CHAPTER TWO

THE SPATIAL REACH OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

INTRODUCTION

This chapter addresses the question of whether the ECHR applies extraterritorially. Focusing on its jurisdictional clause, it looks mainly at the interpretation given by the European Court of Human Rights (ECtHR), which has to date provided the most prolific output on the subject. Where appropriate, reference is made to the practice of other mechanisms, especially of UK national courts concerning overseas military operations. Case law is analysed in chronological order and similar cases are clustered together. The chapter starts with the travaux préparatoires, which have sometimes been referred to in discussion of the subject.

1. Wording and Origins of Article 1 ECHR

Article 1 contains the jurisdictional clause of the ECHR, according to which:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.¹

The ECHR contains no reference to ‘territory’, and thus it will apply once a person is considered to be ‘within the jurisdiction’ of a state party. The travaux préparatoires do not provide great help here,² not only because of their supplementary nature as a

¹ Emphasis added.
It is also to be noted that the ECtHR has repeatedly indicated that the Convention is a ‘living instrument’, to be interpreted ‘in the light of present-day conditions’, and not solely in ‘accordance with the intentions its authors expressed more than forty years ago’, thus suggesting the inappropriateness of an interpretation over-relying on the travaux préparatoires. See, inter alia, ECtHR, Tyrer v. United Kingdom, Judgment of 25 April 1978 (Merits), Application no. 5856/72, Series A no. 26; (1979–80) 2 EHRR 1, § 31; Loizidou v. Turkey, Judgment of 23 March 1995 (Grand Chamber, Preliminary Objections), Application no. 40/1993/435/514; 20 EHRR 99, § 71; Selmouni v. France, Judgment of 28 July 1999 (Grand Chamber: Merits and Just Satisfaction), Application No. 25803/94; 29 EHRR 403; 7 BHRC 1, § 101.

See Banković decision, §§ 63 and 65. Conversely, see Orakhelashvili, arguing that the Court in Banković has in certain matters accorded decisive importance to the travaux. Alexander Orakhelashvili (2003), “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights”, 14(3) European Journal of International Law 529, at 547.

The Committee of Experts in charge of considering the draft ECHR accepted the amendment as follows:

… It seemed to the Committee that the term ‘residing’ might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word…. The Committee therefore replaced the term

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4 See Banković decision, §§ 63 and 65. Conversely, see Orakhelashvili, arguing that the Court in Banković has in certain matters accorded decisive importance to the travaux. Alexander Orakhelashvili (2003), “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights”, 14(3) European Journal of International Law 529, at 547.

5 See draft prepared by the Consultative Assembly of the Council of Europe, of 8 September 1949, reproduced in ‘Travaux Préparatoires’ of the ECHR, volume II, at 276 (emphasis added). See also Banković decision, § 19.

6 See Report of the Sub-Committee instructed to make a preliminary study of the amendments proposed by the members of the Committee, of 5 February 1950, reproduced in ‘Travaux Préparatoires’ of the ECHR, volume III, p. 200.

7 Ibid., p. 200.

8 Ibid., p. 200. Later on during the drafting of the UN Covenant the US suggestion to include a reference to territory in its jurisdictional clause would be adopted; however, this late change would not be reflected in the text of the European Convention. See Gondek (2009), The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, at 91 and 118–119, who makes the points of interrelatedness and cross-fertilization among different human rights treaties, especially regarding the ECHR and the ICCPR, and who sees this particular episode as one among a number providing further evidence in this regard.