill Academic Publishers 2014) 308.
[114] *Weber and Saravia v Germany* (n 1) para 72.
[115] *Weber and Saravia v Germany* (n 1) para 80.
[116] *Weber and Saravia v Germany* (n 1) para 84.

territorial sovereignty of foreign States as protected in public international law.'[117]

The paragraph establishes that the interception was not a breach of public international law, namely Uruguay's sovereignty, since the communications data was collected and monitored on interception sites in Germany. However, how the finding that the conduct did not breach of Uruguay's state sovereignty is translated to meaning that a conduct is under a state's jurisdiction if the interference occurs on the territory of the state is unclear.

One interpretation is that the Venice Commission has assumed that jurisdiction under the ECHR has the same meaning as jurisdiction under public international law. Consequently, because the conduct was legal, the conduct was within Germany's jurisdiction. Jurisdiction under public international law serves a different purpose than jurisdiction under human rights treaties do, as concluded in chapter two.[118] While the former is concerned with the allocation of competences and by determining whether a conduct was legal or not, so is not the latter.[119] By concluding that interferences which occur on the national territory is 'clearly' within the intercepting state's jurisdiction based on the courts finding that the interference was not in breach of international law, the Venice Commission confuses the two different notions of jurisdiction. The opposite conclusion from the opposite scenario would mean that illegal state acts does not fall under the Convention. Say for example that the conduct was a breach of Uruguay's sovereignty because the collection occurred on Uruguayan soil, and the court therefore found that there was no statutory basis. If using the same syllogism as in the report by the Venice Commission, this would mean that interferences that are in breach of public international law are not under a state's jurisdiction. Taking into account the context of the sentence, the conclusion evidently leads to absurd results.

Another interpretation is that the Venice Commission only meant to refer to the sentence 'Signals emitted from foreign countries are monitored by interception sites situated on German soil and the data collected are used in Germany', which is cited in the footnote in the report.[120] However, I don't see any legitimate way to draw a conclusion regarding jurisdiction based on that finding, as the sentence is only a statement of facts. Consequently, the courts findings in *Weber and Saravia* cannot be considered to expresses that interference-based jurisdiction is established law.

[117] *Weber and Saravia v Germany* (n 1) para 88.
[118] See chapter 2.3.2.
[119] See chapter 2.3.
[120] The Venice Commission (n 112) footnote 31.

Furthermore, basing examination on the location of the interference would not be an appropriate adjustment to the spatial model. Foremost, an interference-based examination is not compatible with the wording of Article 1 ECHR, which through the use of the wording 'everyone within its jurisdiction' clearly focus on the location of the individual.[121] It would further contradict previous case law from the ECtHR, the ICJ and the UN HR Committee, in which the location of the victim has been the basis for the examination. The interference-based approach further poses the issue of deciding *where* the violation occurs. The collection of signals can be performed in one state, the process in a second and the storage in a third, while the intercepting state is a fourth.[122] As I have rejected the interference-based approach on other grounds, I will not delve in to the matter of deciding where the interference occurs. However, it proves that a territorial approach to the issue, which is difficult to retain to a territory, is generally unsuitable.

For transnational interception to fall under the Convention using the spatial model, the individual consequently has to be located within a territory under the intercepting state's control. The spatial model will thus apply equally to transnational and extraterritorial surveillance.[123]

3.2.2 Extraterritorial Surveillance

When using the location of the victim as the basis for the examination in both transnational and extraterritorial cases of surveillance, the issue of what is defined as an area emerge. In the ECtHR case law, effective control over an area has so far mostly been found to exist as a consequence of a state's military occupation of a territory. Thus, it is difficult to translate the existing case law to how surveillance could amount to control over an area. One way of applying the ECHR on cases of foreign surveillance where the victim is located outside the state's national territory, is to reduce the size of what constitutes an area to an object. Thus, by claiming that the state has effective control over a collecting tap on a cable, or effective control over the servers or computers on which the data is processed and stored, the state would exercise jurisdiction using the spatial model.[124]

The issue poses the question whether the size of the area matters, and namely if an object can constitute an area.[125] In the case of *Al-Saadoon and Mufdhi v*

[121] Huxtable (n 33) 98.
[122] Huxtable (n 33) 98.
[123] Forcese (n 11) 208.
[124] For a similar reasoning, see UN HRC, 'The Right to Privacy in the Digital Age, Report of the Office of the United Nations High Commissioner for Human Rights' (n 9) paras 33–35.
[125] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 129.

the United Kingdom, a detention facility was considered large enough to constitute an area.[126] Thus, a territory under the spatial model can be both a territory in the traditional sense, as well as smaller premises.

Although it has not been defined in the ECtHR case law how big an area must be to constitute an area under the spatial model, it seems unlikely that it could be reduced to the size of a tap on a cable, a server or a computer. As 'territory' is defined as an area or a district over which a state or a court has jurisdiction, it would not be compatible with the word's ordinary meaning to equal an area to an object.[127] Notably, jurisdiction under the spatial model equals the effective control over an area in which an individual is located. The area in question therefore seems to require that an individual fit within it. Consequently, it is unsuitable to adjust the spatial model for the purpose of applying the ECHR to foreign mass surveillance, as it would contradict the definition of 'territory' and the underlying rationale of the spatial model. Furthermore, it has been argued in academia that if the size of an area was reduced to the size of an object, it would eventually not be possible to distinguish the spatial model from the personal model.[128] Evidently, the spatial model cannot be applied to foreign mass surveillance. Neither can the spatial model be adjusted in an appropriate way to do so.

3.3 The Personal Model

The second model of extraterritorial application in the ECtHR case law is the personal model. As the personal model is concerned with states' exercise of factual authority and control, one does not need to choose between victims-based or interference-based jurisdiction. Under the personal model, the inquiry is instead whether the state exercises authority and control over the individual.[129]

In cases regarding foreign mass surveillance, the question would be whether a state through the collection, storage, analysis or communication of an individual's data exercises authority and control over that individual. If examining the claim by the Venice Commission that the processing, analysis and communications of the data are 'clearly within national jurisdiction, and is governed both by national law and states' applicable human rights obligations' under the personal model, the process, analyses and communications

[126] *Al-Saadoon and Mufdhi v the United Kingdom* (n 62).
[127] Oxford English Dictionary Online, entry 'territory' <https://www.oed.com/view/Entry/199601?rskey=mGur44&result=1&isAdvanced=false#eid> accessed 25 May 2020.
[128] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 113–114; Huxtable (n 33) 97.
[129] *Lopez-Burgos v Uruguay* (n 101) para 12.1; *Al-Skeini v the United Kingdom* (n 59) paras 136–137.

would be considered a sufficient degree of authority and control.[130] The question of what amounts to authority and control has not definitively been solved in the ECtHR case law, and no unitary view can be found in academia. Any specific, decisive criterion for the effective control test can therefore not be established. Therefore, facts that have been regarded to constitute authority and control under the ECHR is applied.

In *Al-Skeini*, the court held that under the personal model, the 'exercise of physical power and control over the person in question' was decisive in cases like *Öcalan, Issa* and *Al-Sadoon and Mufhdi*. A majority of the cases where the ECtHR has applied the personal model have concerned the detention and arrest of individuals, and thus contained an element of physical control.[131] It has further been held in academia that the threshold for the personal model is the exercise of physical control.[132] If a person was physically searched by a state's agents abroad, the search would, most likely, be considered an exercise of jurisdiction. However, surveillance can be performed with a great physical distance between the intercepting state and the victim. Accordingly, while surveillance in the form of a physical search probably would fall under the ECHR, virtual surveillance would not.[133]

However, there are several cases in which states were considered to exercise its jurisdiction without exercising physical control over the individual, such as *Pad, Jaloud* and *Al-Skeini*. In *Pad*, the applicants where shot from a helicopter, in *Jaloud* the applicant was shot as he passed through a Dutch controlled checkpoint, and in *Al-Skeini* the third applicant was shot in a gunfire.[134] Physical control, such as detention and arrests, is clearly one form of authority and control that amounts to jurisdiction. However, physical control cannot be considered the only type of exercise of authority and control that amounts to jurisdiction. So far, the personal model does not necessarily hinder the application of the ECHR on foreign surveillance.

In *Al-Skeini*, the court concluded that the United Kingdom had controlled the individual *because* they also controlled the area and thus exercised public

[130] The Venice Commission (n 112) para 6.
[131] *Öcalan v Turkey* (n 60); *Al-Saadoon and Mufhdi v the United Kingdom* (n 62); *Al-Jedda v the United Kingdom* No 27021/08 ECHR 2011*; Ramirez Sanchez v France* No 59459/00 ECHR 2006-IX.
[132] Oona A Hathaway and others, 'Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?' (2011) 43 Arizona State Law Journal 389, 406.
[133] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 122–123.
[134] *Pad v Turkey* (n 62)*; Al-Skeini v the United Kingdom* (n 59); *Jaloud v the Netherlands* [GC] No 47708/08 ECHR 2014.

powers normally exercised by the Ba'aht regime.[135] Evidently, the killing itself did not amount to authority and control. In *Pad*, in which the killing was sufficient to establish a jurisdictional link, Turkey did not contest that the applicants were within Turkey's jurisdiction. This implies that the threshold for what amounts to authority and control under the ECtHR case law is high when a state does not exercise physical or territorial control. Because of the difficulties in arguing that the interception of an individual's communications through SIGINT is the exercise of public powers, it is difficult to see how foreign mass surveillances interception would fall under the Convention.[136]

In the court's most recent case, *Jaloud*, the threshold for what amounts to authority and control seems to have been lowered. In *Jaloud*, the court found that the applicant was within Netherland's jurisdiction as he was shoot by Dutch military when passing in a vehicle through a check point controlled by the Netherlands. The Netherlands did not exercise effective control over the area, exercise any public powers normally exercised by the government or have physical control over Jaloud. Rather, the court found that the Netherlands exercised authority and control within the checkpoint, and that Jaloud had been brought within Netherland's jurisdiction as he passed through it.[137]

The court's findings in *Jaloud* have been interpreted as stating that Jaloud was within the Netherland's jurisdiction because they exercised authority and control over his rights in the moment of the violation. Thus, the state's ability to secure or violate the rights of Jaloud amounted to jurisdiction. If translated to foreign mass surveillance, a state's possibility of intercepting an individual's communications would result in an individual being under a state's jurisdiction.[138]

However, if a state had jurisdiction as soon as it had the ability to violate a person's rights, the threshold would become obsolete.[139] Or if interpreted more restrictively, it is possible to argue that an individual is within a state's jurisdiction because it exercises authority and control over that person's rights to privacy as it intercepts that person's communications. Put differently, the state controls the individual's right to privacy in the moment of the interception and the individual is therefore under the state's jurisdiction. However,

[135] *Al-Skeini v the United Kingdom* (n 59) paras 143–148; Marko Milanovic 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121, 130.
[136] Margulies (n 8) 2152.
[137] *Jaloud v the Netherlands* (n 134) para 152.
[138] Watt (n 37) 10.
[139] Friederycke Heijer and Cedric Ryngaert, 'Reflections on Jaloud v the Netherlands, Jurisdictional Consequences and Resonance in Dutch Society' (2015) Journal of International Peacekeeping 174, 180.

such an interpretation would be equivalent to saying that violating a right creates jurisdiction. Consequently, anyone affected by an act by a contracting party would be within the state's jurisdiction.[140] As I have argued in chapter 2.4, such an interpretation would make the threshold obsolete.

A case which might be easier to compare with foreign mass surveillance is the case of *Mohammed Ben El Mahi and Others v Denmark,* since the case also concerned a virtual violation. The applicants, all located or based in Morocco, lodged a complaint against Denmark for the publications of caricatures of the Prophet Muhammed by a Danish Newspaper. The court reiterated that jurisdiction under Article 1 ECHR is primarily territorial and that extraterritorial jurisdiction could arise when a state exercised effective control over an area outside its national territory, or when an individual is found under a state's control through its agents operating abroad. Without any further explanation, the court found that there was no jurisdictional link between the applicants and Denmark.[141] Thus, the ECtHR seems to have strictly limited the personal model to cases where state agents are physically present abroad.[142] Such limitation was further implied in *Al-Skeini*.[143] Accordingly, the application of the personal model to foreign bulk interception – or any other virtual human rights violations – is precluded.

Evidently, the ECtHR's previous application of the personal model does not easily apply to foreign mass surveillance. Therefore, academia has deemed the personal model inappropriate for such cases. Margulies, Georgieva, Watt, Bignami and Resta argues that the existing case law in which physical control and exercise of public powers have been considered the exercise authority and control, does not easily translate to virtual human rights violations.[144] Milanovic argues that the personal model cannot be limited and will thus ultimately collapse to a universal application of the Convention.[145] According to Huxtable, applying the personal model would simply mean that foreign surveillance is added to the list of ad hoc exceptions from territoriality.[146]

Notable, the ECtHR has indicated that the personal model can be applied to foreign mass surveillance. In *Big Brother Watch,* the applicants argued that

[140] Lea Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game Changers' (2016) 2 European Human Rights Law Review 161, 173.
[141] *Mohammed Ben El Mahi and Others v Denmark* (Dec) No 5853/06 ECHR 2006-XV.
[142] *Ben El Mahi v Denmark* (n 138); *Al-Skeini v the United Kingdom* (n 59) paras 134–137.
[143] *Al-Skeini v the United Kingdom* (n 59) para 136.
[144] Margulies (n 8) 2150; Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art 17 ICCPR and Art 8 ECHR' (2015) 31 Utrecht Journal of International and European Law 104, 113; Watt (n 37) 10; Bignami and Resta (n 35) 16.
[145] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 129.
[146] Huxtable (n 33) 102.

the intelligence sharing between the United States and the United Kingdom under the PRISM and Upstream project violated their right to privacy under Article 8 ECHR. The signals were collected by the United States National Security Agency, and thereafter shared with the United Kingdom which stored, examined and used the intelligence. Regarding what part of the conduct that was considered to constitute the interference, the ECtHR held:

> *'As the communications are being intercepted by foreign intelligence agencies, their interception could only engage the responsibility of the respondent State if it was exercising authority or control over those agencies'.*[147]

Accordingly, if the United Kingdom had exercised authority and control over the NSA, the interference would be within the United Kingdom's jurisdiction. By using the terms of 'authority and control', the ECtHR implies that the personal model could be applied. Evidently, although the personal model has been rejected in academia, the personal model seems to be favoured by the ECtHR. How the personal model could be interpreted in line with the ECtHR's statement, without merely adding foreign mass surveillance as a factual exception to the territoriality principle, is further explained in chapter 4.5.

3.4 Concluding Remarks

As shown in this chapter, both the spatial and personal model causes conceptual difficulties when applied to foreign surveillance. The ECtHR previous case law have mainly concerned military operations abroad and does not easily translate to the reality of foreign mass surveillance. Because of the difficulties in applying the spatial model and personal model to foreign mass surveillance, authors have deemed the existing models of application unsuitable for virtual human rights violations.

In this regard, I echo the authors who have concluded that the spatial model cannot be applied or adjusted for the purpose of applying to foreign mass surveillance. SIGINT does not involve factual control over a territory and would therefore not fall under the convention using the spatial model. By basing the jurisdiction on the location of the interference, violations would fall under the Convention if the violation is committed within the respondent state's territory. Accordingly, the ECHR would apply to transnational surveillance, but not extraterritorial surveillance. However, the spatial model is concerned with whether a state controls the area in which an individual is based. Thus, the location of the victim should remain the basis for the examination. The size of a territory can further not be shrunk to the size of an object without

[147] *Big Brother Watch v the United Kingdom* (n 1) para 420.

the spatial model contradicting the ordinary meaning of territory and the underlying rationale of the spatial model. Moreover, a territorial approach to the issue of surveillance is generally unsuitable as data knows no borders.

Likewise, authors have argued that the formulated thresholds for the personal model cannot be applied to foreign mass surveillance. SIGINT can be conducted by a state without ever physically interacting with the individual whose communications it is intercepting. Accordingly, foreign mass surveillance does not involve the exercise of public powers, physical control or state agents operating abroad. Although it has been argued that the threshold as of *Jaloud* is the exercise of control over a person's rights, such interpretation would make the notion of jurisdiction obsolete. Consequently, the acknowledged exercises of authority and control cannot be applied to foreign mass surveillance.

I agree with authors who argue that the personal model as defined today is not easily applied to foreign mass surveillance. Likewise, I agree with Huxtable that it would be unfortunate if the court simply added foreign surveillance to the list of factual exceptions from territoriality. However, according to the VCLT rules of treaty interpretation, the court's case law should not be considered an exhaustive list of when the Convention can be applied extraterritorially. The case law should rather be used for the purpose of establishing the underlying principles of the ECHR's applicability. Consequently, the acts which have constituted exercise of authority and control under the personal model is not an exhaustive list of acts that amounts to authority and control.[148] Put differently, the so far acknowledged acts of authority and control that can amount to extraterritorial jurisdiction are not criteria for application, but factual exceptions.

Consequently, the difficulties in applying the personal model is a result of the fact that the ECtHR has not defined power, authority and control properly. Chapter two highlighted that the ECtHR's interpretation of the ECHR's extraterritorial applicability lacks underlying principles. As a consequence, the application of the personal model proved unsuccessful. Therefore, I argue in chapter 4.5 that the personal model can be adjusted and consequently applied to foreign mass surveillance if defined correctly. As indicated in *Big Brother Watch,* the personal model could be applied to foreign mass surveillance. This can further be accomplished without contributing to the patchwork of the ECHR extraterritorial applicability created by the ECtHR and without making

[148] Alexander Orakhelashvilli, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 European Journal of International Law 529, 546.

the threshold criterion obsolete. However, this requires adjustments, or rather clarifications, to the personal model.

This chapter concludes that the spatial and personal model as defined in the ECtHR's case law cannot be applied to foreign surveillance, other than simply adding foreign surveillance as another factual exception to the territoriality principle. Because the existing models as defined in the ECtHR's case law does not capture violations committed through foreign mass surveillance, alternative models of application have been suggested. In the following chapter, alternative models are applied and evaluated.

4 Applying Alternative Models of Extraterritorial Application

4.1 Introduction

Chapter two proved that the existing models of extraterritorial application as defined in the ECtHR's case law cannot be applied to foreign mass surveillance. This chapter explores whether the shortcomings in the ECtHR interpretation of the ECHR's extraterritorial application, and consequently the application of the ECHR on foreign mass surveillance, can be solved by any of the alternative models. Firstly, alternative models suggested in academia are considered. These consist of the virtual model (chapter 4.2), the 'third model' (chapter 4.3) and the functional model (chapter 4.4). Thereafter, the personal model is revisited. By defining the notions of power, authority and control under the personal model, a normative model is introduced (chapter 4.5).

4.2 The Virtual Model

For the purpose of capturing violations conducted through foreign mass surveillance, a virtual model of application has been suggested in academia. The virtual model would function as an additional, third model. Essentially, just like the personal model equals the effective control over a person or the spatial model is the effective control over an area, the virtual model equals the effective control over communications.[149] The virtual model is argued to be based on the already existing effective control test, and to be given further legitimacy because of *Jaloud*. Watt argues that jurisdiction in *Jaloud* was established based on the state's control over the individual's rights at the moment of the violation.[150] Translated to surveillance, the intercepting state controls the individual's right to privacy in the moment of the interception, and that individual is therefore brought within the intercepting state's jurisdiction. This would enable the responsibility of the intercepting state even though another state controls the individual or the territory in which the individual is located.[151]

[149] Margulies (n 8) 2150; Georgieva (n 144) 113; Watt (n 36) 10; Bignami and Resta (n 35) 16.
[150] Watt (n 37) 10–12.
[151] Margulies (n 8) 2151.

Likewise, the International Commission of Jurists suggests an application of the ECHR based on the control over individuals' communications rather than the individual itself. In their submission to *Big Brother Watch* they argued that a state has jurisdiction because is exercises authority or control over individuals' information.[152] The statement by Human Rights Commissioner Pillay could be interpreted as suggesting a similar solution. In her report, Pillay held that states have jurisdiction when they exercise effective control over communications infrastructure. Thus, if a state exercises effective control over communications infrastructure, that state would have effective control over individuals' right to privacy and therefore jurisdiction.[153]

Above all, the virtual model captures virtual human rights violations, such as surveillance of electronic communications, which the current models of extraterritorial application fail to do. Given the globalization, the rapid technical advancements and the Convention as a living instrument, a virtual control test would correspond to recent developments. It would thus ensure an equal right to privacy, regardless of location. Especially considering the disconnect between the victim, the intercepting state and the location of the violation, the virtual control test is appealing as it is only concerned with a state's control over individuals' data. As argued in academia, it would be an effective model of application to capture violations committed digitally.[154]

However, the virtual model is flawed. Firstly, the virtual control test relies on an extensive interpretation of *Jaloud*, meaning an individual is within a state's jurisdiction if the state controls that individuals' rights at the moment of the violation. As I have previously argued, such an interpretation would make the threshold obsolete. The mere possibility of control over an individual's data should not be sufficient to establish jurisdiction.[155] Secondly, establishing an additional model would contribute to the patchwork, to use the words of Judge Bonello, of the ECtHR case law on extraterritorial application.[156] Thus, even if not equating control with the possibility of control, the virtual model is unsuitable. Rather than establishing a definition of jurisdiction which can be consistently applied, the virtual model accepts the courts faulty reasoning

[152] International Commission of Jurists, 'Big Brother Watch and Others v the United Kingdom: Written Submissions on Behalf of the International Commission of Jurists' (International Commission of Jurists, 9 February 2016) <https://www.icj.org/wp-content/uploads/2016/02/UK-ICJ-AmicusBrief-BBWothers-ECtHR-legalsubmission-2016.pdf> accessed 25 May 2020, 8.
[153] UN HRC, 'The Right to Privacy in the Digital Age, Report of the Office of the United Nations High Commissioner for Human Rights' (n 9) paras 33–35.
[154] Margulies (n 8) 2150; Georgieva (n 144) 113; Watt (n 36) 10; Bignami and Resta (n 35) 16.
[155] Jordan J Paust, 'Can You Hear Me Now?: Private Communication, National Security and the Human Rights Disconnect' (2015) 15 Chicago Journal of International Law 612, 625.
[156] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 5.

by adding an extra model to repair its deficiencies. Although the virtual model would effectively capture cases of signals interception, it is an unsatisfying solution to the problem of the extraterritorial application of the ECHR, which goes beyond communications surveillance.

4.3 The 'Third Model'

The second alternative model is Marko Milanovic's suggested 'third model'. Milanovic argues that the spatial model cannot be adjusted for the purpose of applying to foreign surveillance without 'collapsing' to the personal model.[157] Neither can the personal model be limited by any factors without such limitations having to be done arbitrarily. Because the spatial model is inclined to equal the personal model, and the personal model is inclined to equal a universal application of the ECHR, Milanovic suggests a third model to replace the existing models under the ECHR.[158] A similar approach have been suggested for the extraterritorial application of the ICCPR.[159]

The obligation to secure the rights according to Article 1 ECHR does not only oblige a state to refrain from violating individuals' rights, but also obliges a state to take positive actions to protect individuals from violations.[160] Because states generally need control over an area to be able to fulfil its positive obligations under the Convention, jurisdiction under the 'third model' would be defined as the effective, overall control over an area. However, a state can always choose to refrain from violating human rights. Under the 'third model' a state would be obliged to *secure and ensure*, and thus take positive actions for the protection of human rights, within the territory which it exercises de facto control over. Outside its territory, a state would only have the obligation to *respect* individuals' rights under the Convention, and thus only refrain from violating human rights.[161]

Accordingly, within its territory a state would have the obligation to secure and ensure individuals the rights of the Convention but whenever acting outside its territory it would only have the obligation to refrain from violating human rights. Notable, this is similar to the applicants reasoning in *Banković,* who claimed that the NATO members were not responsible for the whole range of rights under the Convention and 'do the impossible', but that the

[157] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 113–114.
[158] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 129.
[159] Harald Koh, 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights' (2010) United States Department of State, 4 <https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> accessed 25 May 2020.
[160] Lemmens (n 47) 11.
[161] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 210.

states still had an obligation to refrain from killing the individuals.[162] If applying this model to foreign surveillance, a state would have to respect individuals' right to privacy by not intercepting their communications, regardless of their locations. Additionally, they would have a positive obligation to secure the right to privacy of individuals located within the territory.[163]

The model has been well received because it would bring clarity and predictability to the application of the ECHR.[164] Although I agree that the model would bring well needed clarity, I do not see that it is compatible with the notion of jurisdiction. The main issue lies in how the 'third model' ties the ECHR's applicability to a state's national territory. The 'third model' would be using a territorial definition of jurisdiction which I, just like Milanovic himself, have argued is incorrect.[165]

Most importantly, the distinction between positive and negative obligations can already be found in the ECtHR case law. Thus, the replacement of existing models with the 'third model' is uncalled for. In *Al-Skeini*, the court stated that a state only have responsibilities under the Convention that are relevant to the situation.[166] Hence, a state does not have any positive obligations to secure *all* individuals rights as that is not relevant to each situation, but it has a negative obligation to refrain from interfering with a person's rights when it has the possibility. Consequently, the result of the personal model would be the same as applying the third model. Therefore, I do not see a need for the ECtHR to change its jurisprudence accordingly other than applying the Article 1 ECHR in accordance with *Al-Skeini*.

4.4 The Functional Model

In his concurring opinion to *Al-Skeini,* Judge Bonello suggested a functional understanding of jurisdiction. Rather than suggesting a new model, he advocated to 'stop the fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underline the fundamental functions of the Convention'. [167] Thus, the

[162] *Banković v Belgium* (n 3) para 47.
[163] Milanovic, 'Human Rights Treaties and Foreign Surveillance' (n 8) 123.
[164] See for example, Louise Henkin 'A Response to Milanovic' (Opinio Juris, 5 December 2011) <http://opiniojuris.org/2011/12/05/a-response-to-milanovic-2/> accessed 25 May 2020; Tilmann Altwicker, 'Transnationalizing Rights: International human Rights Law in Cross-Border Contexts' (2018) 29 The European Journal of International Law 581, 591.
[165] See chapter 3.3; Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 24–26.
[166] *Al-Skeini v the United Kingdom* (n 59) para 136.
[167] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 8.

functional approach to jurisdiction is not an additional model of extraterritorial application. The functional approach should perhaps not even be considered an alternative model, but rather an expression of fundamental principles of human rights law. For clarity, however, I will refer to this understanding of jurisdiction as the functional model.[168]

With a reference to the Preamble, stating that the ECHR aims at 'securing the universal and effective recognition and observance of the ECHR's rights, Bonello argues that the founders of the ECHR did not intend for a territorial limitation of the ECHR.[169] Jurisdiction should, according to Bonello, therefore be established when a state has authority and control in the sense that they are capable of fulfilling or not fulfilling its obligations under the Convention. States secure the rights of the ECHR through five functions; 1) By not violating human rights, 2) by having system that prevents human rights breaches, 3) by investigating alleged human rights breaches, 4) by holding agents of the state who commit human rights violations responsible and 5) by compensating the victims.[170] Using a functional test for jurisdiction, a state would be considered to exercise its jurisdiction when it has the power of performing these functions.[171] Similar to the third model, and as stated by the court in *Al-Skeini*, a state would only be responsible for the obligations which it can fulfil.[172]

Authority and control over these functions would consequently lead to a violation being within a state's jurisdiction. Under the functional model, the key question when establishing jurisdiction would be whether the violation was dependent on the action of state agents over which the state exercises authority and control. If 1) the violation depended on agents of the state, 2) the state could hold the perpetrators responsible and 3) the state could compensate the victims, the state has jurisdiction.[173] Judge Bonello's understanding of jurisdiction have been advocated by Huxtable as appropriate for applying on foreign mass surveillance. Huxtable argues that because foreign mass surveillance is dependent on acts of state agents, a state accordingly has the power to hold the perpetrators responsible and compensate the victim.[174]

If concluding that a state has the power to hold the perpetrators responsible and compensate the victims if the violation is dependent on the acts of the state agents, the only threshold for the functional model is that the violation

[168] Huxtable (n 33) 107.
[169] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 9.
[170] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 10.
[171] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 11.
[172] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 12.
[173] *Al-Skeini v the United Kingdom* (n 59) concurring opinion of Judge Bonello, para 10.
[174] Huxtable (n 33) 108.

was committed by a state's agents. The jurisdictional test would consequently be no different from the question of attribution. Consequently, the functional model would risk being tantamount to saying that violating a right, creates a right. I agree with Judge Bonello that the most appropriate solution to the jurisdiction issue is to seek answers in the underlying principles of human rights law and the notion of jurisdiction, rather than adding new models or factual circumstances that can amount to jurisdiction. However, merely demanding that the act was committed by a state agent which the state exercises authority and control over, would make the jurisdiction threshold obsolete.

4.5 The Normative Model

4.5.1 The Legal Framework

By detangling and defining power, control and authority, the personal model could effectively apply to foreign surveillance and remedy some of the shortcomings in the ECtHR's interpretation of the ECHR's extraterritorial applicability. The personal model means the exercise of authority and control over an individual. This understanding of the personal model is also concerned with the exercise of authority and control but adds a normative threshold. The personal model could under this interpretation function as the only model of application under the ECHR – both territorially and extraterritorially. Since the suggested model is essentially based on the personal model, but contains a normative threshold, I will in the following refer to this 'new' model as the normative model.

As demonstrated in chapter two, jurisdiction is the exercise of factual power over a territory or an individual. Under the personal model, factual power is the exercise of authority and control over an individual. This should be read in a conjunction. Thus, a state has jurisdiction only when it exercises authority *and* control.[175] Authority is defined as the power or right to give orders, make decisions and enforce obedience.[176] If used in the context of jurisdiction, authority could be described as jurisdiction to prescribe rules. Duttwiler argues that an authoritative act differentiates from mere control because it is carried out with the purpose of being binding for the individual.[177] Likewise, Raible suggests that jurisdiction is the exercise of factual power, and that factual

[175] Milanovic, *Extraterritorial Application of Human Rights Treaties* (n 10) 34.
[176] Oxford English Dictionary Online, entry 'authority' <https://www.oed.com/view/Entry/13349?redirectedFrom=authority#eid> accessed 25 May 2020.
[177] Duttwiler (n 89) 156.

power is the application of rules and the potential for control.[178] In his concurring opinion to the case of *Assainidze v Georgia*, Judge Loucaides suggested a similar understanding of jurisdiction:

> *'[J]urisdiction means actual authority, that is to say the possibility of imposing the will of a state on any person, whether exercised within the territory of the High Contracting Party or outside that territory. Therefore, a High Contracting Party is accountable under the Convention to everyone directly affected by any exercise of authority by such in any part of the world. Such authority may take different forms and may be legal or illegal.*[179]

According to Loucaides description of jurisdiction, actual authority is the state's possibility of imposing its will on an individual.

Control, on the other hand, means the power to influence or direct peoples' behaviour or the course of events.[180] Accordingly, control could be described as the jurisdiction to enforce rules.[181] Hence, control is necessary for a state to enforce its prescribed rules on an individual. Duttwiler describes this understanding of factual control as follows:

> *'Specifically coined for jurisdiction understood as the power to prescribe conduct, control is a State's capacity to bring a person's conduct in line with the conduct required by the State. Only where a State possesses such control, does it possess actual authority. And only where it possesses actual authority, can it exercise jurisdiction.'*[182]

Thus, a state needs to strive towards influencing an individual's behavior, as well as having the capacity to do so for it to be considered to exercise its jurisdiction. As power is defined as the ability to act or affect someone or the capacity to direct and influence the behavior, the control does not need to be exercised.[183] The potential of enforcing its prescribed rules is, similar to what Raible suggests, sufficient.[184] The requirement of control does consequently not refer to the control over the individual, but the control over enforcing its rules and affecting an individual's rights.[185]

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[178] Raible, 'The Extraterritoriality of the ECHR' (n 140) 174–176.
[179] *Assanidze v Georgia* No 71503/01 ECHR 2004-II, Concurring opinion of judge Loucaides.
[180] Oxford English Dictionary Online, entry 'control' <https://www.oed.com/view/Entry/40563?rskey=xLyw9q&result=2&isAdvanced=false#eid> accessed 25 May 2020.
[181] Duttwiler (n 89) 156.
[182] Duttwiler (n 89) 160.
[183] Oxford English Dictionary Online, entry 'power, <https://www.oed.com/view/Entry/149167?rskey=Tr5EmD&result=1&isAdvanced=false#eid> accessed 25 May 2020.
[184] Raible, 'The Extraterritoriality of the ECHR' (n 140) 174–176.
[185] Duttwiler (n 89) 160.

The criterion of legal or political authority and control should not be interpreted as requiring that the act was in accordance with domestic rules. Such an interpretation would limit the scope of application to actions performed in accordance with domestic laws, which chapter two argued is incorrect given that many violations are unlawfully committed.[186] A state's conduct does not need to be lawful to be considered the exercise of authority, but the power needs to be claimed to be exercised legitimate. Consequently, it is sufficient that the act is conducted by a state's agents or that the order comes from an authority. Thus, the threshold for what is considered authority is low.[187]

However, authority and control are not merely the exercise of power, but contains a normative element, as suggested by Besson. Put differently, a state must strive towards imposing its will on an individual, appeal for compliance or apply its rules.[188] Under Loucaide's understanding of jurisdiction, the normative element lies in the act of authority, through which a state's will is expressed. Under Raible's, Duttwiler's and Besson's understanding of jurisdiction, a state strives towards influencing the individual's behaviour through applying its rules.[189] This understanding of jurisdiction can be argued to already exist under the ECHR. In the ECtHR case law, the normative criterion has been established by the finding that a state exercised public powers, controlled the territory or had physical control over an individual.[190]

Under this understanding of jurisdiction, the spatial model does not exist. Power can be had without being exercised, and the ECtHR has therefore found proxies for the exercise of factual power, as explained by Raible.[191] Thus, if a state controls the territory, the state is presumed to exercise authority and control since a state normally exercises authority and control within its territory. It is consequently the exercise of authority and control that is

[186] Cedric Ryngaert, 'LJIL Symposiom: Response to Samantha Besson' (Opinio Juris, 21 December 2010) <http://opiniojuris.org/2012/12/21/ljil-symposium-response-to-samantha-besson/> accessed 25 May 2020; Marko Milanovic, 'LJIL Symposium: A Comment on Samantha Besson's Article on the Extraterritorial Application of the ECHR' (Opinio Juris, 21 December 2010) <http://opiniojuris.org/2012/12/21/ljil-symposium-a-comment-on-samantha-bessons-article-on-the-extraterritorial-application-of-the-echr/> accessed 25 May 2020.
[187] Duttwiler (n 89) 157; Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 865.
[188] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 865.
[189] Raible, 'The Extraterritoriality of the ECHR' (n 140) 176–177.
[190] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 873; Raible, 'The Extraterritoriality of the ECHR' (n 140) 176.
[191] Raible, 'The Extraterritoriality of the ECHR' (n 140) 174.

decisive when establishing whether there is a jurisdictional link, both territorially and extraterritorially.[192] Conversely, if a state is prevented from exercising authority within its territory, as was the case of *Ilaşcu v Moldova and Russia*, that state does no longer exercise jurisdiction.[193] The decisive criterion is thus not the territory or control over an individual, but whether a state exercises normative authority and control. Consequently, the only model of extraterritorial application under the ECHR is the personal model.

4.5.2 Applying the Normative Model

The question is then how this model could be applied to foreign mass surveillance. Mass surveillance is an act of authority, whether conducted in accordance with domestic laws or not. The possibility of performing the surveillance equals control. Control does not necessarily mean the control over an individual, as suggested in the virtual model, but a state's power to actually impose its will on an individual by performing the act itself. Thus, the state must have control over the intelligence agency performing the surveillance, the communications infrastructure or over an individual's data to enforce its authority. This reasoning is in line with the courts finding in *Big Brother Watch*, in which the court held that the interception of signals by the NSA would be within the United Kingdom's jurisdiction if the United Kingdom exercised authority and control over the NSA.[194] Conversely, if the control over the intelligence agencies of another state equals jurisdiction, the control over its own intelligence agencies should do the same.

By defining control as the possibility to enforce its authority, jurisdiction can arise before the violation occurs. In accordance with *Al-Skeini*, and as suggested in the third model, a state would only be responsible for the rights relevant to the situation. Thus, a state would have the obligation to refrain from intercepting individuals' communications.[195]

The following question is what normative element the act of foreign mass surveillance has. The UN HRC has previously highlighted the chilling effects that surveillance has on individuals' communication behaviours and how it

[192] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 863; Heijer and Lawson (n 87) 165; Raible, 'The Extraterritoriality of the ECHR' (n 140) 174.
[193] Kjetil Mujezinović Larsen, ''Territorial Non-Application' of the European Convention on Human Rights' (2009) 78 Nordic Journal of International Law 73, 81–82.
[194] *Big Brother Watch v the United Kingdom* (n 1) para 420.
[195] Samantha Besson, 'LILJ Symposium: A Response by Samantha Besson' (Opinio Juris, 21 December 2012) <http://opiniojuris.org/2012/12/21/ljil-symposium-a-response-by-samantha-besson/>, accessed 25 May 2020.

infringes the right to freedom of speech, information, religion and assembly.[196] Mass surveillance is performed on a large scale worldwide for the purpose of monitor and, if found necessary, correcting peoples' behaviours. In the light of the above, foreign mass surveillance should be considered normative. The issue lies in whether it is possible to argue that the mere collection of data will influence someone's behavior, especially when a majority are not aware that they are being listened to.[197] A large number of signals are intercepted, but only a small amount is processed, analyzed, stored or communicated. This understanding of jurisdiction could thus result in mass collection not falling under the Convention.

The normative model is similar to Altwickers suggested model of effective control over situations. Under this model, a state exercises its jurisdiction by controlling the circumstances of a transnational situation. Altwicker argues that by adding a normative criterion, the model is limited so that the notion of jurisdiction does not become obsolete. The normative criteria consist of a sufficient normative relationship between the rights holder and the duty bearer. The relationship is sufficient if three criteria can be established; 1) An identifiable person or a group of rights bearers, 2) identifiable duty bearers and 3) a time- and space-specific event or series of events.[198] Using these three criterions, only targeted surveillance meet the requirement of an identifiable rights bearer. Accordingly, individuals who are victim of mass surveillance are not identifiable rights bearers.[199] Consequently, mass surveillance is not a sufficient normative relationship to establish a jurisdictional link.

However, I do not agree with Altwicker that mass surveillance lacks identifiable rights bearers. Although the information is collected in bulk, there will still be identifiable individuals having their communications intercepted. The ECtHR held in the case *Centrum för rättvisa v Sweden* that secret systems of signals surveillance potentially affect all users of electronic communication devices.[200] The width of the surveillance conducted by states today, entails that the mere existence of surveillance is enough to change individuals' behaviors, as proved by the UN HRC.[201] Thus, the collection should be seen as

[196] UN HRC, thirteenth session, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (28 December 2009) A/HRC/13/37; UN HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (n 16) 7–9; Lyon (n 4) 61.
[197] Paust (n 155) 625.
[198] Altwicker (n 164) 590.
[199] Altwicker (n 164) 593.
[200] *Centrum för rättvisa v Sweden* (n 1) para 94.
[201] UN HRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (n 196); UN

a general appeal that can be considered normative. Consequently, because of how the mere existence of surveillance regimes affects individuals' communication behaviours and their right to right to freedom of speech, information, religion and assembly, the conduct of foreign mass surveillance is normative.

4.6 Concluding Remarks

In this chapter, alternative models of extraterritorial application have been applied to foreign mass surveillance. Although the virtual model and the 'third model' would effectively capture the issue, they proved inappropriate for several reasons. The virtual model lacks legal support and would contribute to the patchwork of the ECHR's extraterritorial application. Milanovic's 'third model' would oblige states to refrain from interfering in people's right to privacy. However, the territorial focus of the 'third model' is not compatible with the definition of jurisdiction. Notable, one can claim that the 'third model' already exists. In *Al-Skeini*, the court expressively stated that the rights could be 'divided and tailored', meaning that a state is only responsible for the rights relevant to the situation.

For the purpose of capturing human rights violations committed through foreign mass surveillance, one does not need to add or replace models of application, but rather (re)define jurisdiction. The functional model attempts to fix the issues of the ECHR's extraterritorial applicability by identifying the underlying principles of human rights. However, the functional model relies heavily on the criterion of whether the act was performed by state agents controlled by the state. Thus, the separate issues of attribution of responsibility and jurisdiction are confused by stating that violating a right, creates a right.

I have in this chapter argued that by detangling the notions of power, authority and control, the normative model – which is essentially based on the personal model – can be applied. Accordingly, jurisdiction is the exercise of factual power, and the exercise of power is the exercise of authority and control. In accordance with the words' ordinary meaning, authority should be described as the power to prescribe rules and control as the power to enforce them. This does not mean that jurisdiction is the exercise of de jure control. Rather, by equating the order of an authority or a state agent to the application of rules, the threshold is lowered.

The mere exercise of authority and control is not sufficient for jurisdiction to be established. If it was considered sufficient, the normative model would

HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (n 16).

entail the same issues as the functional model, under which violating a right creates a right. For jurisdiction to arise, the act of authority must be normative. Hence, the act must be normative in the sense that it imposes a state's will or influence the behaviour of the individual. By adding a normative threshold, the notion of jurisdiction under Article 1 ECHR does not become obsolete. The normative criterion puts a further emphasis on the relationship between the holder of human rights and the duty-bearers, which I in chapter 3.3.2 argued is the correct understanding of jurisdiction. If the state has the possibility to exercise its normative authority, the state has jurisdiction and thus responsibility for the rights relevant to the situtition.

Under this understanding of jurisdiction, only one model of application exists. Similar to what Raible and Besson argues, territory, physical custody and exercise of public powers are rather proxies, or functions, of jurisdiction.[202] The finding that a state controlled the territory or the finding that the state exercised public powers is under this understanding of jurisdiction a mere method for establishing that authority and control was exercised. Thus, the existing proxies in the ECHR is not to be considered an exhaustive list of what type of authority and control that amounts to jurisdiction. The normative model, or the personal model with an acknowledged normative threshold, would apply equally territorially and extraterritorially. While authority within the territory would be assumed, authority outside the territory would have to be proven.

[202] Besson, 'The Extraterritoriality of the European Convention on Human Rights' (n 82) 863; Raible 'The Extraterritoriality of the ECHR' (n 140) 176.

5 Findings and Conclusions

Foreign surveillance of communications is conducted on a large scale and is generally unregulated in international law. Thus, the applicability of human rights treaties to foreign surveillance is crucial for individual's right to privacy. In *Liberty* and *Big Brother Watch*, the court assumed that the ECHR applied, despite the fact that the victim was located outside the intercepting state's territory. In *Big Brother Watch*, the court similarly held that a state would be considered to exercise its jurisdiction if it exercised authority and control over a foreign intelligence agency, despite the fact that both the victim, the interference and the collecting intelligence agency were located outside the state's national territory. The ECtHR has thus on multiple occasions implied that the ECHR applies to foreign mass surveillance. Therefore, this thesis was built on the presumption that the ECHR *should* apply to foreign mass surveillance.

Building on the above, this thesis aimed to answer *how* the ECHR can be applied. Thus, this dissertation aimed at providing clarity regarding the legal basis of the extraterritorial applicability of the ECHR on cases of foreign mass surveillance. By examining the underlying principles of the ECHR's extraterritorial applicability and applying both existing and alternative models of extraterritorial application, this thesis concludes that, theoretically, both existing and alternative models, *could* be applied to foreign mass surveillance. The existing models could be adjusted for the purpose, and alternative models could be added. Consequently, the core issue is rather which model is the most appropriate for the purpose of applying on foreign mass surveillance. By interpreting the notion of jurisdiction and by evaluating the strength and weaknesses of different models of extraterritorial application, this thesis has proved that several of the methods are inadequate; They would either not apply to foreign mass surveillance or make the threshold of jurisdiction obsolete for the purpose.

This thesis has argued that the ECtHR's understanding of jurisdiction leads to a more restrictive application of the ECHR, than the notion of jurisdiction actually entails. By applying the ECtHR's narrow interpretation of jurisdiction, this thesis concludes that foreign surveillance is not covered by either the spatial or the personal model. This thesis argues that the spatial model cannot apply to virtual violations; Foreign surveillance does not involve control over territory, an object is not equivalent to a territory and the possible threefold locational disconnect between the victim, the interference and the

intercepting state makes the territorial focus generally unsuitable for virtual violations.

Previous authors have similarly argued that foreign surveillance does not fulfil the requirements of physical control and exercise of public powers under the personal model. Therefore, existing models of application have been deemed unsuitable for the purpose applying to virtual human rights violations generally, and violations due to foreign mass surveillance specifically. However, according to the VCLT rules, the previous cases of extraterritorial application are not to be considered requirements for application or underlying principles of application, but rather exceptions from the territoriality principle. Simply applying the acknowledged exceptions from territoriality is consequently not the correct way to approach the issue. Therefore, I have argued that the personal model could be applied if defined properly, which I have referred to as the normative model.

The normative model takes is stance in a (re)interpretation of the notion of jurisdiction. Unlike the ECtHR have concluded, jurisdiction is not primarily territorial. Neither does the term jurisdiction under Article 1 ECHR serve to determine whether a state has the right to apply its domestic rules or regulate the implications of jurisdiction. Rather, it seeks to determine whether jurisdiction exists. This is not a question of application of domestic rules, but a question of exercised factual power. According to the personal model, factual power is exercised when a state exercises authority and control. While authority is the legal or political authority to prescribe rules, give orders or enforce obedience, control is the possibility of influencing people's behaviour in accordance with the prescribed rules. Accordingly, I have argued that jurisdiction has a normative criterion. A state must thus impose its will, appeal for compliance or apply its rules for the purpose of effecting individuals' behaviour to be considered to exercise its jurisdiction.

The normative model would effectively capture foreign mass surveillance, and thus give individuals located outside the territory an equal right to have their privacy respected as individuals who are located within the territory. The act of intercepting an individual's communication is under this understanding of jurisdiction a normative authoritative act which the intercepting states controls. Thus, jurisdiction is the factual relationship of power rather than the location of an individual. Transnational and extraterritorial surveillance would, accordingly fall under the Convention. The normative threshold would further prevent the notion of jurisdiction from becoming obsolete and consequently human rights universal.

I have argued that the personal model is the only model that exists under the ECHR. However, the normative model contains elements from several of the examined models. The element of control is essentially defined equally under the virtual model, the functional and the normative model: If the intercepting state has the potential of intercepting an individual's communications, the state has jurisdiction. Further, a state would only have the obligation to refrain from intercepting individuals' communications, as found in *Al-Skeini* and suggested in the virtual and third model. However, instead of adding a third model which equals effective control over communications or differentiates between positive and negative obligations, it is based on the ascertained underlying principles of jurisdiction and could function as the only model. Although I have argued that the spatial model should not be considered a model, the exercise of control over territory would lead to control over individuals.

However, what the court should do and what the court will do, are two separate questions. As I see it, the court has two options. The first option is to maintain that jurisdiction is primarily territorial and continue on the patchwork by simply adding foreign mass surveillance to the list of acts that amounts to authority and control. Thus, jurisdiction would be established using the personal model. Jurisdiction would accordingly still be considered territorial, and extraterritorial jurisdiction would still be exceptional. This option would not bring much clarity for other types of extraterritorial acts. Instead, a new examination on the facts of the case would have to be conducted before the question could be answered. Considering the ECtHR's statement in *Big Brother Watch*, it is, unfortunately, likely that the court will choose this path.

The second option is for the ECtHR to review its case law on extraterritorial application and redefine jurisdiction under the ECHR. I argue that by doing so, they will find that jurisdiction is not territorial and that there only exists one model of application: The personal model with an added normative criterion, or the normative model as I have called it. The personal model is not merely the exercise of authority and control, limited by factual circumstances, but limited by a normative threshold. To begin with, of course, jurisdiction as factual power would have to be acknowledged by the ECtHR. The court would further have to acknowledge that jurisdiction is not primarily territorial, which would be a major change to the court's jurisprudence. By such an alteration, foreign mass surveillance would fall under the Convention. Perhaps more important, such an interpretation would remedy many of the shortcomings as regards to the ECHR extraterritorial application.

The application of the ECHR to foreign mass surveillance does not mean that foreign mass surveillance is forbidden as such. States would still enjoy a wide margin of appreciation and be allowed to conduct mass surveillance but

would be obliged to ensure the safeguard required by the Convention. This thesis has examined *how* the ECHR can be applied extraterritorially to foreign surveillance, and thus concluded that the ECHR *can* be applied to several, more or less appropriate, basis. The question of whether the ECHR *should* be applied by taking into account the collective interests of state's conduct of foreign mass surveillance is perhaps the most interesting question, but a question for a different text.

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