REFLECTIONS ON EXTRA-TERRITORIAL ECHR JURISDICTION: *JALOUD V THE NETHERLANDS*

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The European Convention may be nearing retirement age, but the European Court of Human Rights isn't sliding into passivity. On the contrary; all the signs are that it has found its stride and is relishing opportunities to take on new challenges. Nowhere is this more apparent than its progressively liberal attitude towards Article 1 and extra-territorial jurisdiction.

For Dutch legal practice, nothing is more critical than understanding when the ECHR will apply. Over the past few years the ECHR has been subtly but surely transformed by the European Court from a purely regional instrument into a global tool for human rights protection. Particularly given modern warfare scenarios, with the Netherlands increasingly deploying military assets in non-European conflict zones and bringing civilians within the Convention's scope, this author would argue that this is to be heartily welcomed.[1] Indeed, it was a Dutch military matter that led to the Court issuing the most far-reaching judgment on extra-territoriality yet: *Jaloud v The Netherlands (2014)*.[2]

The substantive question in *Jaloud* concerned the adequacy of the Netherlands' investigation into a fatal shooting at a military checkpoint in Iraq, manned by Dutch soldiers present in the region to support the UK occupying force. As a preliminary matter, however, the Netherlands contested the ECHR's applicability, arguing that it had no jurisdiction within the meaning of Article 1. Rejecting this argument, the Court adopted and expanded *Al-Skeini*'s (already controversial) hybrid model of spatial and personal control to find that jurisdiction flowed from the Netherlands assumption of authority over the relevant region, the exercise of authority by Dutch forces supervising the checkpoint and the intrinsic nature of a checkpoint. However, although arguably in *Al-Skeini* none of these would alone have sufficed to establish jurisdiction, reliance on those particular factors to found jurisdiction re-scoped Article 1 to be far more permissive than *Al-Skeini*; perhaps even more permissive than the Court really intended.

Finding spatial control required imputing authority over the area in which the Dutch troops were stationed to the Netherlands. Problematically, however, the Netherlands had no legal authority in Iraq: it was a third-party participant to the UK's occupation and in truth 'seconded' soldiers. Creatively, therefore, the Court relied on Dutch technical retention of '*full command*'[3] over its forces to find an enduring vertical connection and claim the necessary control was thereby exercised. As armed forces are routinely placed under foreign orders in multinational operations whilst national chains of command remain simultaneously intact, this ensured that regardless of the limited involvement States may have in overseas missions, if they send national

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1 Notably, despite there being no indication that those drafting the ECHR in stable post-war Europe contemplated that (or how) it should apply to extra-territorial acts, particularly military operations conducted by Contracting States in non-European territory, the ECtHR has long wrestled with just that question.

2 ECtHR 20 november 2014, appl.no. 47708/08 (*Jaloud* v *The Netherlands*).

3 I.e. The power to determine overall military policy and punish soldiers for misconduct.

military contingents to foreign territory, in whatever capacity or form, home jurisdiction will always necessarily be exercised.[4] Far-reaching impact indeed.

To find personal control, the Court focused on the checkpoint. Analysing this closely, this seemingly innocuous paradigm was revolutionary. Conceptually, a 'checkpoint' needs no physically demarcated geographical location or tangible existence; it may be transient, mobile and incorporeal.[5] Whilst factually in *Jaloud* the Netherlands had troops on a road in Iraq, understanding a 'checkpoint' in the way as sketched above raises the question what geographical space needs to be controlled in future cases. Planes (and more pertinently, drones) exert absolutely no control over territory, but if after *Jaloud* the Court is ready to find that personal control jurisdiction may operate alone without territorial control,[6] aerial attack may have (perhaps unintentionally) been brought within Article 1's scope. After all, what is the difference between an individual bringing himself before State jurisdiction by passing through a 'checkpoint' and use of a use of a weapon creating State jurisdiction over an individual?[7]

Jaloud is thus far more than it first appears. Consistently holding that the ECHR applies wholly or not at all, the European Court had always formerly maintained that to engage the ECHR abroad States needed to exercise control over territory much as if at home:[8] *Jaloud's* novel concept of 'checkpoint jurisdiction' significantly diluted the threshold level of territorial control required to engage Article 1, arguably even paving the way to eradicate the requirement altogether. Post-*Jaloud*, Article 1 jurisdiction may arguably be engaged whenever a State (1) deploys military assets abroad and (2) assumes a sphere of control over individuals, (3) even without directly controlling either those individuals (4) or their geographic surroundings, or (5) even having physical presence in the foreign State. Quite a staggering re-definition.

For Dutch lawyers, *Jaloud* is a strong signpost of the European Court's evolving liberal attitude towards jurisdiction. Possibly frustrating for those tasked with accurately weighing the legal liabilities of proposed extra-territorial State actions,[9] certainly a boon for those arguing on behalf of victims, offering tantalising possibilities of future innovative ECHR interpretation and application and hope of similarly rights-protective judgments. It also encompasses a wider

4 A. Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?' (2014) 53 *Military Law and the Law of War Review* 2014, vol. 53, p. 287-318 at p. 294. He also expressed concern that the notion of '*full command*' ignores exercise by national contingents of powers emanating solely from international mandates.

5 Sari 2014 (*supra* note 4), at p. 291-292.

6 C. Ryngaert, 'Jaloud v. the Netherlands: European Court of Human Rights finds the Netherlands liable for failing to adequately investigate the use of lethal force by Dutch troops in Iraq,' *Ucall Blog* (http://blog.ucall.nl), 15 December 2014 described *Jaloud* as coming '*dangerously close*' to cause and effect jurisdiction.

7 N. Quenivet, 'Did the Drone Attack on Brits in Syria Trigger the Applicability of the ECHR?', *Euro Rights Blog* (http://eurorights.net/) 14 September 2015, who also commented that drawing arbitrary lines leads to the unsatisfactory result that targeted killings do not trigger ECHR jurisdiction but accidental encounter of armed forces does.

8 See *Banković a*t par. 59-61 and 67 and *Al-Skeini* at par. 133, 136, 138 and 150.

9 M. Milanovic, 'The Bottom Line of Jaloud', *EJILTalk! Blog* (www.ejiltalk.org) 26 November 2014, argues that perhaps States shouldn't engage in 'jurisdictional guesswork' but simply proceed assuming the ECHR will apply and focus on persuading national or European courts (if it comes to that) of the merits of their case. He notes the flexibility the ECtHR was willing to afford the Netherlands in the substantive aspects of the Article 2 inquiry, and states that the ECtHR is not '*on a mission of imposing wholly unreasonable or impracticable demands that states could never comply with.'*

message, showing that gone are the days when the European Court simply claimed sacrosanct ECHR ties with European land and clung to bygone design. The European Court may consistently loyally defer to the ECHR's text and have reaffirmed again in *Jaloud* that in principle it remains fundamentally connected to territory,[10] but in interpreting and applying Article 1, particularly in *Al-Skeini* and *Jaloud* it has firmly moved from viewing the ECHR as cleaving to State boundaries with limited extra-territorial application exceptionally permitted to boldly proclaiming extra-territoriality in novel situations, creatively using the ambiguity inherent within Article 1[11] to protect all who enter into power relationships with Contracting States. Old age seems to have brought radicalism. Like many pensioners rebelling against expectations the Court has shown its continued willingness to fight against its creators and judge for itself what its limits should be. And the Court's increased fervor to mould the ECHR to modern realities will likely be echoed at national level. Dutch lawyers would be wise to heed this signal.

Of course, there is a small risk, even post-*Jaloud*, that the Court will later baulk at having stepped so close to the reaches of its mandate and be cowed back into hesitancy and restrictiveness.[12] For the sake of rights beyond artificial borders let us hope not. Happy Birthday ECHR: here's to many more years of creative and revolutionary interpretation.

10 In ECtHR 12 December 2001, appl.no. 52207/99 (Banković/Belgium), the Court rebuffed application of the 'living instrument' doctrine and firmly curtailed any tendency towards expansive interpretations of jurisdiction; stating that the ECHR was '*essentially regional*', '*not designed*' for global application and only exceptionally could extra-territorial acts fall within Article 1 (at par. 67, 71 and 80). Despite distinguishing itself from *Banković*'s restrictive conclusions, ECHR 7 July 2011, appl.no. 55721/07 (Al-Skeini and others/UK) at par. 131 and 141 endorsed this doctrine, highlighting the ECHR's European identity and stating that territory remained pivotal for determining jurisdiction. These passages were directly quoted in *Jaloud* v *The Netherlands* at par. 138.

11 Unlike most international treaties, the ECHR does not expressly delineate the reach of its arm. States must have jurisdiction over situations within the meaning of Article 1 to be responsible for ensuring substantive rights (ECtHR 8 July 2004, appl.no. 48787/99 (Ilaşcu/Moldova and Russia) but Article 1 is indefinite in scope. The travaux préparatoires (Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights (Vol. III, p. 260)) indicate that it was only intended to cover European geography: Contracting States were originally required to protect the rights of 'everyone residing within their territories'. Altering this to 'everyone within their jurisdiction' did not intend to eliminate the territorial connection, merely reflect views that the ECHR ought apply even if persons present on State territory were not lawful residents. However, the amendment critically rendered Article 1 ambiguous.

12 Y. Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law', *Law and Ethics of Human Rights Journal,* 2013; Vol. 7-1, p. 47-71 at page 50 suggests that the Court's past reluctance to diverge irrevocably from a state-centred approach to jurisdiction and the possibility that *Jaloud* was somewhat inadvertent in effect may reflect a broader underlying philosophy about the importance of borders in international law and concern not to be accused of 'power-grabbing'.