

'Impact on rights' as a form of extraterritorial jurisdiction: a new legal restriction on border controls through international cooperation

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Abstract: International cooperation with partner states in regions of origin and transit of migrants and refugees has become one of the main priorities for the EU member states' migration policies, including Spain. These practices take different forms: this contribution will look at the provision of funding, equipment, training, or assistance to other states to exert exit controls and intercept refugees. These practices have brought significant challenges for the existing protection mechanisms of human rights and refugee law. Among them, the identification of extraterritorial jurisdiction is highly problematic due to the lack of physical contact between the sponsoring state and the individuals concerned. The Human Rights Committee (HRC) in its General Comment 36 has provided a new basis for the establishment of the extraterritorial jurisdiction of the states that could be added to the current legal strategies to make sponsoring states responsible for cooperative deterrence practices. The aim of this contribution is analyze this this new basis of jurisdiction, under which the Covenant would be applicable to actions of states, whether within or outside their territories, which have a 'direct and reasonably foreseeable impact on the right to life.'

Keywords: Extraterritorial Jurisdiction Externalization of Border Controls Cooperative Deterrence General Comment 36.

(A) INTRODUCTION: CONTROLLING EUROPEAN BORDERS THROUGH INTERNATIONAL COOPERATION

International cooperation with partner states in regions of origin and transit of migrants and refugees has become one of the main priorities for the EU member states' migration policies. In the last few decades, these states have developed a broad range of initiatives which intend to transfer to third countries the execution of border control activities, with the ultimate goal of reducing the number of spontaneous arrivals to their own territories. Through this so-called new generation of cooperation-based *non-entrée* policies, EU states achieve the double objective of containing migratory movements in regions of origin and transit and avoiding any responsibility for the deterrence of refugees and persons entitled to international protection.¹ The EU-Turkey Joint Action Plan and Statement² and the Italy-Libya Memorandum of Understanding³ are paradigmatic examples of this trend.

Since the beginning of the new century, Spain has led the movement toward developing cooperation agreements with third states. Indeed, Spain's conduct has been referred as a model of 'good practice' that

* Article published on 31 December 2019

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¹ T. Gammeltoft-Hansen and J.C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbia Journal of Transnational Law* (2015) 235-284, at 243.

² EU-Turkey joint action plan, 15 October 2015, MEMOE/15/5860; EU - Turkey Statement, 18 March 2016.

³ Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017.

has inspired the EU's external approach to migration management.⁴ Spain has signed migration agreements and MoUs with almost every origin and transit migration country in the Maghreb and West Africa. Morocco has been described as the 'best gendarme of the Spanish South border.'⁵ Lately, Spain's efforts have been focused on Senegal and Mauritania.⁶ Spanish practice takes different forms, including the donation of funds and equipment such as patrol boats, helicopters, computers, and communication systems;⁷ the training of national officials and security forces on issues related to border controls;⁸ the creation of networks of national satellite communication centers to coordinate interception of boats; and the provision of development cooperation funds.⁹ This model of migration management has been considered a success, resulting in a dramatic drop of arrivals to Spanish shores, especially in the Canary Islands during the Cayucos crisis.¹⁰

Spanish and European authorities' enthusiasm regarding the success of Spanish migration policy contrasts with their ignorance regarding the consequences for the rights of migrants and refugees. We cannot ignore the high number of migrants who have lost their lives trying to reach Spanish soil. In September and October 2005, 11 immigrants were shot and killed by Moroccan gendarmes when they were crossing the fences in Ceuta and Melilla, incidents that caused the intervention of the European Commission.¹¹ There were further fatalities in 2006 and 2009 as a result of Moroccan security forces repelling border crossing attempts.¹² Indeed, it has been argued that there is a direct link between the strengthening of the use of force by the Moroccan security forces to combat fence climbing and the increase of Spanish funds to Moroccan border control.¹³ A report by the Spanish CSIC and the UN Refugee Agency from January 2019 shows that 48% of the people traveling to Spain through Morocco were victims of abuses in Morocco (especially in the areas close to Ceuta and Melilla), including physical

⁴ El País, 'La UE sitúa a España como ejemplo de control de flujos migratorio', 24 April 2015.

⁵ Asociación Pro Derechos Humanos de Andalucía-APDHA, *Derechos Humanos en la Frontera Sur 2015* (APDHA, 2015), at 35.

⁶ C. González Enriquez, P. Lisa, A. Selin Okyay and A. Palm, 'Italian and Spanish approaches to external migration management in the Sahel: venues for cooperation and coherence', *Real Instituto Elcano Working Paper* 13/2018, at 17.

⁷ Some of them materialized through the concession of extraordinary subventions: Real Decreto 845/2006, de 7 de julio, por el que se regula la concesión de una subvención extraordinaria al Reino de Marruecos para la mejora del control de sus fronteras y lucha contra la emigración ilegal (BOE 162, 8 July 2006). Real Decreto n° 187/2007, de 9 de febrero, por el que se regula la concesión de una subvención extraordinaria a la República Islámica de Mauritania para la mejora del control de sus fronteras y la lucha contra la emigración ilegal (BOE 39, 14 February 2007).

⁸ This is one of the aims of the [BLUESAHEL](#) programme financed by EU.

⁹ The provision of Development Cooperation has been implemented through the 'Plan Africa'. The III Plan África was launched in 2019. One of its strategic aims is 'Orderly, safe and regular mobility'. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, *III Plan África. España y África: desafío y oportunidad* (Gobierno de España, 2019), at 65-67.

¹⁰ More than 30,000 migrants arrived in 2006 to the Canary Islands vs. 400 migrants in 2017. Ministerio del Interior, *Balance de la lucha contra la inmigración ilegal 2007* (Ministerio del Interior, 2008); Ministerio del Interior, *Inmigración irregular. Informe Quincenal. Datos acumulados del 1 de enero al 31 de diciembre de 2018* (Ministerio del Interior, 2018). Ministerio del Interior, 'Jorge Fernández Díaz ensalza la gran experiencia de España en la lucha contra la inmigración irregular que la sitúa a la vanguardia de la Unión Europea', Press Statement, 16 October 2013.

¹¹ European Commission, *Visit to Ceuta and Melilla – Mission Report Technical mission to Morocco on illegal immigration, 7th October – 11th October 2005*, MEMO/05/380, 19 October 2005, at 1 y 7.

¹² ABC, '[Al menos 27 inmigrantes han fallecido desde 2005 tras los asaltos a la valla](#)', 6 February 2014.

¹³ T. Spijkerboer, 'The Human Costs of Border Control', 9 *European Journal of Migration and Law* (2007), at 130 and 139.

violence and being forcibly moved by authorities to areas in southern Morocco.¹⁴

In addition, the intensification of border controls by partner countries blocks the path of migrants and refugees to European territory and is one of the causes of the diversification of migration routes to Spain. The Strait of Gibraltar, as a migration route, has been displaced by massive border crossings over Ceuta and Melilla's fences and other much longer and more dangerous sea routes to the Canary Islands from the coasts of Senegal and Mauritania.¹⁵ The diversification of the routes is one of the reasons for Spain's more recent cooperative efforts with the latter countries.¹⁶

These practices have brought significant challenges for the existing protection mechanisms of human rights and refugee law – to the point that some scholars refer to a 'crucial turning point' in the legal practice.¹⁷ One of the most problematic legal consequences is the diffusion and denial of responsibility by the sponsoring states, as these practices avoid any physical contact with migrants and refugees.¹⁸ Hence, the responsibility for migration control is shifted to countries outside the EU. According to the UN Special Rapporteur on the human rights of migrants, this shift is not accompanied by appropriate human rights guarantees since the emphasis is put in the strengthening of the capacity of third countries to stop irregular migrants exiting their territories rather than the ensuring of protection for the rights of the migrants through legitimate migration control processes.¹⁹

In addition to creating accountability gaps, from the perspective of human rights extraterritorial jurisdiction, these agreements fall outside the scope of the notion of jurisdiction as interpreted until now by human rights bodies and courts. Providing equipment, training, or economic assistance to partner states does not, in principle, amount to an exercise of *power, effective control, or authority over individuals*, making identification of the jurisdiction of the sponsoring states problematic. If jurisdiction is not established, the premise for the applicability of the main human rights treaties is not fulfilled. The main purpose of this article is to examine a new strategy for legal research in order to overcome the limitations of current models of extraterritorial jurisdiction: the notion of 'effect or impact on rights' incorporated by the Human Rights Committee (HRC) in its General Comment (GC) 36 on Article 6 of the ICCPR (right to life).²⁰ The HRC's newly expressed basis for the establishment of extraterritorial jurisdiction expands

¹⁴ CSIC and UNHCR, *Refugees and Migrants arriving in Spain* (Gobierno de España, 2019), at 26–30.

¹⁵ European Commission, *supra* n. 11, at 4; T. Spijkerboer, *supra* n. 13, at 130.

¹⁶ P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers, 2010), at 319.

¹⁷ T. Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', 20 *European Journal of Migration and Law* (2018) 373–395, at 375.

¹⁸ V. Moreno-Lax and M. Lemberg-Pedersen, 'Border-induced displacement: The ethical and legal implications of distance-creation through externalization', 56 *Questions of International Law* (2019) 5–33, at 18. V. Moreno-Lax and M. Giuffré, 'The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless responsibility' for Forced Migration Flows' in S. Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 82–108.

¹⁹ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, A/HRC/23/46, 59.

²⁰ Adopted by the Committee at its 127th session (8 October – 2 November 2018), CCPR/C/GC/36.

the spatial scope of the ICCPR as compared to the Committee's approach in its GC 31.²¹

Section B will examine the evolution of the meaning of extraterritorial jurisdiction in the work of the HRC, and section C will analyze the notion of 'impact on rights' as a new legal strategy to bring individuals under the jurisdiction of the EU states when they engage other countries in border control activities. The overall conclusion of this article (section D) is that 'impact on rights' is a newly emerging basis for the establishment of the extraterritorial jurisdiction of the states that could be added to the current legal strategies to make sponsoring states responsible for cooperative deterrence practices.

(B) EXTRATERRITORIAL JURISDICTION IN THE VIEW OF THE HUMAN RIGHTS COMMITTEE: FROM POWER OR EFFECTIVE CONTROL OVER INDIVIDUALS TO MERE 'IMPACT ON RIGHTS'

Jurisdiction determines the spatial scope of human rights treaties. A state party to the ECHR or the ICCPR must respect and ensure its rights and freedoms to 'everyone within their jurisdiction'²² or 'all individuals within its territory and subject to its jurisdiction.'²³ When a state exercises its jurisdiction, these main human rights treaties apply. As a general principle, jurisdiction is presumed to be exercised normally throughout the state's territory, but it is well established that human rights treaties are also applicable to extraterritorial activities of the states under certain circumstances.²⁴

International courts have developed a significant body of jurisprudence on the extraterritorial application of human rights treaties in a variety of different situations, including the acts of diplomatic and consular agents in foreign territory,²⁵ military interventions and occupation,²⁶ the detention and custody of

²¹ General Comment 31 on the nature of the general legal obligation imposed on States Parties to the Covenant, adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13 (GC 31), 10.

²² Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4th November 1950, Art. 1.

²³ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Art 2.1.

²⁴ J. Abriketa and M. Nagore Casas, 'Extraterritorial Application of Human Rights Treaties', *Oxford Bibliographies in International Law* (2016); K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers, 2013); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersectia, 2009); J. A. González Vega, '¿Colmando los Espacios de «No Derecho» en el Convenio Europeo de Derechos Humanos? Su eficacia extraterritorial a la luz de la jurisprudencia', *XXIV Anuario Español de Derecho Internacional* (2008) 141-175; M. Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy* (Oxford, 2011); S. Morgades Gil, 'La aplicación extraterritorial del Convenio Europeo de Derechos Humanos y Libertades Fundamentales: El Concepto de Jurisdicción en Perspectiva Cosmopolita', in C. García Segura (dir.) *La Tensión Cosmopolita. Avances y Límites en la Institucionalización del Cosmopolitismo* (Tecnos, 2016) 158-159.

²⁵ *M. c. Dinamarca*, European Commission of Human Rights, decision on the admissibility, App. 17392/90, 14 October 1992.

²⁶ *Issa and others v. Turkey*, ECtHR, App. 31821/96, 19 October 2004; *Mansur Pad and Others v. Turkey*, ECtHR, App. 60167/00 (admissibility), 28 June 2007; *Isaak v. Turkey*, ECtHR, App. 44587/98, 3 June 2009; *Solomou c. Turkey*, ECtHR, App. 36832/97, 3 June 2008; *Al-Skeini and others v. U.K.*, ECtHR, App. 55721/07, 15 June 2011; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004.

individuals abroad,²⁷ the interception of vessels on the high seas,²⁸ and international peace-keeping or peace-enforcement operations.²⁹ With the exception of a few cases, notably *Hirsi Jamaa*, there is little jurisprudence concerning the legal implications of the extraterritorial border control activities of states.³⁰ The Court that has contributed the most to the creation of this body of jurisprudence is the European Court of Human Rights, which has developed three different models of jurisdiction: the *territorial* model, based on the effective control over an area or territory; the *personal* model, based on the exercise of state agent authority and control over individuals; and a mixed model, based on the exercise of *public powers* abroad.³¹ Throughout its multiple decisions, it has described extraterritorial jurisdiction as exerting 'effective control,' 'effective overall control,' 'decisive influence,' a 'high level of dependency or integration,' and 'state agent authority and control.' This variety in terminology has provoked strong criticism from scholars who believe that ECtHR's sentences suffer from 'rampant casuistry and conceptual chaos.'³²

Conversely, the interpretation of the meaning of *jurisdiction* in art. 2(i) of the ICCPR has not undergone major changes since the HRC's early decisions on individual communications as compared to the European Court of Human Rights. An explanation could be that the efforts of the Committee have been focused more on the clarification of the particular wording of the jurisdictional clause than on the meaning of jurisdiction. According to art. 2(i) ICCPR, each state party undertakes 'to respect and to ensure to all individuals *within its territory and subject to its jurisdiction*' the rights recognized in the Covenant. The main debate concerning the ICCPR's spatial application has been the conjunctive or disjunctive reading of this clause, that is, whether both *territory* and *submission to jurisdiction* are requirements that have to be jointly appreciated for the application of the ICCPR or the occurrence of one of them is enough (either the presence of the individuals in the territory of the state or the exercise of jurisdiction by the state over individuals regardless of where they are located).

Certain states, such as the United States and Israel, have consistently opposed the extraterritorial

²⁷ *Sergio Euben López Burgos v. Uruguay*, HRC, Com. R12/52 (A/36/40), 29 July 1981 (*López Burgos*); *Lilian Celiberti de Casariego v. Uruguay*, HRC, Com. 56/1979, CCPR/C/13/D/56/1979, 29 July 1981 (*Celiberti de Casariego*); General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, par. 63; *Illich Sánchez Ramírez v. France*, European Commission of Human Rights, App. 28780/95 (admissibility), 24 June 1996; *Ilascu and others v. Moldova and Russia*, ECtHR, App. 48787/99, 7 May 2004; *Öcalan v. Turkey*, ECtHR, App. 46221/99, 22 April 2005; *Ivanov and others v. Moldova and Russia*, ECtHR, App. 23687/05, 18 October 2011; *Al-Jedda v. UK*, ECtHR, app. 27021/08, 15 June 2011; *Hassan v. UK*, ECtHR, App. 29750/09, 25 June 2014; *Al-Saadoon and Mufdhi v. UK*, ECtHR, App. 61498/082, 2 February 2010.

²⁸ *Viron Khavara and others v. Italy and Albania*, ECtHR, App. 52207/99 (admissibility), 11 January 2001; *Medvedyev and others v. France*, ECtHR, App. 3394/03, 3 February 2010; *Hirsi Jamaa and others v. Italy*, ECtHR, App. 27765/09, 19 January 2012.

²⁹ GC 31, 10.

³⁰ *Hirsi Jamaa*, *supra* n. 28. It should be also mentioned *N.D. and N.T. vs. Spain*, ECtHR, Apps. 8675/15 and 8697/15, 3 October 2017 and *J.H.A. v. Spain*, Committee Against Torture, CAT/C/41/D323/2007, 21 November 2008.

³¹ The ECtHR explains these bases for extraterritorial jurisdiction in *Al-Skeini and Others v. United Kingdom*, App. 55721/07, 15 June 2011, 130–142.

³² M. Milanovic, *supra* n. 24, at 4.

application of the ICCPR, but the general opinion of the commentators³³ and the Committee itself is that Art. 2(i) should be read disjunctively. Initially, the Committee based this interpretation on the need to avoid a double standard of legality depending on the location (territorial or extraterritorial) of the state's activities.³⁴ It would be unconscionable, in the words of the Committee, to interpret Art. 2(i) in a sense that allows states 'to perpetrate violations of the Covenant in foreign territory, which violations it could not perpetrate on its own territory.'³⁵ In 2004, the HRC confirmed this view in its GC 31 on the nature of the general legal obligation imposed on states parties to the Covenant. According to the GC, states parties are required by art. 2(i) to respect and to ensure the Covenant rights 'to all persons who may be within their territory *and* to all persons subject to their jurisdiction,' that is, to individuals 'within the *power or effective control* of the State Party' even if not situated within its territory.³⁶ Hence, the Committee upheld a disjunctive reading of ICCPR's jurisdictional clause.

Since this clarification, the Committee has not elaborated much on the specific meaning of jurisdiction. Two main ideas can be drawn from the HRC's interpretation. First, jurisdiction is a *de facto* concept. It is equivalent to the exercise by the state of *power of effective control over individuals*. It is irrelevant whether the power or effective control was obtained lawfully or unlawfully by the state. The question is whether there was an exercise of actual power or control by the state, 'regardless of the circumstances in which such control was obtained.'³⁷ Second, the HRC has mainly conceived of jurisdiction in its *personal* dimension, as a relationship between the state and the individuals concerned. Jurisdiction does not refer to the location of the person affected by the activity of the state but rather to 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.'³⁸ In sum, so far, the HRC has mainly developed the personal model of extraterritorial jurisdiction, so that the ICCPR is applicable to all persons within the territory or the state and, extraterritorially, to all persons subject to the state's jurisdiction. This model is clearly embraced in GC 31 and in individual communications regarding cases of arrest and abduction of individuals carried out by state agents in foreign territory³⁹ or the refusal to issue passports to nationals residing abroad.⁴⁰ In addition, the HRC has also conceived of jurisdiction territorially in cases of military occupation, notably with regard to Israel's occupation of the Palestinian territories. In those cases, the HRC declared the

³³ K. Da Costa, *supra* n., at 15-92; M. Gondek, *supra* n. 24, at 231-247; N. Rodley, 'The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena', 5 *E.H.R.L.R.* (2009) 628-636; D. McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 41-72.

³⁴ *López Burgos*, 12.3; R. Wilde, 'Legal black hole? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' 26 *Michigan Journal of International Law* (2005) 739-806, at 797.

³⁵ *López Burgos*, 10. See Cristian Tomuschat's individual opinion in *López Burgos*, 7-8.

³⁶ GC 31, 10.

³⁷ *Ibid.* K. Da Costa, *supra* n. 24, at 56; M. Milanovic, *supra* n. 24, at 41.

³⁸ *López Burgos*, 12.2. The HRC refers to the meaning of jurisdiction in art. 1 of the Optional Protocol, regarding the competence of the Committee to examine individual communications. On the interpretation of this clause, see D. McGoldrick, *supra* n. 33, at 48-49.

³⁹ *López Burgos* and *Celiberti de Casariego*.

⁴⁰ Da Costa analyses these cases in detail in K. Da Costa, *supra* n. 24, at 45-49.

Covenant to be applicable to *areas* subjected to the effective control of the state.⁴¹

In GC 36, the HRC advances its interpretation of ICCPR's jurisdictional clause. First, in paragraph 63, the HRC includes both personal and territorial models of jurisdiction. The Covenant is applicable to 'all *persons* over whose enjoyment of the right to life it [the state] exercises power or effective control.' Additionally, states have to respect and protect the lives of individuals 'located in *places that are under their effective control*, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant.' Second, and more remarkable, the Committee specifies that power or effective control over persons extends to 'persons located outside any territory effectively controlled by the State whose right to life is nonetheless *affected by its military or other activities in a direct and reasonably foreseeable manner*.' Here, the HRC introduces, for the first time, the notion of *effect or impact on rights* as a new ground for the extraterritorial application of the ICCPR.

Before addressing the rationale behind this new approach to the concept of jurisdiction, it is worth reviewing the drafting process of the GC. It was initiated in 2015 during the 114th session of the Committee. The document proposed then for discussion did not include any reference to the notion of impact.⁴² This wording was incorporated in a subsequent draft of the Comment submitted in 2017 (120th session) to the comments of stakeholders, including member states, NGOs, and academics. This draft referred to 'persons located outside any territory effectively controlled by the State who are nonetheless *impacted* by its military or other activities in a *direct, significant, and foreseeable manner*.'⁴³ The definitive version was approved on 30 October 2018 (124th session) with some amendments: the deletion of the word *significant* and the addition of the adjective *reasonably*. Moreover, in the edited version of the draft, published in September 2019, the word 'impacted' in paragraph 63 was substituted by 'affected.' Following these modifications, the final text of paragraph 63 reads as follows:

'In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises *power or effective control*. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless *affected by its military or other activities in a direct and reasonably foreseeable manner*.'

The question is whether the Committee is developing a new model of extraterritorial jurisdiction where the power or control is exercised neither over territories nor persons but over *rights*, specifically the right to life. It could be argued that the 'impact on rights approach' closely resembles the personal model and could be considered an expansion of it since it is difficult to separate individuals from their inherent rights. As currently interpreted, the personal model is clearly established when there is physical control over individuals, e.g., in cases of extraterritorial detentions, but it also covers situations in which there is no

⁴¹ Concluding Observations on Second Report by Israel, DDP/C/78/ISR, 21 August 2003, 11.

⁴² Draft general comment No. 36, Article 6: Right to life, prepared by Yuval Shany and Nigel Rodley, Rapporteurs, CCPR/C/GC/R.36/Rev.2, 2 September 2015, 62.

⁴³ General comment No. 36 on article 6 of the ICCPR, on the right to life, adopted on first Reading during the 120th session, Revised draft prepared by the Rapporteur, 66.

physical contact with the individuals affected by state actions. For example, the ECtHR has held that the state had exercised jurisdiction over individuals who were passing by car through a checkpoint (*Jaloud v. The Netherlands*)⁴⁴ and over individuals who were fired at from helicopters (*Pad and Others v. Turkey*).⁴⁵ In these cases, although the jurisdiction over individuals had no physical basis, the state was operating abroad, through its agents. Nevertheless, it seems in GC 36 that the HRC intends to cover other situations where the activity of the state takes place within its own territory, but it produces extraterritorial effects. The paradigmatic cases concern targeted killings using drones and foreign surveillance programs. The Committee in its General Observations on the USA and the UK has subjected both practices to review, respectively.⁴⁶ Regarding the former, which undoubtedly affect the right to life, the HRC declared art. 6 ICCPR to be fully applicable to any use of armed drones by the USA in extraterritorial counterterrorism operations.⁴⁷

In the words of one of the rapporteurs of the GC, Yuval Shany, GC 36 suggests that ‘there would be additional situations covered by the Covenant, where state activity in its territory or outside the territory has direct and reasonably foreseeable impact on the ability of individuals to enjoy their right to life,’ which is consistent with the interpretation of jurisdiction in GC 31 and intends to ‘avoid the protection gaps that a narrower approach entails, without imposing on States unreasonable and unforeseen obligations.’⁴⁸

The same reasoning could be applicable to other situations where there is no contact between the state and the individuals whose rights are affected. This is the case with cooperative deterrence migration practices. As currently interpreted by human rights courts and bodies, the personal model of jurisdiction is hardly applicable to such practices because it requires physical contact or, at least, the presence of state agents abroad. This proposal will be analysed in the following section.

(C) EFFECT OR IMPACT ON RIGHTS: A NEW LEGAL STRATEGY TO ADDRESS COOPERATIVE MIGRATION CONTROLS

HRC’s GC 36 refers to the protection of asylum seekers and refugees in various provisions where it recognizes their special vulnerability.⁴⁹ It also sets forth an extensive concept of the obligation not to extradite, deport, or transfer that is broader than the scope of the principle of *non-refoulement* under international refugee law and which includes the protection of aliens not entitled to refugee status.⁵⁰ In

⁴⁴ *Jaloud v. The Netherlands*, App. 47708/08, 20 November 2014, 152.

⁴⁵ *Mansur Pad and Others against Turkey* (Decision on admissibility), App. 60167/00, 28 June 2007, 54.

⁴⁶ Concluding observations on the fourth periodic report of the United States of America CCPR/C/USA/CO/4, 23 April 2014, 9; Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, 17 August 2015, CCPR/C/GBR/CO/7, 24.

⁴⁷ Concluding Observations USA (2014), 9.

⁴⁸ R. Goodman, C. Heyns and Y. Shany ‘Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36’, 4 February 2019. On the consistency with HRC’s previous practice, see also D. Mogster, ‘Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR’, *Ejiltalk*, 27 November 2018.

⁴⁹ GC 36, 23.

⁵⁰ GC 36, 31, and 55.

addition, it establishes the obligation of states parties to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them, regardless of the exercise of authority and control by the flag state over the persons onboard, and of those individuals who find themselves in a situation of distress at sea, according to international obligations on rescue at sea.⁵¹ However, the major contribution of the GC to the protection of refugees and migrants is the expansion of the concept of extraterritorial jurisdiction which can also arise from the development of military or other activities *affecting* ‘in a direct and reasonably foreseeable manner’ the rights of persons located outside any territory effectively controlled by the state.

As previously mentioned, the personal model of extraterritorial jurisdiction as currently interpreted allows for the scrutiny of most externalized border control practices under the framework of human rights treaties. Jurisdiction of the state is established whenever it exercises power of effective control over persons, which is the case in interceptions of refugees and migrants on the high seas, pushbacks, shiprider agreements, the deployment of immigration control officers in foreign countries, visa requirements, and carrier sanctions.

However, the identification of extraterritorial jurisdiction is problematic in cooperative deterrence measures due to the lack of physical contact between the sponsoring state and the individuals concerned. It is difficult to argue that providing funding, equipment, training, or assistance to other states suffices to determine the jurisdiction of the sponsoring state over the refugees and migrants subject to border controls. It is thanks to the sponsoring state that border controls are implemented; however, as a matter of principle, the jurisdictional link is established between the individuals and the partner state.

Scholars have formulated different legal strategies to declare the responsibility of the sponsoring states: the notion of jurisdiction as ‘decisive influence’ developed by the ECtHR,⁵² the determination of responsibility for aiding or assisting another state’s wrongful acts based on art. 16 of the Articles on Responsibility of States for International Wrongful Acts,⁵³ and the extraterritorial effects jurisdiction approach.⁵⁴ What is contended here is that another avenue would be the notion of ‘impact on rights’ as a new basis for extraterritorial human rights jurisdiction.

This is not the first time the HRC has used the expression ‘to affect or impact on rights.’ In its concluding observations on the Second Report by Israel, the HRC declared the Covenant to be applicable in the occupied territories for all conduct of Israel’s authorities or agents that *affected the enjoyment of rights* enshrined in the Covenant.⁵⁵ The HRC did not elaborate on the conditions legally required for an action to affect or impact individuals’ human rights, but it did provide some examples of activities affecting rights, such as the detention of individuals, targeted killings, and the demolition of properties belonging to families of suspected terrorists. However, the factual context of these activities is dissimilar from the

⁵¹ GC 36, 63. A general analysis on GC 36 is developed by S. Joseph, ‘Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36’, 19 *Human Rights Law Review* (2019), 347-368.

⁵² V. Moreno-Lax and M. Giuffrè, *supra* n. 18, at 23-24.

⁵³ T. Gammeltoft-Hansen and J.C. Hathaway, *supra* n. 1, at 276-282. V. Moreno-Lax and M. Giuffrè, *supra* n. 18, at 19-21.

⁵⁴ T. Gammeltoft-Hansen, *supra* n. 17, at 381-385.

⁵⁵ CCPR/C/78/ISR, 11.

actions analyzed in this article since it is undeniable that the Israeli agents had control over the occupied territories and the persons whose rights were affected.

Under the ‘impact approach,’ any action or omission⁵⁶ that might affect the rights of individuals located abroad equates to the exercise of jurisdiction over them. The type of activities capable of affecting rights is formulated in GC 36 in very broad terms: ‘military and other activities.’ Hence, providing funds, equipment, training, or assistance should be understood among them since these activities restrict refugees’ rights to leave their countries, their access to protection, and *non-refoulement*. A similar view was embraced by the ECtHR in the cases concerning Transnistria region, where the Court declared Russia’s jurisdiction over the territory controlled by the Moldavian Republic of Transnistria based on the ‘military, economic, financial and political support given to it by the Russian Federation,’⁵⁷ and in the cases concerning the Nagorno-Karabakh region.⁵⁸

In the words of the Committee, the impact on rights has to be ‘direct’ and ‘reasonably foreseeable.’ The requirement of direct impact is consistent with the idea that the exercise of power or authority by the state has to be direct but needs not be based on physical control. In *Isaak, Solomou, and Andreou*, the ECtHR held that Turkey had exercised jurisdiction over persons located outside areas controlled by it because Turkey’s acts, through its agents, were the ‘direct and immediate cause’ of their injuries.⁵⁹ In *Jaloud*, the ECtHR established the Netherlands’ jurisdiction over the death of an individual who was a passenger in a vehicle that was fired upon while it was passing through a checkpoint.⁶⁰ Hence, state’s jurisdiction is engaged if they provide funding, equipment, training, or assistance to other states to perform border controls, even if there is not physical contact with the migrants or refugees, since these activities *directly* affect their rights regardless of where they are.

The HRC does not provide a relevant test for establishing when states’ actions are likely to affect rights in a ‘reasonably foreseeable manner.’ It should be understood that the HRC is excluding the application of the ICCPR in cases of non-predictable impacts on rights, but the terms are still rather vague. Individual cases concerning actions conducted within the territory of the state but having effects abroad provide further elaboration. In *Munaf*, the Committee declared that a state party might be responsible for extraterritorial violations of the Covenant conducted by other states if there is a ‘link in the casual chain that would make possible violations in another jurisdiction’ so that ‘the risk of an extraterritorial violation

⁵⁶ Omissions should also be included, i.e., the omission of the obligation to rescue vessels in distress at sea. See V. Moreno-Lax and M. Lemberg-Pedersen, *supra* n. 18, at 30.

⁵⁷ *Ilascu and Others v. Moldova and Russia*, App. 48787/99, 7 May 2004, 392; *Ivantoc and Others v. Moldova and Russia*, App. 23687/05, 18 October 2011, 118; *Catan and others v. Moldova and Russia*, Apps. 43370/04, 8252/05 and 18454/06, 5 September 2012, 122

⁵⁸ In *Chiragov* the Court established Armenia’s jurisdiction over the NKR due to its military, political, financial and other support given to it, *Chiragov and Others v. Armenia*, App. 13216/05, 22 January 2015, at 186. See M. Nagore, ‘Presencia militar y jurisdicción extraterritorial: la dilución del concepto de ‘control efectivo sobre el territorio’ en los casos de Nagorno-Karabakh ante el TEDH’, 43 *Revista General de Derecho Europeo* (2017) 272–296.

⁵⁹ *Isaak v. Turkey*, App. No. 44587/98 (Admissibility), 21; *Solomou v. Turkey*, App. 36832/97, 3 June 2008, 48–51; *Andreou v. Turkey*, App. 45633/99, 6 October 2009, 25.

⁶⁰ *Jaloud*, *supra* n. 44, 152.

must be a necessary and foreseeable consequence and must be judged on the *knowledge* the State party had at the time.⁶¹ This interpretation is consistent with the approach of the Committee in cases of deportation or expulsion of individuals to other states where it is likely that they would face death penalty. According to the Committee, if a state party deports a person in circumstances that result in a real risk that his or her rights under the Covenant will be violated in another jurisdiction, 'that State party itself may be in violation of the Covenant.'⁶² This applies to cooperative deterrence activities which constitute the primary cause of the implementation by partner states of exit controls and the interception of refugees and migrants. It is thanks to sponsoring state's funding and assistance that controls or interceptions are possible so that the link in the casual chain is established. Sponsoring states are undoubtedly aware of the risk of extraterritorial violations of the rights of refugees that are a consequence of their actions.

The HRC has also required the fulfillment of this test concerning the positive obligations of states to protect individuals from the activities undertaken by other states, international organizations, and corporate entities operating in their territory or subject to their jurisdiction but 'having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory.'⁶³ This provision has been developed by the HRC mostly with regard to extraterritorial actions of companies. In *Yassin et al v. Canada*, the HRC established the duty of states to ensure that the Covenant's rights 'are not impaired by extraterritorial activities conducted by enterprises under their jurisdiction.'⁶⁴ This approach was also stated in its concluding observations on the periodic reports of Canada,⁶⁵ Germany,⁶⁶ and Korea.⁶⁷ In sum, states have the responsibility to protect individuals from acts affecting their rights carried out by other actors, including other states, whether they take place extraterritorially or within the states' territories but having extraterritorial effects.

Finally, we should note the reaction of states to this expansion of ICCPR's spatial scope. Indeed, some states have already opposed to this concept in their comments to one of the provisional drafts of the GC. Austria suggested adherence to the case law of the ECtHR (authority and control through its agents operating abroad), Norway contended that it is the person who has to be within the power and/or effective control of the state, but not the right to life, and the Netherlands suggested going back to the interpretation of the Committee in GC 31. The strongest opposition has come from France, which has been the only state that has submitted comments after the final adoption of the GC. In its view, the definition of extraterritoriality is too vast, contrary to the terms and the spirit of the Covenant, and a source of legal insecurity.⁶⁸

⁶¹ *Mohammad Munaf v. Romania*, Communication 1539/2006, views adopted on 30 July 2009, 14.2

⁶² *A.R.J. v. Australia* Communication No. 692/1996, views adopted on 28 July 1997, 6.9.

⁶³ GC 36, 22.

⁶⁴ *Yassin et al. v. Canada*, CCPR/C/120/D/2285/2013, 6.5

⁶⁵ Concluding observations on the sixth periodic report of Canada, CCPR/C/CAN/CO/6, 6.

⁶⁶ Concluding observations on the sixth periodic report of Germany, CCPR/C/DEU/CO/6, 16.

⁶⁷ Concluding observations on the fourth periodic report of the Republic of Korea, CCPR/C/KOR/CO/4, 10.

⁶⁸ Germany, Canada, and the USA also opposed to the wording of the General Comment' draft. All the comments submitted by the States are available [here](#).

(D) CONCLUSION

GC36 has extended the spatial scope of the right to life beyond HRC's own prior jurisprudence. It provides a new basis of jurisdiction – the 'effect or impact on rights' – that is likely to be added to current legal strategies to force EU states' cooperative migration deterrence practices to comply with human rights obligations. The 'impact on rights approach' can fill gaps in the personal model of jurisdiction since it is much more flexible than the exercise of 'power or effective control' over individuals. Under this new basis of jurisdiction, the Covenant would be applicable to actions of states, whether within or outside their territories, which have a 'direct and reasonably foreseeable impact on the right to life.' This article has tried to address some legal questions concerning these terms, but further clarification from the Committee would be desirable. In sum, this is still an emerging concept in international law, but it could be a powerful tool to restrict the current trend of states using international cooperation to contain migrant and refugee movements.