

IN THE EUROPEAN COURT OF HUMAN RIGHTS

App No. 64371/16

BETWEEN:

JOSHUA WIEDER

Applicant

v

THE UNITED KINGDOM

Respondent

and

App No. 64407/16

CLAUDIO GUARNIERI

Applicant

v

THE UNITED KINGDOM

Respondent

WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENER

1 February 2022

Introduction

1. These written comments are submitted by Media Defence (the ‘Intervener’), pursuant to leave granted by the President of the Fourth Section in accordance with Rule 44(3) of the Rules of Court.¹
2. These cases concern complaints about violations of Articles 8 and 10 on the basis of the applicants’ reasonable belief that their communications and related data were intercepted, extracted, stored, analysed, and disseminated by United Kingdom (the ‘UK’) intelligence agencies, as well as the sharing of intercepted communications between intelligence agencies. In the domestic proceedings the applicants were found not to come within the jurisdiction of the UK, within the meaning of Article 1 of the European Convention on Human Rights (the ‘Convention’), on the basis they were resident outside the UK.
3. In recent years the Court has developed its case law on Article 1 of the Convention primarily in the context of situations of armed conflict and allegations of violations of the right to life and unlawful detention. However, states have the capacity to violate a wide range of human rights of persons located outside their territories, including the rights to privacy and freedom of expression. Related to this, many states have extended their cyber operations, including their surveillance capacity, beyond their territorial borders, increasing the risk that domestic legal restrictions will be evaded.² This has important implications for press freedom, as such operations are capable of intercepting journalistic communications and related data that can identify journalistic sources. A cyber operation that facilitates state access to journalists’ communications and related data without adequate safeguards is more likely to affect public interest journalism due to the nature and content of that journalism.³
4. Modern day journalism routinely involves investigations into complex topics across multiple jurisdictions involving a range of actors.⁴ There is increasing recognition that legal frameworks designed to enable journalists to protect the confidentiality of their sources and materials have come under ‘significant strain’, in particular in

¹ Leave granted by way of letter from the Court dated 11 January 2022.

² See for example, HRC, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Doc. A/HRC/23/40 (17 April 2013) §64: “a number of States have begun to adopt laws that purport to authorize them to conduct extra-territorial surveillance or to intercept communications in foreign jurisdictions. This raises serious concern with regard to the extra-territorial commission of human rights violations and the inability of individuals to know that they might be subject to foreign surveillance, challenge decisions with respect to foreign surveillance, or seek remedies ... These developments suggest an alarming trend towards the extension of surveillance powers beyond territorial borders, increasing the risk of cooperative agreements between State law enforcement and security agencies to enable the evasion of domestic legal restrictions.”

³ For the purposes of these written comments, the term ‘cyber operations’ encompasses a wide range of state activities conducted for the purpose of gathering intelligence, for example audio-visual observation or surveillance; the interception of communications, electronic and otherwise, including communications data; and the collection, storage, processing, and transfer of personal data to third parties.

⁴ See for example the scale and complexity of information obtained by the International Consortium of Investigative Journalists, who worked with over 140 media organisations across the world in coordinating the publication of the material in the investigation into the ‘Pandora Papers’ – International Consortium of Investigative Journalists, *Pandora Papers* (3 October 2021), available at: <https://www.icij.org/investigations/pandora-papers/>

circumstances where technological and societal developments⁵ present new challenges.⁶ These cases provide the Court with an opportunity to interpret ‘jurisdiction’ under Article 1 of the Convention in a way that recognises the evolution in journalistic practice, that accommodates technological developments relating to cyber operations, and that avoids unconscionable double standards in the conduct of states using cyber operations, depending on whether they act within or outside their territory.

5. Through these written comments, the Intervener submits that (i) state conduct of cyber operations outside its territorial boundaries can give rise to the exercise of jurisdiction by that state within the meaning of Article 1; (ii) recent international and comparative case law and legislation on the meaning of ‘jurisdiction’ provides further support for that proposition; and (iii) the safeguards that protect against the possibility of unlawful interference with journalistic communications and related data within the territory of a State should also apply extraterritorially, and to both interception of communications and receipt of solicited intercept material, without distinction.

State cyber operations outside its territorial boundaries and jurisdiction within the meaning of Article 1

6. This Court’s case law provides authority for the proposition that cyber operations conducted by a state against an individual that take place within the territory of that state give rise to the exercise of jurisdiction by that state within the meaning of Article 1.⁷ Applying this Court’s case law, and the general principles it has developed on the interpretation of Article 1, the conduct of cyber operations by a state against an individual outside its territorial boundaries could also give rise to an exercise of jurisdiction by that state.

General principles relevant to interpretation of Article 1

7. International law requires that the concept of ‘jurisdiction’ be interpreted in light of the object and purpose of the relevant treaty.⁸ Consistent with that requirement, this Court has stated on a number of occasions that when interpreting its provisions it must have regard to the Convention’s special character as a human rights treaty.⁹ This approach is

⁵ Relevant to this is the observation made by the Grand Chamber in the recent judgment in *Big Brother Watch and others v the United Kingdom* while noting the ‘specific difficulties’ that arise in the context of assessing bulk interception of cross-border communications by the intelligence services: “In the current, increasingly digital, age the vast majority of communications take digital form and are transported across global telecommunications networks using a combination of the quickest and cheapest paths without any meaningful reference to national borders.” – ECtHR, *Big Brother Watch and Others v the United Kingdom* [GC], nos. 58170/13, 62322/14 and 24960/15, §322, 25 May 2021.

⁶ See for example UNESCO, *Protecting Journalism Sources in the Digital Age* (2017), available at: <https://unesdoc.unesco.org/ark:/48223/pf0000248054>, p.7, “[t]he legal frameworks that support protection of journalistic sources ... are increasingly at risk of erosion, restriction and compromise - a development that is seen to represent a direct challenge to the established universal human rights of freedom of expression and privacy, and one that especially may constitute a threat to the sustainability of investigative journalism.”

⁷ See for example *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [GC], no. 45036/98, §137, ECHR 2005-VI, where the relevant act took place in Ireland while the applicant company was based abroad.

⁸ Article 31 (1) of the United Nations, *Vienna Convention on the Law of Treaties of 1969*, Treaty Series, vol 1155, p.331.

⁹ See for example ECtHR, *Al-Adsani v the United Kingdom* [GC], no. 35763/97, §55, ECHR 2001-XI: “The Convention ... cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. The

reflected in the Court's consistently stated view that the object and purpose of the Convention as an instrument for human rights protection require that its provisions be interpreted and applied so as to make its safeguards "practical and effective".¹⁰

8. The Court has also consistently stated that when interpreting the provisions of the Convention, including Article 1, it must consider the relevant rules of international law, noting that it should, as far as possible, interpret the Convention in harmony with other rules of international law of which it forms part.¹¹ The Court has also observed that when confronted with 'a continuous evolution' in a specific area, such as 'jurisdiction', it will search for common ground among international law norms.¹²
9. Connected to this is the concept of the Convention as a living instrument, "which must be interpreted in the light of present-day conditions, and that [the Court] has taken account of evolving norms of national and international law in its interpretation of Convention provisions".¹³ Importantly, in the context of these cases now being considered by this Court, it has emphasised that Article 1 cannot be interpreted so as to allow a state party to commit violations of the Convention on the territory of another state which it could not commit on its own territory.¹⁴ This principle is well established in international law. The International Court of Justice (the 'ICJ'), when addressing the question of jurisdiction noted that "... the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory".¹⁵

Relevant case law of this Court on Article 1 jurisdiction

10. In *Weber and Saravia v Germany*, the first applicant, a German national living in Uruguay, was an investigative journalist, who regularly travelled throughout Europe as part of her work, and who alleged her communications were intercepted by German state agents. That case was found to be inadmissible without the Court examining the extraterritorial question.¹⁶ In *Liberty v United Kingdom* and *Big Brother Watch v*

Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part ...".

¹⁰ ECtHR, *Mamtkulov and Askarov v Turkey* [GC], nos. 46827/99 and 46951/99, §101, ECHR 2005-I.

¹¹ See for example ECtHR, *Cyprus v Turkey* (just satisfaction) [GC], no. 25781/94, §23, ECHR 2001-IV: "The Court reiterates that the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 (the 'Vienna Convention'). As a matter of fact, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see, among many others, *Loizidou v Turkey* (merits), 18 December 1996, §43, Reports of Judgments and Decisions 1996-VI; *Al-Adsani v the United Kingdom* [GC], no. 35763/97, §55, ECHR 2001-XI.

¹² ECtHR *Demir and Baykara v Turkey* [GC], no. 34503/97, § 67, ECHR 2008.

¹³ See for example, ECtHR *Rantsev v Cyprus and Russia*, no. 25965/04, §§ 273-274, ECHR 2010 (extracts); ECtHR, *Güzelyurtlu and Others v Cyprus and Turkey*, no. 36925/07, §286, 4 April 2017.

¹⁴ See for example, ECtHR *Solomou and Others v Turkey*, no. 36832/97, §45, 24 June 2008; ECtHR, *Issa and Others v Turkey*, no. 31821/96, §71, 16 November 2004; ECtHR, *Andreou v Turkey*, no. 45653/99, 27 October 2009; ECtHR, *Isaak v Turkey*, no. 44587/98, 24 June 2008.

¹⁵ See ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (9 July 2004), ICJ Reports 2004, p.136, §109, available at: <https://www.un.org/unispal/document/auto-insert-178825/>

¹⁶ ECtHR, *Weber and Saravia v German (dec.)*, no. 54934/00, §72, ECHR 2006-XI.

United Kingdom the question of Article 1 jurisdiction was not considered in detail, notwithstanding there were applicants in both cases who were based outside the UK and who alleged that their communications were intercepted following cyber operations conducted by UK state agents.¹⁷

11. The general principles applicable to jurisdiction that the Court has developed in the context of a range of different factual situations have not, therefore, yet been examined in detail in situations involving state cyber operations. In *Al-Skeini v United Kingdom* the Grand Chamber described those general principles in the following terms:

“A state’s jurisdictional competence under article 1 is primarily territorial. Jurisdiction is presumed to be exercised normally throughout the state’s territory. Conversely, acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of article 1 only in exceptional cases.

*To date, the Court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the state was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.”*¹⁸

12. In the context of state cyber operations abroad, these passages contain three important elements. First, the question of whether jurisdiction is established is ultimately dependent on a detailed inquiry into the factual circumstances of each case. This can be seen in the recent decision in *Georgia v Russia (II)* where the Court, following an intense examination of the factual circumstances, determined that precisely because of the difficulty in establishing the relevant circumstances, while also taking into account the factual situation in that case was predominantly regulated by other legal norms, that is, international humanitarian law, a ‘jurisdictional link’ could not be established.¹⁹
13. Second, the reference to “exceptional” circumstances does not impose a strict requirement that the factual circumstances of a case must meet a particular standard or threshold.²⁰ The UK Supreme Court, when examining these passages in the context of a case involving British armed forces operating abroad, noted that the word ‘exceptional’ is there “not to set an especially high threshold for circumstances to cross before they can justify a finding that the state was exercising jurisdiction extraterritorially. It is there to make it clear that, for this purpose, the normal presumption that applies throughout the state’s territory does not apply”.²¹ In a subsequent case before the High Court of England and Wales, also involving the operation of British armed forces abroad, the court considered the basis on which a member state’s activities abroad can

¹⁷ ECtHR, *Big Brother Watch and Others v the United Kingdom* [GC], nos. 58170/13, 62322/14 and 24960/15, §272, 25 May 2021; ECtHR, *Liberty and Others v the United Kingdom*, no. 58243/00, 1 July 2008

¹⁸ ECtHR, *Al-Skeini and Others v the United Kingdom* [GC], no. 55721/07, §§131-132, ECHR 2011; See also ECtHR, *Georgia v Russia (II)* [GC], no. 38263/08, §81, 21 January 2021.

¹⁹ ECtHR, *Georgia v Russia (II)* [GC], no. 38263/08, 21 January 2021.

²⁰ Public international law principles provide support for this point; see The International Law Commission, *Yearbook of the ILC* (1975), II p.83, ‘[i]nternational life provides abundant examples of activities carried out on the territory of a State by agents of another State ... [t]here is nothing abnormal in this.’

²¹ UKSC, *Smith and Others (FC) v The Ministry of Defence*, [2013] UKSC 41, §30.

fall within the scope of its human rights treaty obligations, noting that while it could still be considered ‘exceptional’ for states to exercise authority or control abroad, it can no longer be considered ‘exceptional’ for jurisdiction to arise when they do so.²²

14. Third, the Court notes that it has recognised a number of exceptional factual circumstances giving rise to the exercise of jurisdiction “to date”. This indicates that the Court does not regard as closed the circumstances where jurisdiction is capable of being exercised by a state extraterritorially.²³ This is consistent both with the idea of the Convention as a “living instrument”²⁴ and the absence of any suggestion that the Convention could only apply extraterritorially within fixed categories or strictly as envisaged by the drafters of the Convention.
15. Although ultimately very much dependent on the facts, of the categories, or models, of extraterritorial jurisdiction identified by the Court in *Al-Skeini*, modern day state practice suggests that state agent authority or control²⁵ is the most apposite to situations where states engage in cyber operations outside their territorial boundaries. This category provides that a state’s responsibility under the Convention can be triggered by acts which “produce effects outside its own territory” and which give rise to jurisdiction, by reason of the exercise of authority or control.²⁶ In those circumstances “the state is under an obligation under article 1 to secure to that individual the rights and freedoms ... that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’.”²⁷
16. This formulation could be applied to a wide range of factual scenarios where a state conducts cyber operations outside that state’s territory which result in the interception of an individual’s communications and related data. Consider the situation where a state’s intelligence agent, while abroad, overpowers and then searches a journalist in order to secure certain information on their person. Then consider an alternative situation where that agent, again while abroad, surveils that journalist using sophisticated equipment and secures that same information. In both scenarios the ultimate aim and outcome of the operation is the same. It is difficult to see how a principled distinction can be drawn between the methods used, in the context of deciding whether jurisdiction arises.²⁸ Any such distinction would be arbitrary and would be an invitation for states to engage in practices contrary to the Convention in order to circumvent their human rights obligations.

Decision of German Constitutional Court on extraterritorial cyber operations

²² High Court of Justice, *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), §137(v).

²³ See UKSC, *Smith and Others (FC) v The Ministry of Defence*, [2013] UKSC 41, §30.

²⁴ ECtHR, *Tyrer v the United Kingdom*, no. 5856/72, §31, 25 April 1978; see also ECtHR, *Demir and Baykara v Turkey* [GC], no. 34503/97, §68, ECHR 2008.

²⁵ ECtHR, *Al-Skeini and Others v the United Kingdom* [GC], no. 55721/07, §§133-137, ECHR 2011.

²⁶ *Id.*, §133; see also *Drozd and Janousek v France and Spain*, 26 June 1992, §91 [Series A no. 240]

²⁷ ECtHR, *Al-Skeini and Others v the United Kingdom* [GC], no. 55721/07, §137, ECHR 2011.

²⁸ See Marko Milanovic, *Surveillance and Cyber Operations* (9 October 2020), Research Handbook on Extraterritorial Human Rights Obligations, Mark Gibney et al. eds., Routledge, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708440, where he provides a series of factual scenarios that move from the physical to the virtual and notes that there is “no point along this spectrum that could be picked as some non-arbitrary dividing line between the existence of jurisdiction and the lack thereof.” See also, more generally, Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age* (31 March 2014), Harvard International Law Journal, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418485

17. A recent decision of the German Constitutional Court on extraterritorial cyber operations is instructive.²⁹ The question before the Constitutional Court was whether the fundamental rights of the Basic Law are binding on the Federal Intelligence Service and the legislator that sets out its powers, regardless of whether the Federal Intelligence Service is operating within Germany or abroad, and whether the protection provided by Article 5, relating to freedom of expression, and Article 10, relating to privacy, applies to telecommunications surveillance of foreigners in other countries.³⁰ The challenge was brought against legislative provisions permitting the Federal Intelligence Service³¹ to carry out surveillance of foreign telecommunications, to share that intelligence with domestic and foreign bodies, and to cooperate with foreign intelligence services in respect of that intelligence. It therefore raised very similar factual issues to the ones the Court must consider in these present cases.
18. The relevance of the Constitutional Court's analysis to this Court's consideration of the question of extraterritorial state cyber operations partly lies in its focus on the applicability of international human rights principles to that question. The Constitutional Court began by noting that the Basic Law provides that the authority of the state is bound by the fundamental rights contained within it and that no restrictive requirements that make that binding effect dependent on a territorial connection with Germany or on the exercise of specific sovereign powers can be inferred.³² It specifically noted that this characterisation applies to freedom of expression and privacy, which require to be protected from surveillance measures.³³
19. The judgment emphasised the relationship between fundamental rights provided for in the Basic Law and international human rights law and noted that while "the Basic Law deliberately differentiates between human rights and rights afforded only to German citizens ... this does not mean that human rights should also be limited to domestic matters or state action in Germany. There is nothing in the wording of the Basic Law to suggest such an understanding."³⁴ Importantly, it found that restricting the application of the Basic Law to Germany's territorial boundaries would undermine universal human rights. In so doing, it expressly acknowledged that this Court has yet to properly grapple with the issue of extraterritorial surveillance.³⁵

²⁹ BVerfG, *Urteil des Ersten Senats vom 19 Mai 2020 - 1 BvR 2835/17 -*, Rn. 1-332, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1bvr283517.html (GERMAN); and BVerfG, *Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17*, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html (ENGLISH)

³⁰ While this case deals with the extraterritorial application of the constitution of a state, the Intervener would submit that broadly the same considerations apply in that regard as apply to the extraterritorial application of the Convention.

³¹ The *Bundesnachrichtendienst* or *BND*.

³² See Article 1(3) Basic Law for the Federal Republic of Germany (*Grundgesetz - GG*). See also, BVerfG, *Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17*, §88, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html

³³ Article 5 and Article 1 Basic Law for the Federal Republic of Germany (*Grundgesetz - GG*).

³⁴ BVerfG, *Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17*, §94, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html

³⁵ *Id.*, §97.

20. One of the key factors in the Constitutional Court’s analysis, no doubt influenced by the range of methods available to the state when engaged in extraterritorial surveillance, was the importance of ensuring fundamental rights protections march in step with state behaviour, noting that a failure to do so would “[g]iven the realities of internationalised political action and the ever increasing involvement of states beyond their own borders ... result in a situation where the fundamental rights protection of the Basic Law could not keep up with the expanding scope of action of German state authority and where it might – on the contrary – even be undermined through the interaction of different states. Yet the fact that the state as the politically legitimated and accountable actor is bound by fundamental rights ensures that fundamental rights protection keeps up with an international extension of state activities.”³⁶ This is particularly relevant in the context of states using technological and other advancements to evade their obligations under human rights law.
21. A further important aspect of this case lies in the Constitutional Court’s recognition that the Basic Law is designed to “provide protection whenever the German state acts and might thereby create a need for protection – irrespective of where and towards whom it does so.”³⁷ This approach is consistent with recent developments on the international legal plane, notably with respect to the so-called ‘functional’ approach.³⁸ In applying this approach the Constitutional Court expressly noted that the Convention “does not stand in the way” of Basic Law rights being applied abroad.³⁹ On that basis, an individual who is resident in London and who is the subject of a cyber operation conducted by German intelligence agents, would come within the jurisdiction of the German state.

International and comparative case law and legislation on the meaning of ‘jurisdiction’

22. Article 2 of the International Covenant on Civil and Political Rights (the ICCPR) requires a state party to ensure that individuals are able to enjoy and exercise their rights under that treaty “within its territory and subject to its jurisdiction”.⁴⁰ The Human Rights Committee (the HRC), in its 2018 General Comment no. 36 (GC 36) on Article 6 of the ICCPR, on the right to life, described jurisdiction in the following terms: “a State party has an obligation to respect and to ensure the rights under article 6 [ICCPR] of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control”.⁴¹ The emphasis is on whether, at the time of the actual interference with the rights of an individual, wherever that individual might be located, the state had effective control over that individual’s ability to exercise their rights.

³⁶ *Id.*, §96.

³⁷ *Id.*, §89.

³⁸ See for example Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law* (28 August 2013), *The Law & Ethics of Human Rights*, vol. 7, no.1, pp 47-71

³⁹ BVerfG, *Judgment of the First Senate of 19 May 2020 – 1 BvR 2835/17*, §99, available at:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html

⁴⁰ UN General Assembly, *Article 2 ICCPR*, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

⁴¹ HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, Doc No. CCPR/C/GC/36, §63, (30 October 2018), available at:

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

23. The authors of GC 36 have noted⁴² that this articulation of the ‘functional’ approach relating to Article 2 jurisdiction is not inconsistent with the practical approach that was already taken by the HRC when considering the question of jurisdiction in the context of the right to life.⁴³ One of the rationales for this approach, they noted, was to “avoid the protection gaps that a narrower approach entails, without imposing on states unreasonable and unforeseen obligations”.⁴⁴
24. The ‘functional’ approach, accommodating evolving state activities abroad and mitigating the potential for arbitrary or absurd outcomes, provides an authoritative, and principled, legal framework within which the question of jurisdiction in the context of cyber operations abroad can be assessed.⁴⁵ The HRC has defined jurisdiction in similar terms to this Court; as the exercise of ‘authority and control’ or ‘power and effective control’ over individuals. The overarching principle behind the use of words such as ‘control’, ‘authority’ or ‘power’ is the existence of a relationship between agents of the state acting outside its territory and the individual whose right is alleged to have been violated, where the state actually affects that right by an act or omission of its agents.⁴⁶ Understood in this way, standard extraterritorial models such as power or control over a person could be regarded as particular examples of a broader principle which is concerned with the impact on the right itself.⁴⁷ Consideration of that impact would form part of the factual assessment in determining whether jurisdiction is established.
25. This approach was adopted by the Inter American Court on Human Rights (IACtHR) in an advisory opinion requested by Colombia, concerning the obligations of a state for

⁴² See Just Security, *Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany of General Comment 36* (4 February 2019), available at: <https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/>

⁴³ For example, in Human Rights Committee, Concluding Observations on the United States of America (2014) UN Doc CCPR/C/USA/CO/4 (on the use of lethal force using drones in foreign territory); Human Rights Committee, Concluding Observations on the United Kingdom UN Doc CCPR/C/GBR/CO/7 (2015) (on the review foreign surveillance programs).

⁴⁴ See, Just Security, *Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany of General Comment 36* (4 February 2019), available at: <https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/>

⁴⁵ It seems axiomatic that the ‘functional’ approach would apply to all rights, not just to the ‘right to life’. See, for example, Marko Milanovic, *Surveillance and Cyber Operations* (9 October 2020), Research Handbook on Extraterritorial Human Rights Obligations, Mark Gibney et al. eds., Routledge, p.10, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708440: “the functional approach should apply to all rights in the Covenant to the extent possible. Thus, if a state exercises power or control over an individual’s enjoyment of the right to privacy by subjecting that individual to surveillance, or by processing or disclosing their personal information, the ICCPR should apply. The same goes for cyber operations that would affect other rights, including the right to life. To be clear, the Committee is yet to explicitly say so, but this to me seems to be inescapable consequence of the approach it took regarding the right to life.”

⁴⁶ See ECtHR, *W.M. v Denmark* (dec.), no.17392/90, ECommHR 14 October 1992: “It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.”

⁴⁷ See Judge Bonello’s Concurring Opinion in *Al-Skeini v UK* at §11: “Very simply put, a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control. Jurisdiction means no less and no more than “authority over” and “control of”. In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional - in the sense that when it is within a State’s authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.”

acts and omissions causing serious transboundary environmental damage undermining the rights to life and personal integrity of individuals living outside its territory.⁴⁸ In its Opinion, the IACtHR held that “As regards transboundary harms, a person is under the jurisdiction of the State of origin if there is a causal relationship between the event that occurred in its territory and the affectation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights.”⁴⁹

26. The IACtHR therefore considered that where a state has the capacity to prevent cross border violations of an individual’s rights, even where those violations are caused by non-state actors, those individuals would come within the jurisdiction of that state. This is consistent with the ‘functional’ approach to extraterritorial jurisdiction. As with the HRC’s interpretation of jurisdiction in GC 36, the Intervener submits that a principled system of human rights protection could not draw a distinction between the exercise by a state of power and control affecting the right to life, and that exercise affecting rights such as privacy and freedom of expression. This approach could equally be applied to a situation where an individual’s communications or data are interfered with as part of a state’s cyber operations abroad.

Relevant safeguards should apply to both interception of communications and related data and receipt of solicited intercept material without distinction.

27. This Court has consistently emphasised the importance of protecting journalistic sources and materials.⁵⁰ It has made clear that interferences with journalists’ sources and materials can only be justified where strict substantive and procedural guarantees are complied with and has, over a number of years, developed standards to be applied in such circumstances.⁵¹ The strict application of those safeguards is particularly important in the context of surveillance regimes which operate in ways that have the potential to create a chilling effect on journalists.
28. Relevant to the protection of journalistic communications and related data, this Court has developed specific safeguards in the context of mass surveillance and bulk interception regimes, where, at the domestic level, an assessment is required to be made at each stage of the process to establish the necessity and proportionality of the

⁴⁸ IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/18, IAC, H.R., (ser. A) No. 23 (Nov. 15, 2017), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf; The American Convention on Human Rights contains a provision which is similar to that set out in the European Convention, covering all persons ‘subject to [the] jurisdiction’ of the States parties, American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 1(1).

⁴⁹ IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/18, IAC, H.R., (ser. A) No. 23 (Nov. 15, 2017), §104(h).

⁵⁰ ECtHR, *Goodwin v the United Kingdom*, no. 17488/90, §65, 27 March 1996; See also, HRC, *General Comment no. 34: Article 19: Freedoms of opinion and expression*, Doc. CCPR/C/GC/34 (12 September 2011) §45; UN General Assembly, *Report to the General Assembly on the promotion and protection of the right to freedom of opinion and expression*, Doc. A/70/361 (8 September 2015), §§14-25.

⁵¹ See generally *Roman Zakharov v. Russia* [GC], no. 47143/06, § 307, ECHR 2015; See also ECtHR, *Sanoma Uitgevers B.V. v the Netherlands* [GC], no. 38224/03, 14 September 2010; ECtHR *Ekimdzhiiev and others v. Bulgaria*, no. 70078/12, 11 January 2022.

measures being taken.⁵² As a matter of principle, this “end-to-end” oversight of bulk interception is required due to the exceptionally intrusive nature of the process. These “end-to-end” safeguards are categorised as follows: (1) the authorisation of bulk interception at the outset, when the object and scope of the operation are being defined, by a body that is independent of the executive; (2) prior internal authorisation when strong selectors linked to identifiable individuals are employed; and (3) the supervision of the operation by an independent authority together with effective *ex post facto* review by a body independent of the executive.⁵³

29. The Intervener respectfully submits that the “end-to-end” safeguards applied to the operation of bulk interception regimes should also apply, without distinction, to a regime where the authorities do not themselves intercept cross-border communications and related communications data, but rather ask foreign intelligence services to intercept such data or to share already intercepted data. Strict safeguards are required in that instance because states that might share intercept material might have a particularly poor human rights record or might have in place laws and practices relating to interception that would be in breach of Convention standards. An additional factor to consider is that such a scenario might involve a number of different states at different stages of the interception process.
30. For those reasons, *ex ante* authorisation by an independent body, preferably a judicial body, would seem to be an essential component of any effective protection regime. In fact, the absence of independent judicial oversight might itself be a contributory cause of unlawful interference. However, according to this Court’s formulation, while the safeguards relating to examination, use and storage of intercept material, its onward transmission, and its erasure and destruction, are the same as for bulk interception material, the requirement for prior independent authorisation is missing.⁵⁴ This lesser standard fails to have regard to the critical objective of ensuring an effective protection regime to avoid abuse and the circumvention of Convention obligations. The only factual difference is the way the state authorities have come into possession of the intercepted data. There is no principled reason why such a distinction should be made or why those standards would not apply in respect of cyber operations carried out aboard.

Conclusion

31. It is submitted that Article 1 should be interpreted in a manner that responds to the challenges of state conduct of cyber operations with implications for media freedom and related rights. An unduly narrow interpretation of ‘jurisdiction’ would lead to the creation of unconscionable double standards in state conduct depending on whether its agents acted within or outside that state’s territory. It would also be out of step with evolving international practice and contrary to the Convention’s core values, such as the rule of law.

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⁵² ECtHR, *Big Brother Watch and Others v the United Kingdom* [GC], nos. 58170/13, 62322/14 and 24960/15, §350, 25 May 2021.

⁵³ *Id.*, §§350-359.

⁵⁴ *Id.*, §498.