

## Territorial scope and jurisdictional reach of the ECHR and Protocols - Laurie Fransman

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### Article 1 of the Convention

- Article 1, ECHR, provides:

#### **"Article 1 – Obligation to respect human rights**

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

- This means the ratified rights and freedoms apply to everyone within the UK. Their immigration status is irrelevant to the question of jurisdiction: *D v UK*. It is also irrelevant when applying article 3, but in applying article 8 there may well be a difference between a short-term TA passenger and a long-term lawful resident<sup>1</sup>.
- The Convention can also have extra-territorial application, rendering the UK liable for acts committed abroad.
- The territorial scope of the Convention and principal Protocols can also be extended to the overseas territories of a state.

### Extra-territorial reach

In *Loizidou* (Preliminary Objections judgement) the applicant complained that her right to the peaceful enjoyment of her possessions had been affected as a result of the continued occupation and control of the northern part of Cyprus by Turkish armed forces which on several occasions prevented her from gaining access to her home and other properties there. "The Turkish Government submitted that, in essence, the present case did not concern the acts or omissions of Turkey but those of the 'TRNC' [Turkish Republic of Northern Cyprus] which they claimed to be an independent State established in the north of Cyprus" (para.47).

"61. ... The Court's enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the 'jurisdiction' of Turkey even though they occur outside her national territory.

In paragraph 62 of the judgement the Court said "the concept of 'jurisdiction' under this provision [art.1, ECHR] is not restricted to the national territory" and referred to the following instances of extra-territorial jurisdiction:

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<sup>1</sup> See *Dalia v France* 19.2.1998

1. "[T]he Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention" (see *Soering, Cruz Varas, and Vilvarajah*). This is because there may be state responsibility under the Convention for what may take place outside its territorial jurisdiction - if there serious grounds for believing an individual will be subjected to treatment seriously violating a fundamental value of the Convention.

2. "In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities<sup>2</sup>, whether performed within or outside national boundaries, which produce effects outside their own territory" (see *Drozd and Janousek*). So the conduct of officials at British Embassies, consulates, High Commission, etc, are within the ambit of the Convention. See also *X v Germany* (1966) 17 CD.

3. "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The 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". This may, in effect, ground an exception to the international law rule that a state cannot be responsible for the act of another state.

The above are generally in conformity with international law, under which state responsibility derives from the fact of control. So it is legally possible under the Convention for the state to be liable for acts committed abroad in territory under its control or against individuals by its agents. Whether in fact the acts may be imputed to the state will depend on the facts; in particular, by ascertaining who gave the orders and who carried them out.

#### Extension of the ECHR and certain Protocols to British Overseas Territories (OTs)

Article 56, ECHR, concerns the territorial application of the Convention and provides that "Any State may ... declare ... that the ... Convention shall ... extend to all or any of the territories for whose international relations it is responsible".

The ECHR has been declared from time to time to apply to various of the UK's territories. The first declaration, of 23 October 1953, provided:

"Her Majesty's Government have considered the extension of the European Convention on Human rights to those territories for whose international relations they are responsible and in which that Convention would be applicable" and went on to specify many, but not all, of the colonies of the day.

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<sup>2</sup> The term 'authorities' is clearly very broad: "the responsibility of a state under the Convention may arise for acts of all its organs, agents and servants" (*Cosans v UK* (1978) 12 DR 140 at 148-9).

Subsequent declarations amended the list, particularly as a result of territories attaining independence and ceasing to be the UK's responsibility. The most recent declaration, made on 3 April 1984 (following Brunei's independence), applies the Convention to Anguilla, Bermuda, the British Virgin Islands, Cayman Islands, Channel Islands, Falkland Islands, Gibraltar, Isle of Man, Montserrat, St. Helena and Turks & Caicos Islands.

Separate comment must be made on the main Protocols.

Regarding the first Protocol (on property, education and elections), it does not automatically apply to the territories to which the ECHR has been extended. Article 4 of the Protocol gives a discreet power to declare to which overseas territories it is to apply. A declaration under that provision was made by the UK in February 1988. That declaration applies the Protocol to Anguilla, the British Virgin Islands, Cayman Islands, Channel Islands, Gibraltar, Montserrat, St. Helena & Dependencies and the Turks and Caicos Islands.

Regarding Protocol 4, if it were ratified it too would not automatically apply to the Overseas Territories to which the ECHR has been extended: article 5(1), Protocol 4, gives the state a discreet power within the context of that Protocol to declare to which territories it extends. Further, even if the UK declared the Protocol to have the same territorial application as the ECHR, article 5(4) provides that the territory of the State to which the Protocol applies, and each territory to which the Protocol is applied by virtue of a declaration by that State under article 5(1),

*"shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State"* (emphasis supplied).

This means the British nationals of the UK would have the right to enter and not be expelled from the UK, but the British nationals of an Overseas Territory would only have the right to enter and not be expelled from their own Territory.

This prompted the Netherlands, when ratifying Protocol 4 in 1982, to make a declaration. The Dutch declaration acknowledged that

*"the Netherlands and the Netherlands Antilles are regarded as separate territories for the application of Articles 2 and 3 of the Protocol, in accordance with Article 5, paragraph 4"*

and concluded that, therefore,

*"the Netherlands reserve the right to make a distinction in law<sup>3</sup>, for purpose of the application of Article 3 of the Protocol, between Netherlands nationals residing in the Netherlands and Netherlands nationals residing in the Netherlands Antilles [now the Netherlands Antilles and Aruba]"*.

The UK, having a separate citizenship for persons from the Overseas Territories, would appear to be ideally set up to apply the distinction enforced by article 5(4). What is

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<sup>3</sup> Though it has not done so to date.

apparent is not necessarily real, though, as British Dependent Territories citizenship is indivisible as between the OTs and does not *per se* include a right to enter any OT. So distinguishing between the UK and its OTs on the basis of the different citizenships would not be workable. In any event, the proposal is to extend British citizenship to virtually all the BDTCs. Therefore, like their Dutch and French<sup>4</sup> equivalents, British citizens from the OTs would have, under Protocol 4 if applied to the OTs, article 3 rights in respect of the metropolitan state and their own OT. Non-reciprocity is probably justified under article 56(3), ECHR, which applies by virtue of article 5(3), Protocol 4, and provides:

"The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements".

Regarding the BDTCs who are not to receive British citizenship (those who owe their status to their association with the Sovereign Base Areas in Cyprus or with the British Indian Ocean Territory), if Protocol 4 is ratified the government is not likely to declare it applies to these two dependencies, so article 3 is not likely to be able to assist such persons to enter or resist expulsion from their own OTs. It may just be arguable, however, that in such circumstances, as British nationals (and especially if they have no other, effective, nationality), article 3 should avail them to enter or resist expulsion from the UK itself.

Regarding Protocol 6 (death penalty), the UK signed it on 27 January 1999, ratified on 20 May and it came into force on 1 June 1999. The UK's territorial declaration applies it to the Channel Islands and Isle of Man only.

Finally, Protocol 7 (article 1 of which provides safeguards in respect of the expulsion of aliens) has not yet been signed by the UK but is likely to be. In article 6(5) it, similar to article 5(4) of Protocol 4, provides for overseas territories to which it may be applied to be treated as separate from the metropolitan state. The Protocol 7 provision, however, says they "may" be treated as separate territories, whereas the Protocol 4 provision says they "shall" be.

Note that there is an argument that the ECHR may still extend to British Overseas Territories which are omitted from the latest declaration but were once included.

#### Divisions and overlaps as between the OTs and the UK

There may be issues as to whether responsibility arises by virtue of the extension of the Convention or a Protocol to the Overseas Territory concerned, or whether the UK is directly responsible by virtue of the Convention's extra-territorial application.

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<sup>4</sup> The French Protocol 4 declaration is that it "shall apply to the whole territory of the Republic, having due regard, where the overseas territories are concerned, to local requirements".

In *McCann*<sup>5</sup> (the killings in Gibraltar case) no jurisdictional issue was raised by the Court at all, it seemingly being taken for granted that the UK was directly responsible by virtue of the extra-territorial acts of its agents.

In *Bui Van Thanh v UK*<sup>6</sup> the UK was considered by the Commission not to be responsible for the repatriation of the Vietnamese boat people from Hong Kong because no article 56 declaration was ever made applying the Convention to that colony. The UK was apparently immune from liability on this basis and could not act extra-territorially.

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<sup>5</sup> (1996) 21 EHRR 97.

<sup>6</sup> (1990) 65 DR 330.