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TITLE

THE EXTRATERRITORIAL REACH OF ICCPR IN THE ERA OF DIGITAL SURVEILLANCE

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Abbreviations

ICCPR - The International Covenant on Civil and Political Rights

ECHR – The European Court on Human Rights

ECHR - The European Convention on Human Rights

ICJ – International Court of Justice

HRC – Human Rights Committee

ILC – International Law Commission

VCLT – Vienna Convention on the Law of Treaties

UN – United Nations

UNGA – United Nations General Assembly

VCDR – Vienna Convention on Diplomatic Relations

FRY - Federal Republic of Yugoslavia

DRC – Democratic Republic of Congo

NATO - North Atlantic Treaty Organization

IHR – International Human Rights

HR – Human Rights

USA – United States of America

INTRODUCTION

a) BACKGROUND INFORMATION ON THE PROBLEM

The ICCPR is a multilateral treaty adopted by the UNGA on 16 December 1966, and in force from 23 March 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process, privacy and a fair trial. As of April 2014, the Covenant has 74 signatories and 168 parties.[2]

ICCPR Article 2(1) 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 …"[3] Thus ICCPR applies either when a person is within the territory of a state party or is subject to a state's jurisdiction.

However, it should be taken into the consideration the fact that ICCPR was signed in an era where there were no cutting-edge technologies and possibilities for digital surveillance. The world is advancing at a rapid velocity and this fact is out of question. Recent discoveries have revealed how new technologies are being developed covertly, often to facilitate these practices, with chilling efficiency. As the previous High Commissioner cautioned in past statements [September 2013 and February 2014], such surveillance threatens individual rights – including to privacy and to freedom of expression and association – and inhibits the free functioning of a vibrant civil society.[4]

Mass surveillance is the intricate surveillance of an entire or a substantial fraction of a population in order to monitor that group of citizens.[5] Mass surveillance is criticized for

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[2] https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights, last accessed 02.22.2016.
[3] International Covenant on Civil and Political Rights (ICCPR), art. 2(1).
[4] http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx, last accessed 02.22.2016.
[5] *"Mass Surveillance Technologies". Electronic Frontier Foundation.*

violating right to privacy, other civil and political rights and freedoms, and being illicit under various legal systems, even the principle of non-intervention.

Privacy International's 2007 survey, covering 47 countries, indicated that there had been an increase in surveillance and a decline in the performance of privacy safeguards. Eight countries were rated as being "endemic surveillance societies".[6] On 12 March 2013 Reporters Without Borders published a *Special report on Internet Surveillance*. The report included a list of "State Enemies of the Internet", countries whose governments are involved in active, intrusive surveillance of news providers, resulting in grave violations of freedom of information and human rights[7].

Hence, since electronic surveillance is commonplace, human right treaties should be interpreted in accordance with recent developments. ICCPR is not an exception either. The further justification of the paper is demonstrated in justification part.

The paper's methodology is illustrated in its structure. Each chapter is a unique tool and method for answering the research question.

The paper's scope is limited to analysis of the application of ICCPR in cases of electronic surveillances, mainly with regards to right to privacy both in cases of mass electronic surveillance including the whole population and people whose privacy is limited by virtue of their profession. This paper is going to be an independent study and is not limited to answer the question in a positive or negative way. The paper will also address the issue of legality of interferences with the right to privacy enshrined in ICCPR and study the minimum safeguards of mass surveillance programs.

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[6] *"Surveillance Monitor 2007 - International country rankings". Privacy International. 28 December 2007.,* The 8 countries are China, Malaysia, Russia Singapore, United Kingdom, Taiwan, Thailand, United States Greece.

[7] *The Enemies of the Internet Special Edition : Surveillance*, Reporters Without Borders, 12 March 2013Five countries were placed on the initial list: Bahrain, China, Iran, Syria, and Vietnam.

b) SPECIFIC RESEARCH PROBLEM

Whether the ICCPR has extraterritorial reach in the era of digital surveillance?

c) JUSTIFICATION/SIGNIFICANCE OF THE PROBLEM

There is a great deal of papers which analyze the extraterritorial reach of ICCPR or of other human right treaties in general.[8] The latter is also supported by various cases both of ICJ[9] and other international tribunals[10] or other human right instruments, for instance HRC comments[11]. However, the scope of the abovementioned papers or case law is limited as they don't regulate the issue concerning the digital surveillance. Hence, the significance of this paper is that the latter is going to address this subject matter mainly in cases of electronic surveillance.

d) PAPER STRUCTURE

This thesis paper will consist of introduction, 4 chapters, conclusion and bibliography.

The **Introduction** will present an overview on the rule on the extraterritorial application of ICCPR, the recent examples of electronic surveillance, the gap concerning the extraterritoriality of ICCPR in the above-mentioned cases, hence the justification of the study, as well as the methodology and the scope and limitation of it.

Chapter 1 will be entitled "The extraterritorial reach of ICCPR in general". This chapter will be a brief historical review of human right jurisprudence of ICJ, HRC and case

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[8] See e.g., Ralph Wilde, Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties, 12 Chinese J. Int'l L. 639 (2013).

[9] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004 (A/ES-10/273 and Corr.1), §§ 107-111; *Case concerning Armed Activities on the Territory of the Congo* (*DRC v. Uganda*), ICJ judgment, 2005, §§ 216 – 217.

[10] *Lopez v. Uruguay,* U.N. HRC, Comm. No. R.12/52, §§ 12.1–12.3, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981);

[11] U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 § 10

law of ECHR, which either establish the extraterritorial application of ICCPR[12] or sets limitations.[13]

Chapter 2 will be entitled "The extraterritorial application of human rights treaties". This chapter will look at different human right treaties[14] including treaties with jurisdiction clauses, provisions on territorial application and treaties without them. Furthermore, it would include policy considerations that are in favor or in detriment of extraterritorial reach of human rights treaties. It will mainly focus on ECHR case law and study different factual circumstances when it was possible.

Chapter 3 will be entitled "The extraterritorial application of ICCPR in the era of digital surveilance". This chapter will make an in depth analysis of different tools of treaty interpretation. The paper will mainly focus on tactics provided by Vienna Convention on the Law of the Treaties[15] and corresponding commentaries[16]. In the light of the abovementioned the paper will try to analyse whether it is possible to interpret ICCPR to allow its extraterittorial reach in the era of digital surveillance[17] and which are obstacles to feel the lacuna in the law.

Chapter 4 will be entitled "The interference with the right to privacy". This chapter wil analyse which interference with regards to right to privacy is permitted by law, whether mass surveillance programs are legal *per se,* which are the minimum safeguards, how the principle of proportionality should be kept and how the ban on discrimination is relevent.

The **Conclusion** will succinctly outline main findings of the research.

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[12] *Supra note 9*.,

[13] Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case *Bankovic and Others v. Belgium and 16 Other Contracting States.*

[14] *Al-Skeini and others v. the United Kingdom,* Grand Chamber judgment 7.7.2011, appl. no. 55721/07,

[15] Vienna Convention on the Law of Treaties, May 23, 1969.

[16] ILC, Draft Articles on the Law of Treaties, (1966), p. 222, §18.

[17] Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the United States, ¶ 22, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), UNGA resolution 68/167 (December 18, 2013), adopted by consensus.

Chapter 1 The extraterritorial reach of ICCPR in general

1.1 The rule

ICCPR, Article 2(1) 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.*[18] Hence, ICCPR applies either when a person is within the territory of a state party or is subject to a state's jurisdiction.

The latter is also supported by various cases both of ICJ[19] and other human right instruments,[20] for instance HRC comments[21]. The restrictive aprroach is that the jurisdiction is primarily territorial,[22] and an individual outside a State's territory may be subject to its jurisdiction only in exceptional circumstances[23] (the 'territorial principle') not only in case of ICCPR but also ECHR. However, we will witness that the case law is changing in a positive way.

1.2 ICJ jurisprudence

The ICJ is the principal judicial organ of the UN. It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Court is composed of 15 judges, who are elected for terms of office of nine years by the UNGA and the Security Council.[24]

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[18] ICCPR, art 2(1).
[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004 (A/ES-10/273 and Corr.1), §§ 107-111; *Case concerning Armed Activities on the Territory of the Congo* (*DRC v. Uganda*), ICJ judgment, 2005, §§ 216 – 217.
[20] *Lopez v. Uruguay,* U.N. HRC, Comm. No. R.12/52, §§ 12.1–12.3, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981);
[21] U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 § 10
[22] *Wall Advisory Opinion,* [109]; *Banković*, [67].
[23] *Banković*, [71].
[24] http://www.icj-cij.org/court/index.php?p1=1 , last accessed 18.04.2016.

ICJ has confronted with the issue of extraterritoriality of ICCPR in the following cases: ***Wall Advisory Opinion*** **and** ***DRC v Uganda*** **case.**

The facts of the ***Wall Advisory Opinion***[25] are as follows: the wall which Israel constructed on the Palestinian territory and its route impaired the freedom of the Palestinians. The I.C.J. was however asked to provide an advisory opinion on the matter when the UNGA requested Israel to halt and reverse the construction of the wall. ICJ has found that international law, the Fourth Geneva Convention, The Hague Convention, relevant Security Council and General Assembly resolutions were all contravened by Israel, the occupying power, for constructing a wall on the Palestinian occupied territory. This action of the Israelites impaired the liberty of movement of the occupied territory with the exception of Israel's citizens as it was enshrined under Article 12 of the ICCPR. The actions of Israel also curtailed the Palestinians access to work, health facilities, education and an adequate standard of living. Although Israel had through its actions contravened International Law and these conventions, both parties, that is, Israel and the Palestinians are under an obligation to observe the rules of international humanitarian law. The implementation of the relevant Security Council resolutions is the only solution to the hostile situation since both sides had taken illegal actions and unilateral decisions. **The Court affirmed that the ICCPR is capable of extraterritorial application.**

In ***DRC v Uganda case***[26] the facts were as follows: DRC was involved in a civil war. Uganda, Rwanda, as well as other countries were all helping various rebel groups which were fighting to overthrow the DRC's government. At this time, various other rebel groups were hiding in the DRC and launching attacks at Uganda's governments. The DRC brought a case to the ICJ with the claim that Uganda was involving itself an internal DRC conflict. Uganda

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[25] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004 (A/ES-10/273 and Corr.1), §§ 107-111;

[26] *Case concerning Armed Activities on the Territory of the Congo* (*DRC v. Uganda*), ICJ judgment, 2005, §§ 216 – 217

made the argument that they were only protecting themselves from anti-Uganda rebel groups as self-defense. **ICJ generalized that international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.** The Court found that Uganda violated the principles of non-use of force in international relations and of non-intervention; that it violated its obligations under international human rights law and international humanitarian law. In addition, the Court also found that Congo violated obligations owed to Uganda under the VCDR. The Court unanimously found that the Republic of Uganda is under obligation to make reparation to Congo for the injury caused and decided that, failing agreement between the parties, the Court would settle the question of reparation.

What we can state from analyzing ICJ jurisprudence is that the latter found the extrateritorial reach of ICCPR only in cases of occupation.

1.3. HRC jurisprudence

The HRC is the body of independent experts that monitors implementation of the ICCPR by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol. The Committee meets in Geneva and normally holds three sessions per year. The Committee also publishes its interpretation of

the content of human rights provisions, known as general comments on thematic issues or its methods of work.[27]

HRC has dealt with this issue in ***Lopez v Uruguay*, *Lilian Celiberti de Casariego v Uruguay*, *Montero v Uruguay, Sophie Vidal Martins v. Uruguay* cases and General Comment 31.**

The facts of the ***Lopez v Uruguay* case**[28] are the following: Lopez Burgos was a dissident union member from Uruguay. He had fled across the border to Argentina where he continued his activities. Agents of Uruguay went to Argentina and kidnapped him and tortured him in a house in Buenes Aires. Uruguay was a party to the CCPR, but Argentina was not. The issue was whether does the CCPR prohibit Uruguay from conduct that is prohibited in the Covenant, even though not within its own territory? Human Rights Committee in para. 12.3 found that "[**I]t would be unconscionable to […] permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.** Uruguay violated covenant obligations when abducted and tortured citizen living in Argentina, mainly Art 7 (ill treatment), Art 9 (arbitrary arrest), Art 14 (denied legal counsel, self incriminate), Art 22 (persecution). Hence, HRC ordered the release of Lopez, compensation and permission to leave.

Similarly, HRC has ruled on the legality of acts by Uruguay in case of another arrest carried out by Uruguayan agents in Brazil in ***Lilian Celiberti de Casariego v Uruguay***[29] case.

The facts of the ***Montero v. Uruguay***[30] are the following: Montero, a Uruguayan citizen residing in Berlin alleged that she is a victim of a breach by Uruguay of article 12 (2)

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[27] http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx, last accessed 18.04.2016.
[28] *Lopez v. Uruguay,* U.N. HRC, Comm. No. R.12/52, §§ 12.1–12.3, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981);
[29] *Lilian Celiberti de Casariego v Uruguay,* U.N. HRC, Comm. No. R.56/79.

[30] *Montero v Uruguay,* U.N. HRC, Comm. No. R 106/81.

(freedom of movement) of the ICCPR as Uruguayan authorities have refused, without further explanation, to renew her passport. **The Court found that ICCPR is applicable extraterritorially** and found a violation, because Miss Montero was refused the renewal of her passport without any justification therefor thereby preventing her from leaving any country, including her own.

Similarly, in ***Sophie Vidal Martins v. Uruguay***[31] the HRC in 1982 found a violation of article 12 when Uruguay had refused to issue a passport to its citizen residing in Mexico, 'thereby preventing her from leaving any country.

In ***Gueye et al. v. France***[32], the HRC in 1989 found a violation of ICCPR article 26 (nondiscrimination) when France had enacted legislation that provided for the same service in the French military a lower pension to retired Senegalese soldiers living in Senegal than it provided to Frenchmen living in France (or even living in Senegal). The act of legislating occurred in France but its discriminatory effect was felt in Senegal where the authors lived as beneficiaries of French pensions.

As stated by HRC in the **General Comment 31**[33]**,** *the enjoyment of Covenant rights … also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.*

HRC, in its 1984 **General Comment concerning the "deployment and use" of nuclear weapons** [34]should also be taken into account as the deployment and use of nuclear

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[31] *Sophie Vidal Martins v. Uruguay* .N. HRC, Comm. No. R 57/1979
[32] *Gueye et al. v. France* .N. HRC, Comm. No. R 196/1985
[33] U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 § 10

[34] U.N. Human Rights Comm., General Comment No. 14: Nuclear weapons and the right to life, last accessed from http://www.facing-finance.org/en/database/norms-and-standards/ccpr-general-comment-no-14-nuclear-weapons-and-the-right-to-life/ 18.04.2016.

weapons obviously involves actions of a state party outside its territory by using lethal military force against individuals not in the custody of the attacking state.

Based on the abovementioned HRC jurisprudence, we can state that the latter finds that ICCPR can apply extraterritorially provided that either the effective physical control in cases of arrests is present or State's consular agents, with the consent of the host State, exercise some of the sending State's governmental functions abroad. The 1984 General Comment sheds doubts whether the criteria of effective control is present in cases of deployment and use of nuclear weapons outside the territory.

Chapter 2 The extraterritorial reach of ICCPR in the era of digital surveillance

2.1. The applicable tactics of the treaty interpretation

The rules of treaty interpretation are stated by Article 31 and 32 of VCLT. Article 31[35] entitled "General rule of interpretation" states:

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[35] VCLT, 1966, ILC, art. 31

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) ***any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;***

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32[36] entitled "Supplementary means of interpretation" states: *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

(a) leaves the meaning ambiguous or obscure; or

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[36] VCLT, 1966, ILC, art. 32

(b) leads to a result which is manifestly absurd or unreasonable.

In *Libya v Chad* [37]and *Kasikili/Sedududu islands*[38] case, the ICJ expressed the view that these articles reflect customary international law. This would have weight for parties of ICCPR who are not parties of VCLT.

Paragraph 5(b) of article 31 specifies as an element to be taken into account together with the context: "***any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation".*** The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Mainly, in the *Russian Indemnity* case the Permanent Court of Arbitration said: "...the fulfilment of engagements between States, as between individuals, is the surest commentary on the effectiveness of those engagements".[39]

Recourse to it as a means ofinterpretation is well-established in the jurisprudence of international tribunals. In its opinion on the *Competence of the ILO to Regulate Agricultural Labour*[40] the Permanent Court said: "*If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty."*

At the same time, the Court[41] referred to subsequent practice in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous. Similarly in the *Corfu Channel* case,[42] the International Court said: *"The subsequent attitude*

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[37] *Chad-Libya*, 1994 I.C.J. 6 (Feb. 3)
[38] *Kasikili/Sedudu Island* (Botswana/Namibia) Judgment of 13 December 1999, ICJ.
[39] *"...Vexecution des engagements est, entre Etats, comme entre particuliers, leplus stir commentaire du sens de ces engagements". Reports of International Abitral Awards,* vol. XI, p. 433. English translation from J. B. Scott, *The Hague Court* Reports (1916), p. 302.)
[40] *P.C.I.J.* (1922), Series B, No. 2, p. 39; see also *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne, P.C.I.J.* (1925), Series B, No. 12, p. 24; the *Brazilian Loans* case, *P.C.I.J.* (1929), Series A, No. 21, p. 119.
[41] *luIbid.,* pp. 40 and 41.
[42] *1.C.J. Reports 1949,* p. 25.

of the Parties shows it has not been their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation."

The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements. The text provisionally adopted in 1964 spoke of a practice which "establishes the understanding of all the parties". By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.[43]

The Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation. It formulated article 27 on that basis, making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty. Nevertheless, it felt that it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extrinsic means of interpretation, such as *travaux pre'paratoires,* until after the application of the rules contained in article 27 has disclosed no clear or reasonable meaning. In practice, international tribunals, as well as States and international organizations, have recourse to subsidiary means of interpretation, more especially *travaux*

[43] Yearbook of the International Law Commission, 1966, Vol. II, p 222, para 13.

preparatoires, for the purpose of confirming the meaning that appears to result from an interpretation of the treaty in accordance with article 27[44].

The Court itself has on numerous occasions referred to the *travaux preparatoires* for the purpose of confirming its conclusions as to the "ordinary" meaning of the text, for example, in its opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Nightus.*

On the other hand, The I.L.C. Commentary to the draft article that became Article 29 (then Article 25) states that *"the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable."* [45]

2.2 Interpretation of ICCPR in the light of VCLT in the era of digital surveillance

Although it was stated above, that the *travaux preparatoires* of the treaties are refered as subsidiary means for interpretation in cases when there is ambiguity, however, given a huge variaty of different and contrasting interpretations of ICCPR, article 2, there is a need to give recourse to ones of ICCPR. Thus, the *travaux preparatoires* of the ICCPR confirm that in adopting the wording chosen of Article 2, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.[46]

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[44] Ibid, p 38 para 18.
[45] Ibid, art. 25.
[46] See the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official Records of the General Assembly, Tenth Session, annexes, A/2929, Part 2, Chap. 5, § 4 (1955). The same idea also in Official Records of the General Assembly, Thirty-sixth Session, annex XIX, §§ 12.2-12.3, and annex XX, § 10.3.

What concerns to subsequent state practice discussed above, bearing in mind that the word is advancing at a rapid pace, and there are recent developments such as digital surveillance which were not familiar in the era of the conclusion of the ICCPR, we can bring several examples which are in favour of extrateritorial application of the Covenant.

There is a recent UN GA resolution 68/167 adopted in December 2013 without a vote addressing the right to privacy in the electronic age.[47]

Also according to leading doctrine, more specifically to the report of U.N. High Commissioner for Human Rights entitled "The Right to Privacy in the Digital Age", ***digital surveillance may engage a State's human rights obligations if that surveillance involves the State's effective control in relation to digital communications infrastructure.*** **More specifically,** ***digital surveillance engages a state's Covenant obligations where "State agents place data interceptors on fiber-optic cables travelling through their jurisdiction".*** [48]

Moreover, recently, in 2014, in its "Concluding Observations on the Fourth Periodic Rep. of the United States", HRC concluded that in general, foreign surveillance implicates the ICCPR[49]**.**

Hence, we can see that there is already fertile ground for establishing ICCPR's extraterritorial reach in the era of digital surveillance.

2.3 Obstacles for claiming that ICCPR is applicable extrateritorially in cases of surveillance

First and foremost, it seems that has been created a situation what we can call "lacuna in the law". Moreover, the International Conference on Data Protection and Privacy

[47] UNGA resolution 68/167 (December 18, 2013), adopted by consensus.
[48] Office of the High Commissioner for Human Rights, The Right to Privacy in the Digital Age: Report of the OHCHR, U.N. Doc. A/HRC/27/37, (June 30, 2014), § 34
[49] See Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the United States, ¶ 22, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014)

Commissioners which is composed of public agencies from 70 countries in 2013 adopted a resolution resolving its members to *"call upon governments to advocate the adoption of an additional protocol to Article 17 to create globally applicable standards for data protection and the protection of privacy"*, which means that **existing ICCPR is insufficient**[50]. ICJ is not allowed to extend the law as it will be inconsistent with past practice. Mainly, in *Fisheries (UK v. Iceland)* case[51], several states pushing for change in law (extension of coastal state fisheries) and third Conference on the Law of the Sea was happening, ICJ stated that, as a court of law, *cannot anticipate the law before the legislator has laid it down."*

Second, recognising that ICCPR has extrateritorrial reach would effect the doctrine existed before ICCPR[52] according to which territorial acts producing extraterritorial effects would not be "*a sound way of conceptualizing the application of human rights treaties since in every case one can draw some kind of causal link between a territorial act and extraterritorial consequences*". For instance, the decision to bomb and bombing itself.

Furthermore, there is distinction between the overarching positive obligation of states to secure or ensure human rights, which extends even to preventing human rights violations by third parties, and **the negative obligation** of states to respect human rights, which only requires states to refrain from interfering with the rights of individuals without sufficient justification. Negative obligations are territorially unlimited, as the text has single jurisdictional regime.[53]

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[50] International Conference on Data Protection and Privacy Commissioners, Resolution of 2013.
[51] *Fisheries (UK v. Iceland)* I.C.J. Reports 1974 ¶ 53
[52] International Criminal Law; Milanovic p. 126
[53] http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/, last accessed 18.04.2016.

Chapter 3 The interference with the right to privacy under ICCPR

3.1. The ban on unlawful and arbitrary interference

Article 17 of ICCPR provides that *(1) "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy"* and that (2) *"[e]veryone has the right to protection of the law against such interference."*

In its general comment No. 16, the HRC explained that the term "**unlawful**" implied that no interference could take place "except in cases envisaged by the law. Interference

authorized by States can only take place on the basis of law".[54] The expression **"arbitrary interference"** can also extend to interference provided for under the law. The introduction of this concept, the Committee explained, "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances"[55]. The Committee interpreted **the concept of reasonableness** to indicate that "any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case".[56]

3.2. The legality of mass surveillance programs *per se*

The very existence of a mass surveillance program creates an interference with privacy."[57] Sponsored by Germany and Brazil, two states that were both affected and embarrassed by the U.S. mass surveillance programs, the Resolution 68/167 manifested that *the mass surveillance programs are illegal, undermining the human right to privacy.*[58]

Even the mere possibility of communications information being captured creates an interference with privacy.[59] As the European Union Court of Justice recently in *Safe Harbour* case observed, communications metadata "taken as a whole may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been

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[54] Human Rights Committee, General Comment No. 16, Article 21, § 4, U.N. Doc. HRI/GEN/1/Rev.1 (1994).
[55] *Ibid*, para 4.
[56]Communication No. 488/1992, *Toonan v. Australia*, para. 8.3; see also communications Nos. 903/1999, para 7.3, and 1482/2006, paras. 10.1 and 10.2.
[57] Office of the High Commissioner for Human Rights, The Right to Privacy in the Digital Age: Report of the OHCHR, U.N. Doc. A/HRC/27/37, (June 30, 2014), § 20

[58] UNGA resolution 68/167 (December 18, 2013), adopted by consensus.
[59]See European Court of Human Rights, *Weber and Saravia v. Germany*, para. 78; *Malone v. UK*, para. 64.

retained."[60] However, the extended view point is that mass surveillance programs *per se* are not illegal.

3.3. The minimum safeguards of legality of those programs and the principle of proportionality

Unlike certain other provisions of the Covenant, article 17 does not include an explicit limitations clause. Hence, there is a need to be guided by Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, ECHR case law, HRC comments and etc. Interferences will only be permitted if they (a) pursue a legitimate aim, (b) are prescribed by a domestic law that conforms to the requirements of the Covenant, and (c) meet the tests of necessity and proportionality.[61] The relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.[62] Restrictive measures must conform to the principle of proportionality.[63]

On one hand, surveillance measures will not be considered "in accordance with law" unless the relevant provisions of a state's domestic law are accessible, clear, and precise.[64] The law must set out at a minimum: the nature, scope and duration of the possible measures; the grounds on which the authorities can order surveillance; which authorities have the power to order surveillance; a limit on the duration of the monitoring; the procedure to be followed for using and storing the data; the circumstances in which the data will be destroyed; and the

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[60]Court of Justice of the European Union, Judgment in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, Judgment of 8 April 2014, paras. 26-27, and 37. See also Executive Office of the President, "Big Data and Privacy: A Technological Perspective" (available from www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_-_may_2014.pdf), p. 19.

[61] *See* Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, annex; U.N.H.R.C., *Van Hulst v. Netherlands*, Communication No. 903/2999.

[62] ICCPR /C/USA/CO/4 § 8; CCPR/C/21/Rev.1/Add. 13, § 6.

[63] Human Rights Committee, General comment No. 27 (1999), § 14-15

[64] U.N. Secretary General, Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/69/397 (Sep. 23, 2014) ¶30.

applicable remedy for violations or abuses.[65] Additionally, tribunals disfavor domestic laws that vest too much discretion in the executive[66] or lack a warrant requirement.[67]

As the HRC has explained, "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them."[68] They must be "the least intrusive instrument amongst those which might achieve the desired result."[69] Additionally, in assessing proportionality, tribunals weigh the nature of the state's aim against the type and seriousness of the interference.[70]

On the other hand, interference with privacy is not unlawful if it is authorized by domestic law that is both accessible[71] and precise. A sufficiently precise law does not confer unfettered discretion on those charged with its execution[72]

National security is one legitimate aim,[73] but not the only one. Unlike other I.C.C.P.R. provisions,[74] Article 17 does not enumerate legitimate aims, leaving states discretion to choose aims. Additionally, surveillance is necessary where a "rational connection between the means employed and the aim"[75] exists and proportional where the methods are the "least intrusive measure" that can yield the needed benefit.[76]

A state provides effective protection of the law against impermissible interferences with privacy if it implements adequate safeguards for, and oversight of, surveillance

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[65] U.N.H.R.C., Concluding Observations on the Fourth Periodic Rep. of the United States, T 22, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) ¶22; *see also Ekimdzhiev v. Bulgaria*, App. No. 62540/00, Judgment, 2007 Eur. Ct. H.R. 533, ¶76 (explaining minimum safeguards required).
[66] *See Roman Zakharov v. Russia,* App. No. 47143/06 (Eur. Ct. H.R. 2015).
[67] *See Iordachi v. Moldova*, App. No. 25198/02 (Eur. Ct. H.R. 2009) ¶45 (stressing the lack of a warrant requirement in assessing the state's domestic law).
[68] U.N.H.R.C., General Comment No. 27 Freedom to Leave Any County, including one's own, CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) ¶¶11-16; *see also Handyside v. United Kingdom*, App. No. 5439/72 (Eur. Ct. H.R. 1976) ¶48; *Klass v. Germany*, App. No. 5029/71 (Eur. Ct. H.R. 1978) ¶42.
[69] General Comment No. 31,
[70] *See Leander v. Sweden*, App. No. 9248/81 (Eur. Ct. H.R. 1987) ¶59.
[71] H.R.C., Concluding Observations on the Fourth Periodic Rep. of the United States, T 22, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) ¶22.
[72] *See U.N. High Commissioner Report* ¶29; H.R.C., General Comment No. 27, ¶13.
[73] *U.N. High Commissioner Report*, ¶24.
[74] *See* Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter "I.C.C.P.R."] arts. 12, 14, 18, 19, 21 and 22.
[75] U.N. Secretary General, Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/69/397 (Sep. 23, 2014) ¶51 [hereinafter *Secretary General 2014 Report*]; *U.N. High Commissioner Report*, ¶25.
[76] *Secretary General 2014 Report*, ¶51.

programs.[77] First, preconditions to surveillance are not necessary as long as there is effective ex post supervision of the surveillance. As stated by the Secretary-General, "safeguards may take a variety of forms, but generally include independent prior authorization and/*or* subsequent independent review."[78] Subsequent independent review should involve "administrative, judicial and parliamentary oversight … and 'public interest advocacy' positions."[79] This supervision must be continuous, as opposed to ad hoc, and reviewing bodies should review and report findings at least every six months.[80] Reviewing bodies should also "have unrestricted access to all files, premises and personnel of the [intelligence] agency."[81] In particular, it is "best practice" that the reviewing body has the power to compel the production of evidence, as in Norway.[82]

The cornerstone cases stating the "minimum safeguards" set by ECHR are *Weber and Saravia v. Germany* and *Liberty and Others v. the UK.*

In ***Weber and Saravia V Germany***[83] case ECHR found that the German surveillance law (the "amended G10 Act"), as further restricted by the German Constitutional Court: "**defined the offences"** which could give rise to an interception order **"in a clear and precise manner"**. (para. 96); **indicated which categories of persons** were liable to have their telephone tapped with **sufficient precision** (para. 97); limited interception orders to a period of **three months** (renewable as long as the statutory conditions for the order were met) (para. 98); set out **strict procedures** for the imposition of surveillance (in particular, for automated "strategic monitoring" through "catchwords"), including prior authorization from an independent commission (the G10 Commission) that is appointed by Parliament (in

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[77] *U.N. High Commissioner Report*, ¶37.
[78] *Secretary General 2014 Report*, ¶45 (emphasis added).
[79] *U.N. High Commissioner Report*, ¶38.
[80] Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/H.R.C./10/3 (Feb. 4, 2009), ¶44.
[81] *Id*.
[82] *Id.* ¶45.
[83] *Weber and Saravia v. Germany*, application no. 54934/00, 29 June 2006

consultation with the Government); contained sufficient **"safeguards against abuse",** including **strict purpose- (use-) limitation-, data disclosure- and data destruction rules**, and close oversight over surveillance by a Parliamentary Board and by the G10 Commission (cf. paras. 116, 120ff, and passim); and "effectively ensured that **the persons monitored were notified** in cases where notification could be carried out without jeopardizing the purpose of the restriction of the secrecy of telecommunications."

In ***Liberty and Others v. the UK***[84] case, the Court held that surveillance in the UK, too, had a basis in domestic law, i.e., in the Interception of Communications Act 1985 (ICA) and the Regulation of Investigatory Powers Act 2000 (RIPA). However, in contrast to the case of *Weber and Saravia*, above, the Court held that in the UK the law: "allowed the executive an **extremely broad discretion** in respect of the interception of communications passing between the United Kingdom and an external receiver ... The **legal discretion** granted to the executive for the physical capture of external communications was ... **virtually unfettered;** the detailed "arrangements" for surveillance were contained in "**internal regulations, manuals and instructions"** that were **not contained in legislation or otherwise made available to the public;** the **supervision** provided by the Interception of Communications Commissioner (further discussed below), did not contribute towards the **accessibility and clarity of the scheme**, since he was not able to reveal what the "arrangements" were; consequently, the procedures to be followed for examining, using and storing intercepted material were not "set out in a form which is open to public scrutiny and knowledge"; and the fact that "extensive extracts" from the Code of Practice on surveillance had belatedly been made public "suggests that it is possible for a State to make public certain details about the operation of a scheme of external surveillance without compromising national security."

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[84] *Liberty and Others v. the UK,* application no 58243/00, 1 July 2008

3.4. The ban on discrimination of those programs

Article 26 of the ICCPR established the prohibition on non-discrimination.[85] HRC and other official commentaries maintain that safeguards must be guaranteed without any distinction based on nationality.[86] There is also ECHR case law.

In ***Gaygusuz v Austria***[87] case the facts are the following: The applicant, a Turkish national who has been working in Austria for many years had sought an unemployment pension. The Austrian State has refused to grant him this pension on the sole ground that he was not an Austrian national. The Court held that this decision amounted to discrimination because the applicant had contributed to the insurance fund and satisfied all legal conditions. Strict scrutiny is therefore required in cases of nationality, racial or ethnicity discrimination.

In ***Koua Poirrez v France***[88] the applicant, an Ivory Coast national had been declined benefits for the disabled since only French nationals had the prerogative to enjoy such benefits. The ECtHR held that this decision was discriminatory because it was only based on national origin and all legal criteria to get this benefit were satisfied.

In ***Zeibek v Greece***[89] the Greek national was seeking a pension especially intended for large families. The authorities refused to grant it since one of the children was not a Greek national, despite the applicant having the required number of children. Furthermore, the authorities decided to withdraw the nationality to the whole family because it presented some irregularities. The ECtHR found that the revocation of their nationality was based on the sole fact that the applicant was a Muslim and was therefore discriminatory. The authorities could

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[85] International Covenant on Civil and Political Rights ("ICCPR"),art. 26.

[86] U.N. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 30: Discrimination Against Non-Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004). *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, §§ 45–73,

[87] *Gaygusuz v. Austria* (Judgment), App. No. 17371/90, 1996-IV Eur. Ct. H.R. § 42;

[88] *Koua Poirrez v France,* (Nº 40892/98). Judgment 30.9.2003

[89] *Zeibek v Greece, Application* no. 34372/97, ECtHR 21 May 1997

moreover not justify this by invoking the necessity to protect the Greek nation, which is a discriminatory criterion based on national origin.

Hence, the mass surveillance programs which indicate that only those communications may be intercepted to which the nationals of the country are not participating are illegal.

Chapter 4 The extraterritorial application of human rights treaties

There is overwhelming jurisprudence of diverse bodies such as the ECHR, the Inter-American Human Right Commission[90] and the ICTY[91] in support of the extraterritorial application of IHR to areas under the effective control of the state.

4.1. ECHR

- **The rule**

The ECHR is an international court based in Strasbourg, France. It consists of a number of judges equal to the number of member States of the Council of Europe that have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms – currently 471 . The Court's judges sit in their individual capacity and do not represent any State. In dealing with applications, the Court is assisted by a Registry consisting mainly of lawyers from all the member States (who are also known as legal secretaries). They are entirely independent of their country of origin and do not represent either applicants or States.

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[90] *E.g.,* Report No. 109/99 *Coard v. U.S.,* Sept. 29, 1999, *available at* <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStatesl0.95 l.htm>.

[91] *E.g., Prosecutor v. Furimdzija*, No. IT-95-17/I-T, para. 183 (Dec. 10, 1999), 121 ILR 214.

The Court applies the ECHR. Its task is to ensure that States respect the rights and guarantees set out in the Convention. It does this by examining complaints (known as "applications") lodged by individuals or, sometimes, by States. Where it concludes that a member State has breached one or more of these rights and guarantees, the Court delivers a judgment finding a violation. Judgments are binding: the countries concerned are under an obligation to comply with them.[92]

Article 1 of ECHR states that *"the High Contracting Party shall secure to everyone* ***within their jurisdiction*** *the rights and the freedoms defined in section 1 of the Convention"*[93]. Hence, while both ICCPR and ECHR reflect a territorial notion of jurisdiction, their specific scope of application clauses are different.

- **ECHR case law**

ECHR has dealt with the extraterritorial reach of ECHR in ***Bankovic v Belgium***, ***Loizidou v. Turkey, Cyprus v Turkey***, ***Ilascu and others v Moldova and Russia, Chiragov and Others v. Armenia, Öcalan v. Turkey, M. v. Denmark, Medvedyev and Others v. France*** cases.

The facts of ***Bankovic***[94] *case* are the following: The application was brought by six citizens of the FRY and concerned the bombing by the NATO of the building of Radio-Television Serbia, RTS during the Kosovo crisis in April 1999. The building was destroyed; 16 people were killed and 16 others were seriously injured. The Court, however, unanimously declared the application inadmissible as the impugned act is to be considered **as falling outside the jurisdiction of the respondent States**. The Court came to the conclusion that **there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States**. Accordingly, it was not satisfied that the

[92] http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf , last accessed 18.04.2016.
[93] ECHR, article 1.
[94] Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case *Bankovic and Others v. Belgium and 16 Other Contracting States.*

applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question. In keeping with the essentially territorial notion of the jurisdiction, the Court has accepted **only in exceptional cases that acts of the Contracting states performed,** or **producing effects, outside their territories can constitute an exercise of jurisdiction by them. An exercise of power merely affecting an individual is insufficient to attract ICCPR obligations.**[95] The Court concluded that the impugned action of the respondent States does not engage their Convention responsibility and that the application could therefore be declared inadmissible.

ECHR in Bankovic case has also described the territorial scope of Article 2 of ICCPR as having been "definitively and specifically confined" by the drafters. [96]

In ***Loizidou v. Turkey***[97] case the facts are as follows: the applicant complained, in particular, that her property rights had been breached as a result of the continued occupation and control of the northern part of Cyprus by Turkish armed forces which had, on several occasions, prevented her from gaining access to her home and other properties there. The Court recalled that, although Article 1 (obligation to respect human rights) of the ECHR set limits on the reach of the Convention, **the concept of "jurisdiction" under that provision was not restricted to the national territory of the Contracting States.** In particular, **State's responsibility might also arise when as a consequence of military action – whether lawful or unlawful – it exercised effective control over an area outside its national territory**. States' obligation to secure in such areas the Convention rights and freedoms derived from the fact that they exercised effective control there, **whether that was done directly, through the State's armed forces, or through a subordinate local administration.** In the present case, Turkey had acknowledged that the applicant had lost

[95] *Banković*, [72]
[96] *Ibid,* Para 54
[97] *Loizidou v. Turkey* (Judgment), App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A), § 62 (1995)

control of her property as a result of the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the "Turkish Republic of Northern Cyprus" (the "TRNC"). **Turkey exercised effective overall control over northern Cyprus through its military presence there**, with the result that its responsibility under the Convention was engaged for the policies and actions of the "TRNC" authorities. Consequently, the acts of the "TRNC" authorities, supported by Turkish forces, fell within Turkish jurisdiction.

Similarly, as an establishment of the effective overall control over the territory through Turkish army we can also indicate the ***Cyprus v Turkey***[98] case. In the ***Ilascu and others v Moldova and Russia Judgement*** [99]the threshold criterion of extraterritorial exercise of jurisdiction was established through the agency exception because of the actions of the Russian troops.[100]

It should be noted that ECHR also uses the wording of "State agent authority" exception which includes the abovementioned differentiation based on the exercise of control by states' military presence that is through its direct involvement in the violation at issue. What concerns "subordinate local administration", ECHR uses the wordings of the "effective overall control over a territory" and "puppet state".

There is a recent case of ***Chiragov and Others v. Armenia***[101] by ECHR. This case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh. In the applicants' case, the Court confirmed that Armenia exercised effective control over Nagorno-Karabakh and the surrounding territories and thus had jurisdiction over the district of Lachin. It noted in particular that numerous reports and public statements, including from

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[98] *Cyprus v Turkey*, Application no. 25781/94, GC Judgement of 10 May 2001, Para 177.
[99] *Ilascu and others v Moldova and Russia Judgement,* Application no. 48787/99, GC Judgement of 8 July 2004.
[100] "International and comparative law center – Armenia", ICLAW study on the Chiragov case and the application of the rules of attribution by the European Court of Human Rights, Para 30.
[101] *Chiragov and Others v. Armenia*, 16 June 2015 (Grand Chamber – judgment on the merits)

members and former members of the Armenian Government, demonstrated that Armenia, through its military presence and by providing military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early date. Armenia's military support continued to be decisive for the control over the territories in question. Furthermore, it was evident from the facts established in the case that **Armenia gave the "Nagorno-Karabakh Republic" (the "NKR") substantial political and financial support;** its citizens were moreover required to acquire Armenian passports to travel abroad, as the "NKR" was not recognised by any State or international organisation. In conclusion, Armenia and the "NKR" were highly integrated in virtually all important matters and the "NKR" and its administration survived by virtue of the military, political, financial and other support given to it by Armenia. **Armenia thus exercised effective control over Nagorno-Karabakh and the surrounding territories.**

However, in this case there was neither direct involvement of state agents nor the actions of local administration were attributable to Armenia to establish the extraterritorial reach of ECHR. The same inconsistency with the standards of attribution defined by ICJ[102] we can witness in *Catan*[103] judgement but this is a subject of another debate.[104]

It should be noted that the abovementioned decisions retreated from *Bankovic* regarding the ECHR zone of application and established the extraterritoriality of ECHR in case of effective conrol either through the State's armed forces or through a subordinate local administration. Not only military, but also political support has been taken into consideration.

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[102] *Tadic* and *Nicaragua* tests, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), merits, ICJ Reports 1986

[103] *Catan and Others v Moldova and Russia,* Application nos. 43370/04, 8252/05 and 18454/06, GC Judgement of 19 October 2012.

[104] "International and comparative law center – Armenia", ICLAW study on the Chiragov case and the application of the rules of attribution by the European Court of Human Rights

The facts of the ***Öcalan v. Turkey***[105] case are the following: at the time of the events in question, the Turkish courts had issued seven warrants for the applicant's arrest and a wanted notice (red notice) had been circulated by Interpol. He was accused of founding an armed gang in order to destroy the integrity of the Turkish State and of instigating terrorist acts resulting in loss of life. In February 1999, in disputed circumstances, he was taken on board an aircraft at Nairobi (Kenya) airport and arrested by Turkish officials. He was then flown to Turkey. The applicant complained that Turkey had violated a number of his Convention rights. The Court noted that the applicant had been arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport. It was common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the **applicant had been effectively under Turkish authority and therefore within its jurisdiction, even though in that instance Turkey exercised its authority outside its territory.** It was true that the **applicant had been physically forced** to return to Turkey by Turkish officials and had been under their authority and control following his arrest and return to Turkey.

Seems, that the decision in *Ocalan* has adopted an approach according to which states, and states' agents are bound to respect those HR obligations that they have the power to effect. The letter is also an example of "agency exception" by putting a lower threshold then in the abovementioned *Cyprus* cases as here there was no situation of occupation. The following case illustrates that "agency exception" is applicable not only for security forces but even for members of diplomatic premises.

The facts of the ***M. v. Denmark***[106]are the following: The applicant, in an attempt to leave East Germany (German Democratic Republic) and move to the West (the Federal Republic of Germany), entered the premises of the Danish Embassy in (East) Berlin in 1988.

[105] *Öcalan v. Turkey*, Application no. 46221/99, GC Judgement of 12 May 2005 (Grand Chamber – judgment)
[106] *M. v. Denmark* (application no. 17392/90) 14 October 1992 (decision of the European Commission on Human Rights1)

At the request of the Danish ambassador, the East German police entered the Embassy, took the applicant away and he was ultimately sentenced to conditional imprisonment after spending 33 days in detention. He complained that his right to liberty and security was violated when he was handed over to the East German police. It was clear from the constant jurisprudence of the ECHR **that authorised agents of a State, including diplomatic or consular agents, brought other people or property within the jurisdiction of that State to the extent that they exercised authority over them.** Therefore, the acts of the Danish ambassador, of which the applicant had complained, had affected people within the jurisdiction of the Danish authorities.

ECHR has found that the extraterritorial reach of ICCPR is possible when state's act on its own territory producing effect in another State in *Soering v. the United Kingdom*[107] *case.* The applicant, a German national, was detained in a prison in England pending extradition to the USA to face murder charges for killing his girlfriend's parents. He complained that, despite the diplomatic assurances, he risked being sentenced to death if extradited to the USA. He maintained in particular that, because of the "death row phenomenon" where people spent several years in extreme stress and psychological trauma awaiting to be executed, if extradited, he would be subjected to inhuman and degrading treatment and punishment. The Court recalled that the decision by a Contracting State to extradite someone might engage that State's responsibility under the Convention where a risk existed that the person would be tortured or otherwise ill-treated if extradited. Under the Convention liability was incurred by the extraditing Contracting State because of its action which exposed an individual to prohibited ill-treatment. **The Court concluded that the United Kingdom would violate Article 3 (prohibition of torture or inhuman or**

[107] *Soering v. the United Kingdom,* Application no. 48787/99, GC Judgment of 8 July 2004.

degrading treatment or punishment) of the Convention if it extradited the applicant to the USA.

ECHR even found extraterritorial reach of ECHR in case of **acts in High seas in *Medvedyev and Others v. France*[108]**case. The applicants were crew-members of a cargo vessel registered in Cambodia. As the French authorities suspected the vessel was carrying significant quantities of narcotics for distribution in Europe, the French Navy apprehended it off the shores of Cap Verde and confined the crew to their quarters on board under French military guard. The applicants submitted that they had been deprived of their liberty unlawfully, particularly as the French authorities had not had jurisdiction. The Court held that France had exercised full and exclusive control over the Cambodian vessel and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner. Besides the interception of the vessel, its rerouting had been ordered by the French authorities, and the crew had remained under the control of the French military throughout the voyage to Brest in France. Accordingly, the applicants had been effectively within France's jurisdiction.

Hence we can witness, that after restrictive attitude in *Bankovic* case, ECHR has stated that ECHR can apply extraterritorially in various factual circumstances not limiting itself by cases of occupations but also in cases when state security forces act abroad, when diplomatic or consular functions are exercised, when there is military presence and political support, for acts in High seas, in cases of extradition and etc.

4.2. Other human right conventions

- **Convention Against Torture**

[108] *Medvedyev and Others v. France,* 23 March 2010 (Grand Chamber – judgment)

As already proved, not all human right conventions are drafted in the same way in terms of their scope. For instance, the Article 2 (1) of the Convention Against Torture indicates that *"each State Party should take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".* [109]

It is apparent, that there is a deep contrast between the abovementioned clause and clause of ICCPR. However, the contrast by itself doesn't mean that in case of lower threshold the ICCPR should not be read not to apply extrateritorrially.

- **Refugee Convention**

While the United States is not a party to the U.N. Convention Relating to the Status of Refugees,[110] it is derivatively bound to the convention's core provisions through its adherence to the Protocol Relating to the Status of Refugees[111]. In *Sale v. Haitian Centers Council Inc*.[112], the U.S. Supreme Court held that Article 33 of the Convention, which provides that no state shall expel or return ("refouler") a refugee to a state where his or her life or freedom is threatened because of race, religion, nationality or political beliefs, was not intended to have extraterritorial effect. As such, a U.S. interdiction program designed to stop persons fleeing by boat from Haiti was not in violation of Article 33 because it took place outside U.S. territorial waters. The Court stated the interdiction program may "violate the spirit of Article 33," but because " … the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions."[113]

The U.N. High Commissioner for Refugees issued a statement critical of the Sale

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[109] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), Dec. 10,1984, S. Treaty Doc. No 100-20 (1988).
[110] U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150
[111] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
[112] *Sale v. Haitian Centers Council Inc*., 509 U.S. 155 (1993),
[113] *Ibid*, at 157.

decision, expressing the opinion that the non-refoulement obligation of Article 33 applied also outside a state's own borders[114]. The Inter-American Commission on Human Rights later expressed its conclusion that the interdiction program upheld in *Sale* violated Article 33 of the Refugee Convention, as well as several provisions of the American Declaration of the Rights and Duties of Man.[115]The United States Government has continued to assert that Article 33 does not apply extraterritorially.

In 1998, however, Congress enacted a rider forbidding the use of appropriated funds for extraterritorial refoulement of refugees, and also establishing a policy of applying non-refoulement as required by the Torture Convention without regard to geographical location.[116]

Here we can draw parallels between the case of ECHR in *Soering* and The Inter-American Commission on Human Rights in *Haitian Centre for Human Rights v. United States* as in the both cases extraditing a criminal and expelling a refugee to a state where his or her life or freedom is threatened because of race, religion, nationality or political beliefs, was intended to have extraterritorial effect.

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[114] See U.N. High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M 1215 (1993).
[115] See *Haitian Centre for Human Rights v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95 doc. 7 rev. (1997).
[116] See Pub. L. No. 105-277, §§ 2241, 2242, 112 Stat. 2681-821 (1998).

CONCLUSION

As we have wittnessed ICCPR has been applied in a variaty of factual circumstanses. Recognized exsemples of extraterritorial reach of ICCPR include where

(i) a State exercises physical or custodial control over an individual;[117]

(ii) a State, through military occupation, exercises control over an area;[118]

(iii) a State, with the agreement of the host State, performs executive or judicial functions normally reserved for a sovereign government;[119] and

(iv) a State's diplomatic or consular agents, with the consent of the host State, exercise some of the sending State's governmental functions abroad.[120]

An exercise of power merely affecting an individual is insufficient to attract ICCPR obligations.[121]

On one hand, if we try to interpret ICCPR broadly in the light of VCLT, we can see that subsequent state practice has developped in a way to allow its extraterritoral effect in case of digital surveillances, provided that the effective control would be set on data which is

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[117] *Burgos v Uruguay*; *Ocalan v Turkey*, [93];
[118] *Wall Advisory Opinion*, [110]-[111]; *Loizidou*, [62]; *Cyprus v Turkey*, [76]-[77]; *Banković*, [70]; General Comment 31, [10].
[119] *Banković*, [71];
[120] *Montero v Uruguay*, [5], approved in *Wall Advisory Opinion* [109];
[121] *Banković*, [72]

analyzed by the contry's bureaus and specialists over whom the country would have wull jurisdiction.

On the other hand, it'is obvious that currently there is lacuna in law concerning this issue. There is a need for legislator to close the gap, because a case on this dire problem would be brought before ICJ, the latter would not have the authority to solve it.

Given the widespread practice of the mass surveillance programs, the viewpoints differ. We are inclined to believe that *per se* they are legal provided that minimum safeguards set by jurisdprudence and the principle of proportionality were respected.

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