only if the process is transparent, accountable, and legitimate, and civil society organisations are part of the monitoring process from an early stage.

Developing and implementing more rigorous criteria won’t be easy. But organisers cannot shirk that responsibility. The Olympics represent the noblest of human efforts to strive towards higher standards. *Citius, Altius, Fortius*, or “faster, higher, stronger” is the motto of the Games, since 1896, when modern Olympics began. By the same standard, organisers should aspire towards the highest standards when they undertake due diligence to select partners, if the Games are indeed a celebration, and the ultimate test of human endeavour.

PART A: ARTICLES

AUTHORITY, CONTROL AND JURISDICTION IN THE EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

The conditions under which the European Convention of Human Rights applies outside a Member State’s territory continue to be imprecisely defined. This article attempts to clarify the meaning of ‘authority’ and ‘control’, the core notions employed by the Convention organs to determine extraterritorial ‘jurisdiction’ under Article 1 of the Convention. In line with early case law, it is argued that a State brings persons within its extraterritorial jurisdiction if it exercises actual authority over them. Actual authority, the article continues, should be understood as the ability to prescribe conduct. Whether a State prescribes conduct by formal or informal means is irrelevant; even seemingly mere factual acts may have a normative content and constitute authoritative acts. ‘Control’ describes the State’s ability to enforce the conduct it has prescribed. Only where it has such control can the State be said to have actual authority, and therefore jurisdiction, over the person concerned.

Keywords: actual authority; effective control; European Convention on Human Rights; extraterritorial application; jurisdiction

Mots-clés: autorité effective; contrôle effectif; Convention européenne des droits de l’homme; application extraterritoriale; juridiction

Trefwoorden: effectief gezag; effectieve controle; Europees Verdrag voor de Rechten van de Mens; extraterritoriale toepassing; jurisdictie

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1. INTRODUCTION

To the extent that European States increasingly embark on international police or military missions, the question of whether the European Convention on Human Rights (ECHR) applies outside of the domestic territory of Member States becomes ever so relevant. There is an obvious need for State agents operating on the ground to know precisely which law applies to their conduct. But inevitably, the European Court of Human Rights (ECHR) approaches the core questions regarding extraterritorial application in a casuistic rather than systematic manner. It has hitherto failed to create the necessary legal certainty.

The lack of conceptual clarity concerns precisely, but not only, the notion at the centre of the debate, namely ‘jurisdiction’. Absent an express definition of its geographical scope, the ECHR applies to persons who come ‘within [the] jurisdiction’ of a Member State. Since the early practice of the Convention organs, jurisdiction was defined as the exercise of actual ‘authority’ and ‘control’ over persons. Already these notions remained largely undefined. But the interpretation of jurisdiction was rendered even more complex by the ECHR’s decision in Bankovic et al. v. Belgium et al. (Bankovic). Holding that jurisdiction must be understood as the legal competence, under international law, to make, adjudicate or enforce the law with regard to a certain situation, it injected an element of legitimacy into the mix: only where a State has the right to act extraterritorially, may jurisdiction for the purposes of Article 1 of the ECHR be established.

The ECHR in Bankovic claimed that it was this kind of de jure jurisdiction which marked the practice of the Convention organs on the extraterritorial application of the Convention. However, while aspects of de jure jurisdiction were present in many situations which came before the ECHR and the European Commission on Human Rights (EComHR), the relevant decisions did not hinge on those. Both the EComHR and the ECHR have relied heavily on jurisdiction based on actual authority and control, rendering legitimacy irrelevant. The ECHR in Bankovic expressly left the door open for such de facto jurisdiction, and its practice since then, including in recent cases such as Al-Skeini et al. v. The UK and Al-Jedda v. The UK, exposes that the legitimacy of State acts is not a necessary condition to establish Article 1 extraterritorial jurisdiction.

The conceptual problems therefore remain the same. The core notions of authority and control lack clear contours. It is unclear how they relate to each other, and to the key concept of jurisdiction. This article tries to contribute to conceptual clarity.

2. LEGITIMACY AS AN ASPECT OF JURISDICTION

As is well known, the ECHR in Bankovic held that jurisdiction must be understood as it is defined in public international law, that is, as the jurisdictional competence of a State to make, adjudicate and enforce the law with regard to a certain situation – in short: to regulate conduct. According to this, jurisdiction under Article 1 ECHR is established where a State is within its right to regulate a person’s conduct; in other words, where the State’s conduct is legitimate under international jurisdictional principles. This is in contrast to the earlier practice of the EComHR and the ECHR, in which the decisive criterion for jurisdiction was the exercise of actual authority or control over persons, notably without considerations as to legitimacy.

Some cases in the Convention organs’ practice indeed reveal aspects of jurisdiction understood as legal competence. They have in common that the respondent States’ extraterritorial conduct was legitimate – under jurisdictional principles, not necessarily under the ECHR – because they could rely on the consent of a third State in one form or the other. Examples include cases involving the alleged wrongdoing by embassy personnel,6 the cooperation of States in criminal matters,8 or the arrest and detention on the high seas. However, as an examination of the relevant decisions reveals, also in these cases it was the exercise of actual authority which established jurisdiction. As a result, the earlier Strasbourg practice does not lend support to the legitimacy criterion introduced in Bankovic.

What follows is a short reflection on the ECHR’s take on jurisdiction as far as the inclusion of an aspect of legitimacy is concerned (Section 2). After that, the Strasbourg case-law on the extraterritorial application of the ECHR will be presented, highlighting the development of the criteria authority and control (Section 3). Subsequently, a brief review of scholarly opinions will be given (Section 4). Finally, taking a fresh look at these concepts, this paper will attempt to explain the nature of jurisdiction and the meaning of authority and control (Section 5.2).

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3 Art. 1 ECHR.
4 ECHR, Bankovic et al. v. Belgium et al. (Grand Chamber) (admissibility decision), 12 December 2001 (Appl.no. 52207/99).
6 See below, Section 3.
7 X. v. Federal Republic of Germany, X. v. United Kingdom; S. v. Federal Republic of Germany, W.M. v. Denmark; Gill and Malone v. United Kingdom. Further, the cases of X. and Y. v. Switzerland, Xhavara et al. v. Italy and Albania, as well as Al-Saadoon et al. v. United Kingdom reveal aspects of consent. See for the full references and explanations below, Section 3.1.
8 Principles of extraterritorial criminal jurisdiction can be discerned in the cases of Freda v. Italy, Reine l. v. France, Sánchez Ramirez v. France, and Öcalan v. Turkey. See for the full references and explanations below, Section 3.1.
9 Cf. the cases of Rigopoulos v. Spain, Medvedyev et al. v. France, and Hiristeanu et al. v. Italy. See for the full references and explanations below, Section 3.1.
10 See below Section 3.1.
But there is a more fundamental reservation that needs to be raised with regard to international law, of a State's actions cannot be a necessary condition for establishing an entitlement of a State to act. If legitimacy were a necessary condition, the Convention would apply only as long as States act within the confines of their competence under international law. If they overstepped these limits, for instance during a cross-border raid without the consent of the territorial State, the ECtHR would not apply. Such an interpretation would lead to absurd results and exclude the applicability of the ECtHR in situations where it is arguably most needed: where states as they could circumvent their human rights obligations by overstepping their jurisdictional boundaries.

Furthermore, as a basic tenet, human rights law is meant to protect the individual against the abuse of State power. To this end, its application does not depend on whether a State abuses its power within or outside the jurisdiction confines imposed by international law. To be effective, human rights have to apply wherever a State wields its power — be it intra or ultra vires. Incidentally, the same rationale applies to the form of State acts. Usually, sovereign acts take a specific form which is required by the precepts of the rule of law (such as certainty of law, foreseeability of legal consequences, and equality before the law). Again, the fact that a State ignores the rule of law cannot entail the non-applicability of the ECtHR. Therefore, any State act, formal or informal, may qualify for jurisdiction.


16 Compare the ECtHR's constantly reiterated guiding principle that 'the Convention is intended to be interpreted in the same spirit as the Charter of the United Nations', Art. 16 of the ECtHR, Art. 16 of the Charter of the United Nations, at 15 May 1945 (Appl. No. 6694/70), at para. 38; ECtHR, Soering v. United Kingdom, 7 July 1989 (Appl. No. 10438/88), at para. 87.

This line of reasoning may be missing in Bankovic, but both Convention organs have always applied a notion of jurisdiction which is much wider than legal competence. They have consistently found that States also bring persons into their jurisdiction in the sense of Article 1 of the ECtHR to the extent that they exercise actual authority or control over them, even if their actions are devoid of legitimacy under general public international law. Furthermore, it is obvious from Bankovic that the ECtHR did not want to completely exclude such situations from the Convention's ambit, even though it relegated them to the category of 'exceptional cases'. The Court's most recent case law, in particular the cases concerning the conduct of British troops in Iraq, confirms that jurisdiction for the purposes of Article 1 of the ECHR may be established absent any kind of international legal competence.

3. JURISDICTION IN THE PRACTICE OF THE CONVENTION ORGANS

The practice of the Strasbourg organs shows that, as a rule, extraterritorial jurisdiction goes along with actual authority or control. Both Convention organs have spoken of control over persons, whereas the ECtHR has also applied this criterion to whole territories. As will be shown, in some ambivalent cases, including recent case law, the ECtHR found jurisdiction to be established without referring to either criterion.

3.1. AUTHORITY OR CONTROL OVER INDIVIDUAL PERSONS

The first time that the ECtHR clearly expressed that a State exercising actual authority over persons may bring them within its jurisdiction was in the Cyprus cases. In 1974, Turkey had invaded and occupied northern Cyprus. The Cypriot government filed State complaints alleging that Turkey violated human rights in the occupied territory. Turkey argued the ECtHR did not apply outside of its territory. However, the ECtHR found that the term jurisdiction was not equivalent or limited to the national territory of a High Contracting Party. It held, 'the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.'
Implicit in this passage is the recognition that there is no inherent geographical limitation to the ECHR’s scope of application. The Convention’s applicability is not tied to the territory of a Member State, but is triggered by the State’s conduct. Wherever it establishes actual authority over an individual, on its territory or abroad, it brings that person within its jurisdiction. The adjective ‘actual’ indicates that the factual circumstances are decisive; the legal cloak of authority, its legitimacy, is irrelevant.

Unfortunately, the Commission did not elaborate on the nature of actual authority in the Cyprus decisions nor in subsequent cases. However, as an additional pointer which the applicants alleged violations committed by the respondent States’ embassies showed that the decisive criterion was the exercise of authority as such. While the first exercise control over such persons or property.21

Thus, not just actual authority but also control seems to bring persons within the jurisdiction of a Member State. Both notions are therefore closely linked to that of jurisdiction. Still, the nature of that relation, and the interrelation between actual authority and control remained unclear.

The principle that authority and control may bring persons within the jurisdiction of a Member State was reiterated by the EComHR in a series of ‘embassy-cases’ in which the applicants alleged violations committed by the respondent States’ embassies abroad. Although consular jurisdiction bears a cloak of legitimacy because it is introduced the notion of control: ‘[T]hese armed forces [..] bring any other persons or property in Cyprus “within the jurisdiction” of Turkey […] to the extent that they exercise control over such persons or property.’20

3.1.1. Cases of Extraterritorial Detention

A case in point was that of the Nazi criminal Rudolf Hess, who was detained in a Berlin prison under the joint authority of the US, the UK, France, and the Soviet Union.28 The complaint was directed against the UK and concerned the refusal (which was due to a Soviet veto) to move the inmate to another prison. The Commission remarked ‘that there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom’.28 However, it denied the UK’s jurisdiction for the reason that Hess was not under exclusively British, but joint authority of the Allies.29

In the cases of Freda v. Italy,30 Reimette v. France,31 and Sánchez Ramírez v. France32 the respondent States had cooperated with non-European States, on whose territory the applicants were arrested and handed over to the respondent States. In each case, the Commission held that from the moment of the handover, the applicants were effectively under the authority, and therefore the jurisdiction, of the respondent.

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20 'In particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to [nationals abroad] which may, in certain circumstances, make the country liable in respect of the Convention.’ EComHR, X. v. the Federal Republic of Germany (admissibility decision), 25 September 1965 (Appl.no. 1611/62), at para. 5 of the legal considerations.
21 EComHR, X. v. the United Kingdom (admissibility decision), 15 December 1977 (Appl.no. 2739/70), at para. 1 of the legal considerations. The same formula is used in: EComHR, W.M. v. Denmark (admissibility decision), 4 October 1990 (Appl.no. 17793/90), at para. 1 of the legal considerations, and EComHR, Gill and Maloum v. UK and The Netherlands (admissibility decision), 11 April 1966 (Appl.no. 2400/74), at para. 1 of the legal considerations. See also: [A]High Contracting Party may […] be liable for the acts or omissions of its authorities occurring outside its territory […]';
States. It was, therefore, again the exercise of actual authority which was decisive, even if aspects of de jure jurisdiction can be discerned as well.\textsuperscript{13}

The irrelevance of de jure jurisdiction is further illustrated by a detention case which was completely unrelated to elements of legal competence. In\textit{Chrysostomos et al. v. Turkey},\textsuperscript{34} the first two applicants were abducted by Turkish-controlled troops from the UN buffer zone which separates occupied Northern Cyprus from the rest of the country. Also here, absent any hint of de jure jurisdiction, the Commission affirmed that States bring any person under their jurisdiction to the extent that they exercise control over them.

Finally, the Commission had to deal with a case of detention on the high seas. The Greek citizen Rigopoulos was the captain of a ship flying the Panamanian flag.\textsuperscript{35} The Spanish customs police, with Panama’s consent, stopped and searched the ship in international waters. Rigopoulos was arrested and then detained on the Spanish police ship. The same case would later be the first extraterritorial detention case to come before the ECtHR.\textsuperscript{36} Both the Commission and the ECtHR implicitly found that jurisdiction was established,\textsuperscript{37} but they did not spell out its basis. Although elements of legal competence were present,\textsuperscript{38} jurisdiction was once more established by actual authority, exercised through the physical detention. This can be concluded from the more recent case of\textit{Medvedev v. France} which also concerned an arrest and detention on the high seas. The applicants were arrested by French troops on a ship flying the Cambodian flag. Notwithstanding the potential relevance of the flag principle and Cambodia’s consent to search the ship, the Court expressly held that during their detention, the applicants found themselves under the control, and therefore the jurisdiction, of France.\textsuperscript{39} This was confirmed by the Grand Chamber:

[\textit{A}s] this was a case of France having exercised full and exclusive control over the \textit{Winner} and its crew, at least de facto, […] the applicants were effectively within France’s jurisdiction for the purposes of Article 1 of the Convention […].\textsuperscript{40}

\textsuperscript{33} All three applicants were suspected of crimes committed on the territory of the respondent States (territorial principle). Freda and Reinette were nationals of the respondent State (personality principle). In all cases, the territorial State cooperated, so that the exercise of enforcement jurisdiction was consensual.

\textsuperscript{34} EComHR, \textit{Chrysostomos et al. v. Turkey} (admissibility decision), 4 March 1991 (Applnos. 15299/89, 15300/89, and 15318/89), at paras. 30 et seq. of the legal considerations.

\textsuperscript{35} EComHR, \textit{Rigopoulos c. l’Espagne} (admissibility decision), 16 April 1988 (Appl.no. 37388/87).

\textsuperscript{36} ECtHR, \textit{Rigopoulos c. France} (admissibility decision), 12 January 1999 (Appl.no. 37388/97).

\textsuperscript{37} Otherwise, they would have denied the application’s admissibility for lack of jurisdiction.

\textsuperscript{38} Flag principle and consent: Spain acted with the consent of its flag State, and, as such, under the flag principle. In all cases, the territorial State cooperated, so that the exercise of enforcement jurisdiction was consensual. In\textit{Chrysostomos et al. v. Turkey},\textsuperscript{34} the first two applicants were abducted by Turkish-controlled troops from the UN buffer zone which separates occupied Northern Cyprus from the rest of the country. Also here, absent any hint of de jure jurisdiction, the Commission affirmed that States bring any person under their jurisdiction to the extent that they exercise control over them.

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\textsuperscript{33} EComHR, \textit{Rigopoulos c. l’Espagne} (admissibility decision), 16 April 1988 (Appl.no. 37388/87).

\textsuperscript{34} ECtHR, \textit{Rigopoulos c. France} (admissibility decision), 12 January 1999 (Appl.no. 37388/97).

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\textsuperscript{39} EComHR, \textit{Chrysostomos et al. v. Turkey} (admissibility decision), 4 March 1991 (Applnos. 15299/89, 15300/89, and 15318/89), at paras. 30 et seq. of the legal considerations.

\textsuperscript{40} EComHR, \textit{Rigopoulos c. l’Espagne} (admissibility decision), 16 April 1988 (Appl.no. 37388/87).

\textsuperscript{41} ECHR, \textit{Rigopoulos c. France} (admissibility decision), 12 January 1999 (Appl.no. 37388/97).

\textsuperscript{42} Otherwise, they would have denied the application’s admissibility for lack of jurisdiction.
'the applicant was [...] within the authority and control of the United Kingdom', and therefore within that State's jurisdiction.48

Decided on the same day, the case of Al-Skeini concerned the death of six Iraqi citizens in Basrah, a town which was at all relevant times under British occupation.49 Two of the victims were in British custody at the time they died.50 The Court reiterated that a State's jurisdiction abroad may be established, inter alia, through the acts of State agents.51 The Court explained that '[w]hat is decisive in such cases is the exercise of physical power and control over the person in question'.52 Incidentally, the Court also reiterated that the control over a foreign area may establish jurisdiction,53 though it is not clear what role the British occupation played in the establishment of jurisdiction over the victims. While the occupation was the ‘starting point’ for the Court’s considerations,54 the lens through which it analysed jurisdiction was the one of authority and control over individuals:

The United Kingdom [...] assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.55

In two further cases, extraterritorial de facto jurisdiction would arguably have been established by physical control over persons as well, but the issue was not examined in detail. Issa v. Turkey concerned the alleged arrest, detention, ill-treatment and subsequent killing of a group of Iraqi shepherds in the course of a Turkish military operation in northern Iraq. The ECtHR held that there was not enough evidence to establish by physical control over persons as well, but the issue was not examined jurisprudentially.57

Besides these cases of extraterritorial detention, there is a series of cases in which Member States affected individuals without however exercising complete physical control over them. Some of these cases are ambivalent in that the ECtHR did not spell out what it based its finding of jurisdiction on.

The case of Xhavara et al. v. Italy et al. concerned the boarding of a ship carrying Albanian nationals who allegedly attempted to enter clandestinely into Italy.58 Thirty-five sea miles off the Italian coast, an Italian navy vessel attempted to stop the boat and rammed it twice in the process. The boat sank, resulting in the death of fifty-eight persons. The ECtHR declared the complaint inadmissible, but not for lack of the State’s jurisdiction, which it did not discuss. Instead, it engaged in a substantial assessment of the case, which would have been unnecessary if the State’s jurisdiction had not been established.59

In another case involving an incident on the high seas, the ECtHR again implicitly found jurisdiction established, without discussing the basis for it. The case of Women on Waves v. Portugal concerned the Dutch foundation, Women on Waves, who planned to hold information seminars on unwanted pregnancies in a Portuguese coastal town.60 The foundation’s activists travelled to Portugal on the chartered ship ‘Bordniep’. While approaching Portuguese territorial waters, the ‘Bordniep’ was prohibited to continue, and a Portuguese military ship was positioned alongside it. Because the ‘Bordniep’ did not fly the Portuguese flag, was outside Portuguese territorial waters,61 and the foundation was Dutch, there was arguably no factor which would have linked the ‘Bordniep’ to Portugal’s legal competence.62 Still, the Court implicitly assumed that jurisdiction was given, even deciding the case on the merits.

Noting that Turkey did not dispute its jurisdiction, the ECtHR did not examine the issue of extraterritoriality any further.57

3.1.2. Cases not Involving Detention

ECtHR, Pad et al. v. Turkey (admissibility decision), 28 June 2007 (Appl.no. 60167/00), at para. 54.

ECtHR, Xhavara et al. c. Italia et Albania (admissibility decision), 11 January 2001 (Appl.no. 39473/98).

Thus, the events occurred outside the contiguous zone, in which a State may enforce its immigration laws: Art. 33(2) of the Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 396.

Xhavara, supra note 58, at paras. 1–4 of the legal considerations.

ECtHR, Women on Waves et al. c. Portugal, 3 February 2009 (Appl.no. 31276/05).

There are no indications that the ship was within the State’s contiguous zone, in which a coastal State may exercise the control necessary to prevent infringement of its laws in certain subjects matters. See Art. 35 et para. 1 lit. a of the UN Convention on the Law of the Sea of 10 December 1982 (UNCLOS), 1833 UNTS 396.

The Portuguese order invoked, amongst other things, the UNCLOS: Women on Waves, supra note 61, at para. 8. One could argue that the right to regulate innocent passage includes the competence to regulate the conduct of persons who are about to enter the territorial waters. However, the UNCLOS only allows the coastal State to ‘take the necessary steps in its territorial sea to prevent passage which is not innocent’: Art. 25(1) UNCLOS (emphasis added).
In the case of *Isaak v. Turkey*, the victim was assaulted. The facts occurred in the UN-buffer zone which separates Turkish-occupied northern Cyprus from the south. During clashes within that zone a Cypriot demonstrator was beaten so badly that he later died of his injuries. Although the assault took place in the neutral buffer zone, the Court noted that Turkish-Cypriot police officers had taken part therein and held that the victim 'was under the authority and/or effective control of the respondent state through its agents'. Hence, a physical assault was sufficient to establish jurisdiction for the purposes of Article 1 of the ECHR.

The situation underlying *Andreou v. Turkey* occurred along the same UN-buffer zone dividing northern and southern Cyprus. During a demonstration south of the buffer zone, a demonstrator crossed into Turkish-Cypriot area and attempted to pull down a Turkish flag from a flagpole. The Turkish-Cypriot troops shot him and then opened fire on the demonstrators standing south of the buffer zone on Greek-Cypriot territory. The applicant was shot and badly injured. Before the ECtHR, the Turkish government argued that given its lack of control over the buffer zone or the Greek-Cypriot territory, the applicant had not been within its jurisdiction. The Court disagreed:

'[E]ven though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey within the meaning of Article I and that the responsibility of the respondent State under the Convention is in consequence engaged.'

Notably, the Court did not explicitly require any control over the victim. The only criterion mentioned is that the State's actions were the 'direct and immediate cause' for the injuries sustained.

The case of *Solomou et al. v. Turkey* – which concerned the person shot in the just mentioned attempt to pull down the Turkish flag – bears an interesting parallel to *Andreou*, although both the shooting and the victim's death occurred within the occupied area of Cyprus. Despite this, the ECtHR did not rely on the Turkish occupation of northern Cyprus to assess jurisdiction. Rather, it held it sufficient that 'the bullets which had hit Mr. Solomou had been fired by the members of the Turkish-Cypriot forces'. Referring to the earlier mentioned case of *Isaak*, it held that 'in any event the deceased was under the authority and/or effective control of the respondent State through its agents'.

Finally, in the above-mentioned case of *Al-Skeini*, three of the victims were shot by British soldiers. The Court found jurisdiction established because the 'United Kingdom, through its soldiers engaged in security operations in Basrah [...], exercised authority and control over individuals killed in the course of such security operations'. Another victim in that case was killed by a stray bullet resulting from an exchange of fire in which British troops were engaged. It could not be established which side fired the fatal bullet. In this victim's respect, the Court found that

'since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.'

Unlike in *Andreou*, the ECtHR did not ascribe jurisdiction to the causal connection between the shootings and the death. The decisive criterion was rather the exercise of authority and control, which in these cases was accompanied by the fatal shootings.

### 3.2. AUTHORITY OR CONTROL OVER A TERRITORY

A second category of extraterritorial cases in the Convention organs' practice encompasses situations in which jurisdiction was established by virtue of the control over a territory. The cases in this category emerge exclusively from the ECtHR's practice; the Commission, while also relying on the criterion of control, did not see the need to apply it with respect to a territory, although it partly dealt with the same cases relating to occupied northern Cyprus.

The Court's landmark case *Loizidou v. Turkey* concerned an applicant who, since the Turkish invasion in 1974, was not allowed to access her real estate in occupied northern Cyprus. In its judgment, the Court affirmed that the 'the concept of "jurisdiction" [...] is not restricted to the national territory of the High Contracting Parties'. Continuing its analysis, it introduced the criterion of territorial control: [T]he responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.

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64 ECHR, Isaak et al. v. Turkey (admissibility decision), 28 September 2006 (Appl.no. 44587/98), at p. 21.
65 ECHR, Andreou v. Turkey (admissibility decision), 3 June 2008 (Appl.no. 45653/99).
66 Andreou, supra note 65, at p. 11.
67 Compare the Court's reference to Isaak (see supra note 64 and the accompanying text), in which the victim was assaulted in the neutral buffer zone: ECHR, Solomou et al. v. Turkey, 24 June 2008 (Appl.no. 36832/97), at para. 51.
68 Solomou, supra note 68, at paras. 50–54.
69 Al-Skeini, supra note 49, at para. 149.
70 Al-Skeini, supra note 49, at paras. 43–46.
71 Al-Skeini, supra note 49, at para. 150.
72 ECHR, Loizidou v. Turkey (preliminary objections), 23 March 1995 (Appl.no. 15318/89), at para. 62.
73 Loizidou, supra note 72, at para. 62.
Despite this difference in approach, it does not seem that the two Convention organs had diverging understandings of the essence of control. The ECtHR apparently assumed that the control over an area gives the Member State control — and therefore jurisdiction — over the persons within that area.\textsuperscript{74} What Loizidou made abundantly clear is that mere factual circumstances may determine jurisdiction: 'The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control.'\textsuperscript{75} It is therefore irrelevant whether the establishment of control was legitimate. These principles concerning jurisdiction by means of the control over an area have since been confirmed in the case of Cyprus v. Turkey\textsuperscript{76} and most other cases concerning the situation in northern Cyprus.\textsuperscript{77}

Besides these cases, territorial control was also an issue in Ilașcu et al. v. Moldova and Russia, but not in the context of extraterritorial jurisdiction.\textsuperscript{78} The complaint against Moldova and Russia concerned a situation which occurred on Moldovan territory. Hence, the case was extraterritorial only from the perspective of Russia. Conversely, the notion of territorial control was employed exclusively with regard to Moldova. The Court established that Moldova had lost control over part of its territory (Transdniestria), and had therefore limited jurisdiction over that area.\textsuperscript{79} With regard to Russia, from whose perspective the case was extraterritorial, the ECtHR did not employ the criterion of territorial control; it, rather, held that the authorities of the Moldovan Republic of Transdniestria, in whose detention the applicants found themselves, remained under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survived by virtue of the military, economic, financial and political support given to it by the Russian Federation.\textsuperscript{80}

The extraterritorial jurisdiction in this case was therefore established by virtue of the physical detention of the applicants, effectuated through Russian de facto organs.

\textsuperscript{74} Although this raises questions because the applicant did not live in the occupied area. See infra, Section 5.2.

\textsuperscript{75} Loizidou, supra note 72, at para. 62 (emphasis added).

\textsuperscript{76} ECtHR, Cyprus v. Turkey (Grand Chamber), 10 May 2001 (Appl.no. 25781/94), at paras. 69 et seq.

\textsuperscript{77} Particularly, the ECtHR simply referred to its findings in Loizidou to decide more than a dozen cases which dealt with applicants who are, like Titina Loizidou, not allowed to access their real estate in occupied northern Cyprus. In lieu of many, see ECtHR, Londres et al. v. Turkey, 2 November 2001 (Appl.no. 15973/99). For a recent case concerning the positive obligation to investigate disappearances in occupied northern Cyprus see ECtHR, Varnawa et al. v. Turkey (Grand Chamber), 18 September 2009 (Appl.nos. 16064/09 et al.).

\textsuperscript{78} ECtHR, Ilașcu et al. v. Moldova and Russia, 8 July 2004 (Appl.no. 48787/99).

\textsuperscript{79} Ilașcu, supra note 78, at para. 333.

\textsuperscript{80} Ilașcu, supra note 78, at para. 392.

In the case of Issa, mentioned above as a potential example of control over persons,\textsuperscript{81} the ECtHR also affirmed the principle that the occupation of an area may entail jurisdiction.\textsuperscript{82} The complaint alleged that Iraqi shepherds were arrested and killed by Turkish troops operating in northern Iraq. The Court did not exclude the possibility that as a consequence of the military operation, Turkey had exercised effective overall control over parts of northern Iraq.\textsuperscript{83} However, the Court rejected the complaint for lack of evidence, holding it was not established that the Turkish armed forces conducted operations in the very area where the victims were at the time.\textsuperscript{84} Thus, the criterion of territorial control was not operative in Issa.

Further, the British occupation in Iraq was at least, in part, an issue in the above-mentioned cases of Al-Saadoon, Al-Jedda and Al-Skeini. Particularly in Al-Skeini, all the deaths occurred in the time period in which the UK was an occupying power in the sense of Article 42 of the Hague Regulations.\textsuperscript{85} However, while the occupation may have played a role in the assessment, the Court's analysis in all these cases referred to authority and control over the individuals.\textsuperscript{86}

Finally, a sort of territorial control was also at issue in the case of Banković. The case concerned the bombardment, by NATO forces, of a television tower in Belgrade, which resulted in several deaths. The applicants, referring to the control-test applied in Loizidou, argued that at the time of the bombardment, NATO's control over the Serbian airspace was nearly as complete as Turkey's control over northern Cyprus.\textsuperscript{87} The ECtHR rejected this, and considered that jurisdiction was to be understood as the legal competence, under international law, to make, adjudicate and enforce the law with regard to a certain situation. The Court was not persuaded that there was 'any jurisdictional link' between the victims of the bombardment and the respondent States and declared the complaint inadmissible.\textsuperscript{88}

3.3. OPEN QUESTIONS

In sum, it can be said that both the EComHR and ECtHR have applied the ECCHR extraterritorially where a person was in fact subject to the authority of a State. While the ECtHR makes a habit of stating that 'Article 1 sets a limit, notably territorial, on

\textsuperscript{81} See supra note 56 and the accompanying text.

\textsuperscript{82} Issa, supra note 56, at para. 69.

\textsuperscript{83} Ibidem, at paras. 73–74.

\textsuperscript{84} Ibidem, supra note 56, at para. 81.

\textsuperscript{85} See supra note 49 and the accompanying text. Art. 42(1) reads: "Territory is considered occupied when it is actually placed under the authority of the hostile army: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Annex: Regulations Respecting the Laws and Customs of War on Land. Available at www.icrc.org/ihl.nsf/FULL/195 (last accessed 20 November 2011).

\textsuperscript{86} See supra Section 3.1.

\textsuperscript{87} Banković, supra note 3, at para. 52.

\textsuperscript{88} Ibidem, at paras. 82, 85.
the reach of the Convention, this has to be taken with a grain of salt. The reality is that the Convention organs have applied the ECHR to numerous extraterritorial situations which occurred on the high seas and on four different continents. Both the Commission and the Court used the criteria of actual authority and control to determine whether jurisdiction was given. However, neither organ has ever clarified how these terms relate to each other, and to the concept of jurisdiction.

Part of the conceptual puzzle is that the ECtHR varies the use of ‘control’, applying it either to persons or territories. By virtue of the clear wording of Article 1, the ECHR’s applicability is governed by jurisdiction over persons. And when the ECtHR is called upon to decide whether the ECHR was violated in respect of a certain person, it only needs to determine whether that person was in the respondent State’s jurisdiction. Given that such jurisdiction may be established by control over the person, it is not immediately apparent why the ECtHR at times determines jurisdiction indirectly through territorial control. And it is equally unclear why the ECtHR applies the concept of territorial control even where the applicants are not present in the territory in question.

Questions are also raised by the Court’s newer approach to assume jurisdiction without referring to either authority or control. For instance, it remains to be clarified what jurisdiction was based on in Women on Waves and Xhavara, in which the ECtHR did not even discuss the issue. Similarly, that the Court in Andreou found jurisdiction established by the fact that the State’s acts were the ‘direct and immediate cause’ of the applicant’s injury, needs to be scrutinised.

The challenge is therefore to analyse the relation between the concepts of jurisdiction, actual authority, and control, and to find the common denominator which explains the different instances of extraterritorial jurisdiction in the Strasbourg case law.

4. JURISDICTION IN SCHOLARLY WRITINGS

Only few scholars have proposed a coherent understanding of jurisdiction and the notions of authority and control. Some propose to equate the exercise of jurisdiction with that of factual ‘power’. In this sense, a person comes within a Member State’s jurisdiction if that State ‘has the power to [affect] his/her human rights’. But while State power certainly plays a role in extraterritorial jurisdiction, this approach would arguably render the notion of jurisdiction obsolete. One could say a State’s factual power underlies all of its acts. To equate power with jurisdiction would, therefore, make the latter term redundant. Such a result would conflict with fundamental principles of treaty interpretation.

Recognising that jurisdiction must be different from mere attribution, Lawson proposed a distinguishing element in the form of a ‘direct and immediate link’ between the extraterritorial State act and the alleged human rights violation. Mentioning the case of Xhavara as an example, Lawson states that ‘[t]here was an obvious causal connection between the conduct of the Italian war vessel and the alleged violation’. This approach is reminiscent of the apparent finding of the Court in Andreou in which the ‘direct and immediate’ causation of the applicant’s injury established jurisdiction. However, causation is a general requirement for State responsibility where actual injuries occurred. It remains unclear how a factual element (the directness of the causal chain) can elevate mere factual conduct to the exercise of jurisdiction. Apart from that, the dividing line will be difficult to draw. This is particularly true from an ex ante perspective – legal certainty is not enhanced in this way. But more fundamentally, the implicit premise of a direct causal chain approach – that every directly and immediately caused harmful result amounts to

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90 See for example Madwedguy, supra note 40, at para. 63.
91 Apart from the extraterritorial cases occurring within Europe, the case-law discussed in this article concerns situations on the American, African, and Asian continent (Costa Rica, Iraq, Kenya, St. Vincent, Sudan).
92 See supra note 63 and the accompanying text.
93 The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention. Art. 1 ECHR (emphasis added).
94 This is true for numerous Cyprus cases in which the applicants, like Loizidou (see supra note 72 and the accompanying text), live in the southern part of Cyprus but cannot access their real estate in occupied northern Cyprus.
95 See supra note 61 and the accompanying text.
96 See supra note 68 and the accompanying text. In an obiter dictum in Banković, the Grand Chamber implies that the ECHR was applicable by virtue of the ‘sharing by prior written agreement of jurisdiction between Albania and Italy’: Banković, supra note 3, at para. 81.
97 See supra note 65 and the accompanying text.
98 See below, Section 5.
100 Lawson, loc. cit. (note 95), at p. 104 (emphasis added).
101 Compare for example Art. 31 (‘Repairance’) of the Draft Articles on State Responsibility: United Nations General Assembly Res. 56/83 (2001), Annex: ‘The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’
an exercise of jurisdiction - is not convincing. Harm may be caused directly, but accidentally. This may not constitute an exercise of jurisdiction at all.\(^\text{103}\) A special 'link' criterion is also suggested by Miller, who proposes a 'territorial justification' for extraterritorial jurisdiction.\(^\text{104}\) According to her, extraterritorial jurisdiction requires 'some ultimate connection' between the physical territory of the State and the individual whose rights are affected. Otherwise, Article 1 does not bring unconnected extraterritorial acts within the scope of the Convention.\(^\text{105}\) The exact nature of this territorial connection remains unclear,\(^\text{106}\) and it seems this approach would exclude a whole series of cases in which the ECtHR clearly found jurisdiction established.\(^\text{107}\)

The most convincing school of thought builds on the legacy of the EComHR in that it understands jurisdiction as actual authority. In the words of Judge Loucaides:

'[Jurisdiction] means actual authority, that is to say the possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Party or outside that territory. Therefore, a High Contracting Party is accountable under the Convention to everyone directly affected by any exercise of authority by such Party in any part of the world. Such authority may take different forms and may be legal or illegal. [...] The test should always be whether the person who claims to be within the 'jurisdiction' of a High Contracting Party to the Convention, in respect of a particular act, can show that the act in question was the result of the exercise of authority by the State concerned.'\(^\text{108}\)

Loucaides’ position has been expressly embraced by Gondek.\(^\text{109}\) Furthermore, Hampson may be counted as belonging to the same school of thought.\(^\text{110}\) According to her, jurisdiction refers 'to the space within which an organ of the state exercises its functions.'\(^\text{111}\) A State acting on the territory of another State is exercising its jurisdiction 'because the mere fact of the action carries with it a claim of an implied authority to act.'\(^\text{112}\) To meet the threshold of Article 1 of the ECHR, the exercise of jurisdiction must be effective.\(^\text{113}\) Effectiveness may be guaranteed by control, which Hampson defines as the 'ability to dominate or command.'\(^\text{114}\)

One may further count Thallinger as belonging to this school of thought. He has undertaken the most detailed analysis to date.\(^\text{115}\) Thallinger defines jurisdiction as a State’s general competence to regulate the conduct of its subjects.\(^\text{116}\) In line with early EComHR case-law, Thallinger postulates that a State brings persons within its jurisdiction to the extent that it exercises actual authority or control over them.\(^\text{117}\) Authority in this sense is not any State power, but exclusively the coercive power used by a State to enforce its legislation.\(^\text{118}\) The jurisdictional link for the purposes of Article 1 ECHR is established by control. It allows the State to effectively exercise its authority and triggers the ECHR’s protection against adverse effects flowing therefrom.\(^\text{119}\)

5. A FRESH LOOK AT JURISDICTION

So far, it has been shown that the legality and the form of State conduct cannot be relevant to establish jurisdiction.\(^\text{120}\) However, another premise needs to be added. As an element of Article 1 ECHR,\(^\text{121}\) jurisdiction needs to be attributed a distinct meaning which justifies its inclusion in the Convention. The term cannot be interpreted so as to become obsolete. In the interpretation of treaties, it has to be assumed that every element of the wording serves a distinct purpose, for it would otherwise not have been retained by the drafters.\(^\text{122}\) The ECtHR rightly rejected a notion of responsibility under the ECHR which would effectively do away with the element of jurisdiction.\(^\text{123}\)


\(^{104}\) Miller clearly counts the cases of foreign occupation and diplomatic jurisdiction in her category, but it is not clear where the 'territorial link' to the Member State's territory lies in these cases. In the cases of extraterritorial arrests, such as Ocalan and Sanchez Ramirez, Miller finds jurisdiction established only because these applicants have ultimately been brought within the territorial control of the respondent State. She thus seems to exclude cases in which the persons affected are never brought to the Member State's territory (for example Al-Saadoon, Women on Waves, Xhavara, Andreou).

\(^{105}\) See the cases mentioned in fn. 104 in fine.


\(^{107}\) See below, Section 5.1.3.

\(^{108}\) See below, Section 5.1.3.

\(^{109}\) See below, Section 5.1.3.

\(^{110}\) See below, Section 5.1.3.

\(^{111}\) Hampson, loc.cit. (note 110), at p. 166.

\(^{112}\) Ibidem, at p. 168.

\(^{113}\) Ibidem, at p. 168.

\(^{114}\) Ibidem, at p. 166.

\(^{115}\) Thallinger, op.cit. (note 13), at pp. 89–208.

\(^{116}\) Ibidem, at p. 150.

\(^{117}\) Ibidem, at p. 186.

\(^{118}\) Ibidem, at pp. 187–188.

\(^{119}\) Ibidem, at pp. 180–189.

\(^{120}\) See supra, Section 2.

\(^{121}\) The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. See supra, Section 2.

\(^{122}\) Principle of effet utile or effectiveness. Cf.: 'It is an acknowledged rule of interpretation that treaty clauses must [...] be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others.' ICJ, International Status of South West Africa, Advisory Opinion of 11 July 1950, Dissenting Opinion of Judge De Visscher, ICJ Reports 1950, at p. 187.

\(^{123}\) Banković, supra note 3, at para. 75; see more recently Medvedyev, supra note 40, at para. 64.
Several scholars have correctly pointed out that such an approach would approximate responsibility under the ECHR to bare State responsibility, because the mere attribution of acts to Member States would suffice to trigger the ECHR’s application. The challenge is, therefore, to clarify the meaning of jurisdiction while bearing in mind that the legality and form of the State conduct are irrelevant, but that not every State act that causes adverse effects constitutes an act of State authority. The starting point should be the ordinary meaning of jurisdiction. This is not only a necessity in the quest for conceptual clarity, but also a basic principle of treaty interpretation. According to the Vienna Convention on the Law of Treaties, a treaty has to be interpreted ‘in accordance with the ordinary meaning’ of the terms of the treaty.

5.1. JURISDICTION AS THE POWER TO PRESCRIBE CONDUCT

A look at the etymological source of the term jurisdiction lends support to the Commission’s early practice according to which State authority was the decisive criterion. ‘Jurisdiction’ derives from the Latin ius (the law) and dictio, which in turns derives from dicere (to say, to declare). Iuris dictio could therefore be loosely translated as the ‘declaration of the law’.

Speaking of States, jurisdiction is therefore the sphere in which the State has the authority to set the rules. A person falls within that sphere if the State has the power to prescribe that person’s conduct. What is needed then is to determine how such authority is to be defined. Not every act of a State constitutes an act of State authority. And as just shown, Article 1 ECHR cannot be read as equating every State action causing adverse effects with the exercise of jurisdiction.

5.1.1. Characteristics of State Authority

Acts of State authority that regulate a person’s conduct are defined by two main characteristics. First, they are one-sided in that the State sets the rules unilaterally. Second, they are of a binding nature; if a State prescribes a person’s conduct, it obliges that person to behave in a certain way. An important corollary is the rule’s enforceability. Thus, as understood here, an act of State authority is a normative act; it establishes a legal relation between the State and the individual. This relation is one-sided in that the individual owes the State, under threat of enforcement, certain behaviour. The required behaviour may take one of the conceivable forms of human conduct: action, inaction or toleration.

Building on the understanding that acts of State authority are normative acts, the first two premises have to be remembered. The act’s legitimacy under international law is irrelevant, as is its form. That means it does not matter in which procedure or form the State regulates conduct. The instruction flowing from the authoritative act may be of general or specific application. It may be issued in writing or orally, explicitly or implicitly, or be embodied in mere factual behaviour. The latter constellation is particularly relevant where a State enforces behaviour without a preceding order. In such cases, the order is inherent in the enforcement act. In other words, the physical act has a normative content.

5.1.2. Physical Acts with a Normative Content

Where a State enforces behaviour in the absence of a preceding order, the physical enforcement act embodies the legal act. The case law of the Strasbourg Convention Organs is rich with such examples. In Xhavara, for instance, the physical blockade of the ship with Albanian migrants can be said to have carried the implicit order to stop, to tolerate a search, and to refrain from landing at the Italian coast. The shooting of Solomou embodied the order to refrain from pulling down a Turkish flag.


125 Art. 3(1) of the Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969, 1155 UNTS 331. The Convention does not apply to preexisting treaties (Art. 4 VCLT), but is widely accepted as reflecting the customary-law principles of treaty interpretation: ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, at para. 94.

126 As will be shown, recourse to the preparatory works of the ECHR is unnecessary, seeing as according to Art. 32 VCLT, the drafting history is only a “supplementary means” of interpretation used when a treaty’s meaning remains obscure (but see: Banković, supra note 5, at paras. 19–21, 65). Besides, several scholars have convincingly argued that the ECHR’s preparatory works are not conclusive as to the question whether the ECHR was meant to apply beyond a Member State’s territory: Gondek concludes, ‘It is difficult if not impossible to reach any conclusions [...] on the basis of the travaux préparatoires of the Convention.’ Gondek, op.cit. (note 109), at pp. 84–92. Thallinger argues the preparatory works should be given only marginal importance because at the time of drafting, the question of extraterritorial acts was of a far lesser importance than today. According to him, to give special weight to the drafting history would further run counter to the Court’s interpretive guidelines that the ECHR should be seen as a "living instrument", and the fact that only a fraction of today’s Member States had taken part in the drafting process: Thallinger, op.cit. (note 13), at p. 173. See further Loucaides, loc.cit. (note 108), at p. 397, and Lawson, loc.cit. (note 99), at pp. 88–90.

127 Similar but with reservations: Thallinger, op.cit. (note 13), at pp. 149–150. See also Al-Shetini, supra note 49, Concurring Opinion of Judge Bonello, at para. 35.

128 See supra, at the beginning of Section 5.

129 This understanding of 'jurisdiction' is not very far from the one proposed by the ECHR in Banković when it held that jurisdiction described a State’s jurisdictional competence under public international law. The Court was right insofar it held it was the exercise of 'public powers' which was at the heart of its practice on extraterritorial jurisdiction. However, as explained above (Section 2.), that the Court included the element of legitimacy in the notion cannot be correct: Banković, supra note 3, at para. 71.

130 See supra note 38 and the accompanying text.
from a flagpole. The shooting of Andreou and her co-demonstrators arguably aimed at enforcing an order to disperse. The British patrols in Al-Skeini required the individuals in their area of responsibility, even if only implicitly, to comply with security regulations and to desist from attacks. Even seemingly irrational violent or punitive acts such as the assault on Isaak contain at least the obligation to tolerate the intrusion. According to this understanding, the proper approach in Banković would have been to establish whether the NATO forces, in this sense, deliberately enforced a certain conduct vis-à-vis the victims present in the targeted radio tower. Absent such reasoning, there is a prima facie discrepancy between Banković and the more recent cases involving deadly shootings, such as Andreou, Solomonou and Al-Skeini.

Other cases where the directive and its enforcement may coincide are ad hoc arrests, such as in the case of Chryssostomos. The inherent order is to refrain from moving freely and to tolerate the intrusion; the physical arrest enforces it simultaneously. The case of Latzidou can be seen as another example for the coincidence of an implicit order and its enforcement. It may well be that the applicant has never actually received an explicit order prohibiting her to access her real estate in occupied northern Cyprus. But the mere fact that Turkish-controlled troops prevent her from doing so embodies that order.

In such cases, a State's physical acts have a normative content because the individual is effectively obligated to comply with the conduct the State imposes on him or her. In the words of Loucaides, the State imposes its will on the individual. It exercises its authority, it dictates the rules, and therefore brings the person concerned within its jurisdiction.

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131 See supra note 68 and the accompanying text.
132 See supra note 65 and the accompanying text.
133 With regard to shootings, see the concurring opinion of Judge Bonello in Al-Skeini: "[Jurisdiction] also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it." Al-Skeini, supra note 49, Concurring Opinion of Judge Bonello, para. 28.
134 See supra note 99 and the accompanying text.
135 See supra note 64 and the accompanying text.
136 The facts as presented by the Court do not shed any light on the exact circumstances of the bombing: Banković, supra note 3, paras. 9–10. Amongst other things the Court should have established whether NATO forces knew that the victims were present in the tower. Furthermore, factors such as whether the victims were or were perceived as – combatants or civilians taking an active part in the hostilities, would arguably have played a role in the assessment.
137 See supra note 34 and the accompanying text.
138 See supra note 72 and the accompanying text.
139 See supra note 108 and the accompanying text.
140 See Thalidier, op.cit. (note 99), at p. 151.
141 Similarly, Hampson stresses that the exercise of jurisdiction must be effective: Hampson, loc.cit. (note 110), at p. 168.

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5.2 THE NOTION OF CONTROL

Jurisdiction as the power to prescribe conduct can only effectively exist where a State is able to enforce its regulations. Only where it is able to do so can it be said to have actual authority and therefore jurisdiction. To establish whether a State has jurisdiction over a given person, it is therefore necessary to determine whether it can enforce that person's compliance with its regulations. This is where the notion of control comes into play.
The meaning of control has an aspect of ‘checking by comparison’. It is about comparing an actual state of affairs with the nominal state and enforcing the latter. In other words, control describes the capacity to bring a situation as it is in line with as it should be. Specifically coined for jurisdiction understood as the power to prescribe conduct, control is a State’s capacity to bring a person’s conduct in line with the conduct required by the State. Only where a State possesses such control, does it possess actual authority. And only where it possesses actual authority, can it exercise jurisdiction.

‘Control’ is therefore a notion that concerns the enforcement of a State’s directives or orders. Hence, the object of control (what needs to be controlled) and the measure of control (how much control is required) are determined by the directive itself. A directive or order as understood here is a means to prescribe a person’s conduct. Therefore, the enforcement of an order requires control over that person’s conduct.

The necessary measure of control depends on how far-reaching or intrusive the order is. For instance, the enforcement of an order requiring someone to serve a prison sentence requires absolute physical control over him or her. The enforcement of an order prohibiting a person to demonstrate on a town square only requires the capacity to prevent that person from accessing that square. Thus, the ECtHR’s terminology must be put into perspective in two respects. Control over ‘territory’ is misleading because what is ultimately relevant is that a person’s conduct is controlled. Control over ‘persons’ is frequently too wide, as it is often not the person as such, but his or her conduct that needs to be controlled.

To illustrate this by the case of Loizidou: the applicant was denied access to her land, so the order was ‘Do not access your land’. To enforce that order, Turkey needed just the measure of control to prevent Loizidou from accessing her land. Even if Turkey did not physically control Loizidou, who lived in southern Cyprus, it controlled her land, and could therefore keep her out. In other words, it had the necessary exclusion control. The direct control over Loizidou’s land gave Turkey sufficient indirect control over Loizidou herself so as to enforce the order, and this was decisive.

Therefore, Loizidou did not (primarily) concern territorial control. The judgment’s focus on the occupied territory is misleading, in particular the holding that ‘[the] obligation to secure, in such an area, the [Convention rights] derives from the fact of such control’. Given that Loizidou resided outside the occupied territory, the rights which had to be secured within that territory were strictly speaking not at issue. The fact that Loizidou’s land was located in the occupied area was not (directly) decisive, because the ECHR’s applicability is governed by jurisdiction over persons, not property; by virtue of Article 1 ECHR, the Member States need to secure the Convention rights ‘to everyone within their jurisdiction’. The mere fact that a property lies within a State’s territory does not bring the property’s owner within its jurisdiction. Only insofar as the control over property enables that State to exercise authority over that person may jurisdiction be established. The reason why the ECHR applied the criterion of control to the territory of northern Cyprus remains obscure. It is conceivable that it wanted to establish that as a matter of principle, the ECHR was applicable in the whole of northern Cyprus. Be that as it may – ironically, the leading case on territorial control was not (at least not primarily) about territorial control at all.

Some cases in the practice of the Strasbourg organs exhibit the dichotomy between a directive and the control necessary for its enforcement particularly clearly. For instance, in Women on Waves, the ‘Borndiep’ had received a written order prohibiting the ship’s entry into Portuguese territorial waters. The same day, a navy ship took position near the ‘Borndiep’ in order to enforce that order. In the ‘embassy case’ of W.M. v. Denmark, the Danish ambassador had repeatedly requested the applicant to leave the embassy. He eventually enforced this order by calling in the Police.

To summarise, the notion of control describes a State’s capacity to enforce its directives. As mentioned, there may be situations in which a State enforces conduct without a prior explicit order, such as in an ad hoc arrest or the shooting of a person. In these cases, the State demonstrates in fact that it has the power to enforce compliance. Under these circumstances, the notion of control is superfluous.
6. CONCLUSION

Jurisdiction for the purposes of Article 1 ECHR is the sphere in which a State has the power to exercise actual authority, that is to prescribe conduct. A State exercises authority if it unilaterally imposes binding directives or orders on individuals. Where the State has the power to enforce such directives, it has actual authority over that person. The notion of control may be useful to assess whether a State has indeed the power of enforcement. 'Control' denotes the State's ability to bring a person's conduct in line with its directive – in other words: to enforce its rules.

A series of important consequences flow from this understanding of jurisdiction: jurisdiction does not describe a relation between States and territory, but between States and individuals. Control over a territory may be indirectly relevant, but ultimately decisive is the control, respectively jurisdiction, over a person. Given that jurisdiction is otherwise detached from a link to territory, it is exclusively determined by the State's conduct, wherever that may occur. Therefore, jurisdiction may be established ad hoc. There is no need for 'some form of structured relationship normally existing over a period of time', as suggested by the respondent States in Banković.

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DANCING ON THE BORDERS OF ARTICLE 4:
HUMAN TRAFFICKING AND
THE EUROPEAN COURT OF HUMAN RIGHTS IN THE RANTSEV CASE

VLADISLAVA STOYANOVA*

Abstract

This article points to four worrisome aspects of the Court's reasoning in Rantsev v. Cyprus and Russia. First, the Court takes on board the concept of human trafficking without offering any meaningful legal analysis as to the elements of the human trafficking definition. Second, the adoption of the human trafficking framework implicates the ECHR in anti-immigration and anti-prostitution agenda. The heart of this article is the argument that the human trafficking framework should be discarded and the Court should focus and develop the prohibitions on slavery, servitude and forced labour. To advance this argument, the relation between, on the one hand, human trafficking and, on the other hand, slavery, servitude and forced labour is explained. The article suggests hints as to how the Court could have engaged and worked with the definition of slavery which requires exercise of powers attaching to the right of ownership', in relation to the particular facts in Rantsev v. Cyprus and Russia. Lastly, it is submitted that the legal analysis as to the state positive obligation to take protective operation measures is far from persuasive.

Keywords: Article 4 of the European Convention on Human Rights; European Court of Human Rights; forced labour; human trafficking; Rantsev v. Cyprus and Russia; servitude; slavery

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Intersentia

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