

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

MICHAEL DUTTWILER*

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

* Lic. iur. (MLaw), LL.M. (Essex), Attorney-at-Law, Associate Legal Officer in the OTP of the International Criminal Tribunal for the Former Yugoslavia. The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general. The author would like to thank Anna Petrig and Clara Sandoval for their comments on this paper.

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)¹ 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 (ECtHR) 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.² 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 ECtHR's decision in *Banković et al. v. Belgium et al.* (*Banković*).³ 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 ECtHR in *Banković* 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 ECtHR and the European Commission on Human Rights (ECmHR), the relevant decisions did not hinge on those. Both the ECmHR and the ECtHR have relied heavily on jurisdiction based on actual authority and control, rendering legitimacy irrelevant. The ECtHR in *Banković* 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.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, European Treaty Series no. 005.

² Art. 1 ECHR.

³ ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber) (admissibility decision), 12 December 2001 (Appl.no. 52207/99).

What follows is a short reflection on the ECtHR'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).

2. LEGITIMACY AS AN ASPECT OF JURISDICTION

As is well known, the ECtHR in *Banković* held that jurisdiction must be understood as it is defined in public international law,⁴ 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.⁵ 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 ECtHR, in which the decisive criterion for jurisdiction was the exercise of actual authority or control over persons, notably without considerations as to legitimacy.⁶

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,⁷ the cooperation of States in criminal matters,⁸ or the arrest and detention on the high seas.⁹ However, as an examination of the relevant decisions reveals,¹⁰ 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 *Banković*.

⁴ *Banković*, *supra* note 3, at para 59.

⁵ Jennings, R. and Watts A., *Oppenheim's International Law*, Longman, Harlow, 1992–1996, Vol. I, at p. 456.

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*, *Khavara 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*, *Reinette 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 *Hirsi Jamaa 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 the ECtHR's understanding of jurisdiction as legal competence. The legitimacy, under international law, of a State's actions cannot be a necessary condition for establishing jurisdiction under the ECHR. Jurisdiction as the legal competence to prescribe conduct denotes an entitlement of a State to act.¹¹ 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 ECHR would not apply. Such an interpretation would lead to absurd results¹² and exclude the applicability of the ECHR in situations where it is arguably most needed – where the rule of law collapses. Worse, it could present States with the wrong incentives, seeing as they could circumvent their human rights obligations by overstepping their jurisdictional boundaries.¹³

Furthermore, as a basic tenet, human rights law is meant to protect the individual against the abuse of State power.¹⁴ To this end, its application cannot depend on whether a State abuses its power within or outside the jurisdictional 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*.¹⁵ 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 ECHR. Therefore, any State act, formal or informal, may qualify for jurisdiction.

This line of reasoning may be missing in *Banković*, 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 within their jurisdiction in the sense of Article 1 ECHR 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 *Banković* 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'.¹⁶ 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 ORGANS¹⁷

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 EComHR clearly expressed that a State exercising actual authority over persons may bring them within its jurisdiction was in the Cyprus cases.¹⁸ 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 ECHR did not apply outside of its territory. However, the EComHR 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'.¹⁹

¹⁶ See the situations mentioned in *Banković*, *supra* note 3, at paras. 69–70.

¹⁷ The review of the Strasbourg case-law partly relies on research done for an earlier publication: Duttwiler, M., and Petrig, A., 'Neue Aspekte der extraterritorialen Anwendbarkeit der EMRK', *Aktuelle Juristische Praxis*, No. 10, 2009, pp. 1247–1260.

¹⁸ EComHR, *Cyprus v. Turkey* (admissibility decision), 26 May 1975 (Appl.nos. 6780/74 and 6950/75); EComHR, *Cyprus v. Turkey* (2) (admissibility decision), 10 July 1978 (Appl.no. 8007/77).

¹⁹ *Cyprus v. Turkey*, *supra* note 18, at para. 8 of the legal considerations. This principle was later reaffirmed in the cases of *Stocké* and *Drozd et Janousek*, although in those cases, the extraterritorial acts could not be attributed to the responding States: EComHR, *Stocké v. the Federal Republic of*

¹¹ Orakhelashvili, A., 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law*, Vol. 14, No. 3, 2003, pp. 529–568, at pp. 539–542. In contrast, Art. 1 of the ECHR is concerned with the question of when a State is bound to respect its obligations under the Convention: Rüth, A. and Trilsch, M., 'Case note on Banković', *American Journal of International Law*, Vol. 97, No. 1, 2003, pp. 168–172, at p. 171.

¹² De Schutter, O., 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', *Baltic Yearbook of International Law*, Vol. 6, 2006, pp. 185–247, at p. 196; Gondek, M., 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', *Netherlands International Law Review*, Vol. 52, No. 3, 2005, pp. 349–387, at p. 364; Happold, M., 'Banković v Belgium and the Territorial Scope of the European Convention on Human Rights', *Human Rights Law Review*, Vol. 3, No. 1, 2003, pp. 77–90, at pp. 80–82.

¹³ Thallinger points to the maxim that no right can arise from an injustice (*ex iniuria ius non oritur*): Thallinger, G., *Grundrechte und extraterritoriale Hoheitsakte: Auslandseinsätze des Bundesheeres und Europäische Menschenrechtskonvention*, Springer, Wien, 2008, at p. 172; Peters, A., 'Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechtstoleranz', *Archiv des Völkerrechts*, Vol. 48, No. 1, 2010, pp. 1–57, at p. 6.

¹⁴ Donnelly, J., *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 2003, at pp. 35–36.

¹⁵ Compare the ECtHR's constantly reiterated guiding principle that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective': see *inter alia* ECtHR, *Artico v. Italy*, 13 May 1980 (Appl.no. 6694/74), at para. 33; ECtHR, *Soering v. United Kingdom*, 7 July 1989 (Appl.no. 14038/88), at para. 87.

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 it 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

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 exercised with the consent of the territorial State,²¹ the Commission's considerations show that the decisive criterion was the exercise of authority as such. While the first decision in an embassy case, *X. v. Federal Republic of Germany*,²² still contained ambivalent terminology, the Commission after 1975 clearly reiterated the principle pronounced in the Cyprus-cases: '[A]uthorised 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.'²³

German, Appl.no. 11755/85, report of 12 October 1989, at para. 166; EComHR, *Drozd et Janousek c. France et Espagne*, Appl.no. 12747/87, report of 11 December 1990, at para. 79. The Court later invoked the same principle: ECtHR, *Drozd et Janousek c. France et Espagne*, 26 June 1992 (Appl.no. 12747/87), at para. 91.

²⁰ *Cyprus v. Turkey*, *supra* note 18, at para. 10 of the legal considerations.

²¹ See the applicable Vienna Conventions whose arts. 2 state that the establishment of consular and diplomatic relations takes place by mutual consent: Vienna Convention on Consular Relations of 24 April 1963, 596 UNTS 261; Vienna Convention on Diplomatic Relations of 18 April 1961, 500 UNTS 95.

²² '[I]n 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.

²³ EComHR, *X. v. the United Kingdom* (admissibility decision), 15 December 1977 (Appl.no. 7547/76), 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. 17392/90), at para. 1 of the legal considerations, and EComHR, *Gill and Malone v. UK and The Netherlands* (admissibility decision), 11 April 1966 (Appl.no. 24001/94), 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 [...].'

The Commission pursued this line.²⁴ In *X. and Y. v. Switzerland*, it affirmed that the Convention applies if States bring persons 'within their actual authority or control'.²⁵ In this case, Switzerland had prohibited the first applicant, a German national residing in Germany, to enter the Principality of Liechtenstein. By virtue of a bilateral treaty, the scope of the Swiss legislation on the residence of aliens had been extended to the Principality. As a consequence, '[a]cts by Swiss authorities with effect in Liechtenstein [brought] all those to whom they [applied] under Swiss jurisdiction within the meaning of Article 1 of the Convention'.²⁶ While these cases set out the principle that authority and control entail jurisdiction, its application became most visible in decisions concerning the extraterritorial detention of individuals.

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.²⁷ 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 *Reinette v. France*,³¹ and *Sánchez Ramirez v. France*³² 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

EComHR, *S. v. Federal Republic of Germany* (admissibility decision), 5 October 1984 (Appl.no. 10686/83), at para. 5 of the legal considerations.

²⁴ Besides the following case, see also *Vearncombe*, in which the principle was reiterated, but the question of jurisdiction left open: EComHR, *Vearncombe et al. v. the United Kingdom and the Federal Republic of Germany* (admissibility decision), 18 January 1989 (Appl.no. 12816/87), at para. 1.b of the legal considerations.

²⁵ EComHR, *X. and Y. v. Switzerland* (admissibility decision), 14 July 1977 (Appl.nos. 7289/75 and 7349/76), at para. 2 of the legal considerations.

²⁶ *X. and Y. v. Switzerland*, *supra* note 25, at para. 2 of the legal considerations.

²⁷ EComHR, *Hess v. United Kingdom* (admissibility decision), 28 May 1975 (Appl.no. 6231/73).

²⁸ The EComHR reiterated this in *Vearncombe*, *supra* note 24, at para. 1.b of the legal considerations.

²⁹ Effectively, the decision was arguably based on lack of attribution rather than jurisdiction. If the criterion is effective control, one cannot but find that control was given, even if it was exercised jointly.

³⁰ EComHR, *Freda v. Italy* (admissibility decision), 7 October 1980 (Appl.no. 8916/80).

³¹ EComHR, *Reinette v. France* (admissibility decision), 2 October 1989 (Appl.no. 14009/88).

³² ECtHR, *Sánchez Ramirez v. France* (admissibility decision), 24 June 1996 (Appl.no. 28780/95).

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.³³

The irrelevance of *de jure* jurisdiction is further illustrated by a detention case which was completely unrelated to elements of legal competence. In *Chrysostomos et al. v. Turkey*,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 Panamese flag.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.³⁶ Both the Commission and the ECtHR implicitly found that jurisdiction was established,³⁷ but they did not spell out its basis. Although elements of legal competence were present,³⁸ jurisdiction was once more established by actual authority, exercised through the physical detention. This can be concluded from the more recent case of *Medvedyev et al. 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.³⁹ This was confirmed by the Grand Chamber:

[A]s this was a case of France having exercised full and exclusive control over the *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 [...].⁴⁰

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.

³⁴ EComHR, *Chrysostomos et al. v. Turkey* (admissibility decision), 4 March 1991 (Appl.nos. 15299/89, 15300/89, and 15318/89), at paras. 30 *et seq.* of the legal considerations.

³⁵ EComHR, *Rigopoulos c. l'Espagne* (admissibility decision), 16 April 1988 (Appl.no. 37388/97).

³⁶ ECtHR, *Rigopoulos c. l'Espagne* (admissibility decision), 12 January 1999 (Appl.no. 37388/97).

³⁷ Otherwise, they would have denied the application's admissibility for lack of jurisdiction.

³⁸ Flag principle and consent: Spain acted with the consent of Panama, the flag State, in accordance with Art. 17(3) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, 1582 UNTS 95; *Rigopoulos*, *supra* note 35, at para. 4 of the factual description.

³⁹ ECtHR, *Medvedyev et al. c. France*, 10 July 2008 (Appl.no. 3394/03), at para. 50.

⁴⁰ ECtHR, *Medvedyev et al. c. France* (Grand Chamber), 29 March 2010 (Appl.no. 3394/03), at para. 67.

In the most recent case concerning detention on the high seas, *Hirsi Jamaa et al. v. Italy*, the ECtHR found both *de jure* and *de facto* jurisdiction established. Italian authorities had intercepted three migrant boats travelling from Libya to Italy. The migrants were transferred to Italian military ships and returned to Libya. Considering the flag principle and that the events occurred on board Italian army ships, the Court held that 'the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.⁴¹

The ECtHR dealt with other cases of extraterritorial detention, amongst which figured the one of *Öcalan v. Turkey*. The former leader of the Kurdistan Workers' Party had been arrested and handed over to Turkish agents in Kenya. The Court held that once handed over, Öcalan was under 'effective Turkish authority' and therefore within the jurisdiction of that State.⁴²

Another case of extraterritorial detention was the one of former Iraqi head of State Saddam Hussein. His application was declared inadmissible because he was in the custody of the US, rather than the European respondent States.⁴³ However, the ECtHR confirmed the broad strokes of the practice of the Convention organs. It stated that jurisdiction may in principle be established by means of physical detention, and more generally, by the actions of State agents abroad.⁴⁴

The events in Iraq generated more case law from the ECtHR. The applicants in *Al-Saadoon and Mufdhi v. the United Kingdom* were detained in Iraq and held in British-run prisons before being handed over to the Iraqi authorities. The ECtHR found that the *de facto* control over the detainees was at all times sufficient to bring them within the UK's jurisdiction.⁴⁵

Most recently, the case of *Al-Jedda* concerned an applicant who was arrested and subsequently interned without charge in a British-run prison for over three years.⁴⁶ Under the heading of jurisdiction, the Court mainly dealt with an issue of attribution, namely whether the UK's acts were attributable to the UN.⁴⁷ Having denied this question, the ECtHR unceremoniously concluded that throughout his internment,

⁴¹ ECtHR, *Hirsi Jamaa et al. v. Italy* (Grand Chamber), 23 February 2012 (Appl.no. 27765/09), at paras. 76–82.

⁴² ECtHR, *Öcalan v. Turkey*, 12 March 2003 (Appl.no. 46221/99), at para. 93.

⁴³ The respondent States were involved neither in the arrest nor the subsequent detention of the former Iraqi head of State, nor were they in control of the territory where the impugned acts had occurred: ECtHR, *Hussein v. Albania et al.* (admissibility decision), 14 March 2006 (Appl.no. 23276/04), at p. 4.

⁴⁴ *Hussein*, *supra* note 43, at p. 4. The ECtHR also confirmed that jurisdiction may be established by territorial control. See for this notion below, Section 3.2.

⁴⁵ ECtHR, *Al-Saadoon und Mufdhi v. the United Kingdom* (admissibility decision), 30 June 2009 (Appl.no. 61498/08), at para. 88.

⁴⁶ ECtHR, *Al-Jedda v. the United Kingdom*, 7 July 2011 (Appl.no. 27021/08), at para. 10.

⁴⁷ *Al-Jedda*, *supra* note 46, at paras. 47–86.

'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 find that the victims were indeed arrested by Turkish troops.⁵⁶ The victims in *Pad et al. v. Turkey* were allegedly picked up by Turkish troops on Iranian territory, brought to Turkey, and killed there. Before the ECtHR, Turkey conceded that the victims were killed by Turkish soldiers but insisted the incident occurred on Turkish territory.

⁴⁸ *Al-Jedda*, *supra* note 46, at paras. 85–86. In fact, during domestic proceedings, the respondent government had accepted that the applicant came within the State's jurisdiction: *ibid.*, at paras. 16, 69, 75.

⁴⁹ ECtHR, *Al-Skeini et al. v. the United Kingdom*, 7 July 2011 (Appl.no. 55721/07), at paras. 143 (start date 1 May 2003), 148 (end date 28 June 2004), 150, 168.

⁵⁰ *Al-Skeini*, *supra* note 49, at paras. 55–71.

⁵¹ *Al-Skeini*, *supra* note 49, at paras. 133–140.

⁵² *Al-Skeini*, *supra* note 49, at para. 136.

⁵³ For the criterion of control over a territory, see below, Section 3.2.

⁵⁴ *Al-Skeini*, *supra* note 49, at para. 143.

⁵⁵ *Al-Skeini*, *supra* note 49, at para. 149.

⁵⁶ ECtHR, *Issa et al. v. Turkey*, 16 November 2004 (Appl.no. 31821/96), at para. 81.

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

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 sinking of a ship carrying Albanian nationals who allegedly attempted to enter clandestinely into Italy.⁵⁸ Thirty-five sea miles off the Italian coast,⁵⁹ 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.⁶⁰

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.⁶¹ The foundation's activists travelled to Portugal on the chartered ship 'Borndiep'. While approaching Portuguese territorial waters, the 'Borndiep' was prohibited to continue, and a Portuguese military ship was positioned alongside it. Because the 'Borndiep' did not fly the Portuguese flag, was outside Portuguese territorial waters,⁶² and the foundation was Dutch, there was arguably no factor which would have linked the 'Borndiep' to Portugal's legal competence.⁶³ Still, the Court implicitly assumed that jurisdiction was given, even deciding the case on the merits.

⁵⁷ ECtHR, *Pad et al. v. Turkey* (admissibility decision), 28 June 2007 (Appl.no. 60167/00), at para. 54.

⁵⁸ ECtHR, *Xhavara et al. c. Italie et Albanie* (admissibility decision), 11 January 2001 (Appl.no. 39473/98).

⁵⁹ 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.

⁶⁰ *Xhavara*, *supra* note 58, at paras. 1–4 of the legal considerations.

⁶¹ ECtHR, *Women on Waves et al. c. Portugal*, 3 February 2009 (Appl.no. 31276/05).

⁶² 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 subject matters. See Art. 33 at para. 1 lit. a of the UN Convention on the Law of the Sea of 10 December 1982 (UNCLOS), 1833 UNTS 396.

⁶³ 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'.⁶⁴ 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.⁶⁵ 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 1 and that the responsibility of the respondent State under the Convention is in consequence engaged.⁶⁶

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.⁶⁷ 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'.⁶⁸

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'.⁶⁹ 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.⁷⁰ 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'.⁷¹

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'.⁷² 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'.⁷³

⁶⁴ ECtHR, *Isaak et al. v. Turkey* (admissibility decision), 28 September 2006 (Appl.no. 44587/98), at p. 21.

⁶⁵ ECtHR, *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: ECtHR, *Solomou et al. v. Turkey*, 24 June 2008 (Appl.no. 36832/97), at para. 51.

⁶⁸ *Solomou*, *supra* note 68, at paras. 50–51.

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 ECtHR, *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.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’.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*⁷⁶ and most other cases concerning the situation in northern Cyprus.⁷⁷

Besides these cases, territorial control was also an issue in *Ilaşcu et al. v. Moldova and Russia*, but not in the context of extraterritorial jurisdiction.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.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 Moldavian Republic of Transdniestria, in whose detention the applicants found themselves,

remain[ed] under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survive[d] by virtue of the military, economic, financial and political support given to it by the Russian Federation.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.

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

⁷⁵ *Loizidou*, *supra* note 72, at para. 62 (emphasis added).

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

⁷⁷ Particularly, the ECtHR simply referred to its findings in *Loizidou* to decide more than a dozen of 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, *Lordos et al. v. Turkey*, 2 November 2010 (Appl.no. 15973/90). For a recent case concerning the positive obligation to investigate disappearances in occupied northern Cyprus see ECtHR, *Varnava et al. v. Turkey* (Grand Chamber), 18 September 2009 (Appl.nos. 16064/90 *et al.*).

⁷⁸ ECtHR, *Ilaşcu et al. v. Moldova and Russia*, 8 July 2004 (Appl.no. 48787/99).

⁷⁹ *Ilaşcu*, *supra* note 78, at para. 333.

⁸⁰ *Ilaşcu*, *supra* note 78, at para. 392.

In the case of *Issa*, mentioned above as a potential example of control over persons,⁸¹ the ECtHR also affirmed the principle that the occupation of an area may entail jurisdiction.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.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.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.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.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.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.⁸⁸

3.3. OPEN QUESTIONS

In sum, it can be said that both the EComHR and ECtHR have applied the ECHR 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

⁸¹ See *supra* note 56 and the accompanying text.

⁸² *Issa*, *supra* note 56, at para. 69.

⁸³ *Ibidem*, at paras. 73–74.

⁸⁴ *Ibidem*, *supra* note 56, at para. 81.

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).

⁸⁶ See *supra* Section 3.1.

⁸⁷ *Banković*, *supra* note 3, at para. 52.

⁸⁸ *Ibidem*, at paras. 82, 85.

the reach of the Convention',⁸⁹ 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.⁹⁰ 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*.⁹¹ 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.⁹²

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*⁹³ and *Xhavara*,⁹⁴ in which the ECtHR did not even discuss the issue. Similarly, that the Court in *Andreou*⁹⁵ 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.

⁸⁹ See for example *Medvedyev*, *supra* note 40, at para. 63.

⁹⁰ Apart from the extraterritorial cases occurring within Europe, the case-law discussed in this article concerned situations on the American, African, and Asian continent (Costa Rica, Iraq, Kenya, St. Vincent, Sudan).

⁹¹ 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Art. 1 ECHR (emphasis added).

⁹² 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.

⁹³ See *supra* note 61 and the accompanying text.

⁹⁴ See *supra* note 58 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.

⁹⁵ See *supra* note 65 and the accompanying text.

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'.⁹⁶ In this sense, a person comes within a Member State's jurisdiction if that State 'has the power to [affect] his/her human rights'.⁹⁷ 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.⁹⁸

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.⁹⁹ 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'.¹⁰⁰ This approach is reminiscent of the apparent finding of the Court in *Andreou*¹⁰¹ 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.¹⁰² 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

⁹⁶ Roxstrom, E., Gibney, M., and Einarsen, T., 'The NATO Bombing Case (Banković et al. v. Belgium et al.) and the Limits of Western Human Rights Protection', *Boston University International Law Journal*, Vol. 23, No. 1, 2005, pp. 55–136, at p. 74. See also Milanović, M., 'From Compromise to Principle: Clarifying the Concept of state Jurisdiction in Human Rights Treaties', *Human Rights Law Review*, Vol. 8, No. 3, 2008, pp. 411–448, at p. 435: '[J]urisdiction relates essentially to a question of fact, of actual authority and control that a state has over a given territory or person. "Jurisdiction", in this context, simply means actual power, whether exercised lawfully or not [...].'

⁹⁷ Roxstrom, Gibney and Einarsen, *loc. cit.* (note 96), at p. 74.

⁹⁸ See below, Section 5.

⁹⁹ Lawson, R., 'Life after Banković: on the Extraterritorial Application of the European Convention on Human Rights', in: Coomans, F. and Kamminga, M.T. (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004, pp. 83–123, at p. 104.

¹⁰⁰ Lawson, *loc. cit.* (note 99), at p. 104 (emphasis added).

¹⁰¹ *Supra* note 65 and the accompanying text.

¹⁰² Compare for example Art. 31 ('Reparation') 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.¹⁰³

A special 'link' criterion is also suggested by Miller, who proposes a 'territorial justification' for extraterritorial jurisdiction.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'.¹⁰⁵ The exact nature of this territorial connection remains unclear,¹⁰⁶ and it seems this approach would exclude a whole series of cases in which the ECtHR clearly found jurisdiction established.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:

'[J]urisdiction' 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.¹⁰⁸

Loucaides' position has been expressly embraced by Gondek.¹⁰⁹ Furthermore, Hampson may be counted as belonging to the same school of thought.¹¹⁰ According to her, jurisdiction refers 'to the space within which an organ of the state exercises

¹⁰³ See below, Section 5.1.3.

¹⁰⁴ Miller, S., 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', *European Journal of International Law*, Vol. 20, No. 4, 2009, pp. 1223–1246.

¹⁰⁵ Miller, *loc.cit.* (note 104), at p. 1225.

¹⁰⁶ 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 *Öcalan* 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*).

¹⁰⁷ See the cases mentioned in fn. 104 *in fine*.

¹⁰⁸ ECtHR, *Assanidze v. Georgia*, 8 April 2004 (Appl.no. 71503/01), Concurring opinion of Judge Loucaides. See also Loucaides, L., 'Determining the Extra-Territorial effect of the European Convention', *European Human Rights Law Review*, Vol. 11, No. 4, 2006, pp. 391–407, at p. 399.

¹⁰⁹ Gondek, M., *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2009, at pp. 375–376.

¹¹⁰ Hampson, F., 'The scope of the extra-territorial applicability of human rights law', in: Gilbert, G., Hampson, F., and Sandoval, C. (eds.), *The Delivery of Human Rights, Essays in Honour of Professor Sir Nigel Rodley*, Routledge, London, 2010, pp. 157–182, at pp. 156–182.

its functions'.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'.¹¹² To meet the threshold of Article 1 of the ECHR, the exercise of jurisdiction must be effective.¹¹³ Effectiveness may be guaranteed by control, which Hampson defines as the 'ability to dominate or command'.¹¹⁴

One may further count Thallinger as belonging to this school of thought. He has undertaken the most detailed analysis to date.¹¹⁵ Thallinger defines jurisdiction as a State's general competence to regulate the conduct of its subjects.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.¹¹⁷ Authority in this sense is not any State power, but exclusively the coercive power used by a State to enforce its legislation.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.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.¹²⁰ However, another premise needs to be added. As an element of Article 1 ECHR,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.¹²² The ECtHR rightly rejected a notion of responsibility under the ECHR which would effectively do away with the element of jurisdiction.¹²³

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.

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 Medvedev, *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.¹²⁴

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.¹²⁵ 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.¹²⁶

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'.¹²⁷

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

¹²⁴ Lagrange, E., 'L'Application de la Convention de Rome à des actes accomplis par les États Parties en dehors du territoire national', *Revue générale de droit international public*, Vol. 112, No. 3, 2008, pp. 521–565, at pp. 535–537; Lawson, *loc.cit.* (note 99), at p. 104; O'Boyle, M., 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Banković'', in: Coomans, F., and Kamminga, M.T. (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004, pp. 125–140, at pp. 130–131; Thallinger, *op.cit.* (note 13), at pp. 150–152.

¹²⁵ Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969, 1155 UNTS 331. The Convention does not apply to predating 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 3, at paras. 19–21, 63). 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 guideline 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-Skeini, *supra* note 49, Concurring Opinion of Judge Bonello, at para. 35.

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.¹²⁸

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.¹²⁹

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.¹³⁰ The shooting of Solomou embodied the order to refrain from pulling down a Turkish flag

¹²⁸ See *supra*, at the beginning of Section 5.

¹²⁹ This understanding of 'jurisdiction' is not very far from the one proposed by the ECtHR 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 58 and the accompanying text.

from a flagpole.¹³¹ The shooting of Andreou¹³² and her co-demonstrators arguably aimed at enforcing an order to disperse.¹³³ 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.¹³⁴ Even seemingly irrational violent or punitive acts such as the assault on Isaak contain at least the obligation to tolerate the intrusion.¹³⁵ 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.¹³⁶ Absent such reasoning, there is a *prima facie* discrepancy between *Banković* and the more recent cases involving deadly shootings, such as *Andreou*, *Solomou* and *Al-Skeini*.

Other cases where the directive and its enforcement may coincide are *ad hoc* arrests, such as in the case of *Chrysostomos*.¹³⁷ The inherent order is to refrain from moving freely and to tolerate the intrusion; the physical arrest enforces it simultaneously. The case of *Loizidou* can be seen as another example for the coincidence of an implicit order and its enforcement.¹³⁸ 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,¹³⁹ 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.

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, at para. 28.

¹³⁴ See *supra* note 49 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.

5.1.3. Differentiation from Mere Factual Conduct without a Normative Content

The difference to mere factual State conduct without a normative content which may affect individuals but does not constitute an authoritative act has to be seen in the purpose. The prescription of conduct is purpose-driven. The very reason why a State uses the unilateral means of imposing its authority on an individual (as opposed to the consensual means of a contract, for instance) is that it intends for its regulation to be implemented on its own terms. Hence, that the individual is obligated to comply is directly intended; there is no accidental exercise of legal authority. The binding effect of the exercise of State authority as understood here is its very purpose.¹⁴⁰ Purposiveness further implies that an act of State authority is directed at one or more specific persons. To determine whether a specific act was an act of State authority, it needs to be asked if the purpose was to require certain behaviour from one or more specified person(s). To mention an example that has been brought up for discussion:¹⁴¹ spending cuts in development aid are not targeted at specific persons and therefore do not constitute acts of State authority in the sense of Article 1 ECHR.¹⁴²

However, once a person is within the jurisdiction of a State, any act may qualify as a human rights violation. The harm actually caused may go beyond the enforcement of the regulation or order in question. To take *Xhavara* as an example, the act of State authority was the order for the Albanian ship to stop, tolerate a search and refrain from landing in Italy.¹⁴³ This normative act – which coincided with the factual enforcement manoeuvres by the navy ship – brought the Albanian migrants within Italy's jurisdiction. To establish jurisdiction, it was, therefore, irrelevant whether the subsequent sinking of the Albanian ship and the drowning of the Albanian migrants was intentional or not.

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.¹⁴⁴ This is where the notion of control comes

¹⁴⁰ Differnt Thallinger, *op.cit.* (note 13), at pp. 189–191, who does not require purposiveness, stating this notion was inherent in 'authority'.

¹⁴¹ See Lawson, *loc.cit.* (note 99), at p. 104.

¹⁴² As here: Thallinger, *op.cit.* (note 13), at p. 151.

¹⁴³ See *supra* note 58 and the accompanying text.

¹⁴⁴ Similarly, Hampson stresses that the exercise of jurisdiction must be effective: Hampson, *loc.cit.* (note 110), at p. 168.

into play. The meaning of control has an aspect of 'checking by comparison'.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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,¹⁴⁸ 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 '[t]he obligation to secure, in such an area, the [Convention rights] derives from the fact of such control'.¹⁴⁹ Given that Loizidou resided outside the occupied territory, the rights which had to be secured *within* that territory were strictly speaking not at

¹⁴⁵ Oxford English Dictionary Online, entry 'control'.

¹⁴⁶ Similarly, Thallinger argues the State must have control over the persons with regard to whom it intends to enforce its authority: Thallinger, *op.cit.* (note 13), at p. 179.

¹⁴⁷ On the other hand, if one wants to determine whether the ECHR is applicable in a certain foreign territory, the decisive factor is not primarily the strength of the occupying troops, but the number of persons present, given that it is their conduct which needs to be controlled.

¹⁴⁸ See the description of facts in *Chrysostomos*, *supra* note 34, paras. 1–10 of the section on application no. 15318/89.

¹⁴⁹ *Loizidou*, *supra* note 72, at para. 62 (emphasis added).

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'.¹⁵⁰ 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 ECtHR 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.¹⁵¹ 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.¹⁵² 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.¹⁵³

To summarise, the notion of control describes a State's capacity to enforce its directives. As mentioned,¹⁵⁴ 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.

¹⁵⁰ Art. 1 ECHR (emphasis added).

¹⁵¹ Another reason might be that Loizidou's complaints before the Court and the Commission differed. Before the Commission, the complaints brought by the then three applicants involved actual physical control over their persons (Loizidou had been arrested within the occupied territory: see *Chrysostomos*, *supra* note 34, at paras. 1–10 of the section on application no. 15318/89). When Loizidou's case came before the ECtHR, now disjoined from the others, her application was limited to the issue of her property to which she was denied access (*Loizidou*, *supra* note 72, at paras. 53–54). Hence, the material facts of the case did not involve physical control over persons anymore. But obviously, the ECtHR saw the jurisdictional link between the respondent State and Loizidou in the fact that her real estate was situated in occupied northern Cyprus, and therefore in the control of Turkey. Thus the ECtHR probably modified the criterion of 'control' to reflect this reality. See also Gondek, who argues that the change to territorial control alleviated the applicant's burden of proof: Gondek, *op.cit.* (note 109), at pp. 160–161.

¹⁵² *Women on Waves*, *supra* note 61, at paras. 8–9.

¹⁵³ *W.M. v. Denmark*, *supra* note 23, fourth paragraph of the section on facts.

¹⁵⁴ See *supra* Section 5.1.2.

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.¹⁵⁵ 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.¹⁵⁶ Therefore, jurisdiction may be established *ad hoc*.¹⁵⁷ 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*.¹⁵⁸

¹⁵⁵ Compare the Human Rights Committee (HRC)'s approach, holding that 'jurisdiction' did not refer 'to the place where the violation occurred, but rather to the relationship between the individual and the State': HRC, *Saldías de López v. Uruguay*, Communication no. 52/1979, Views of 29 July 1981, at para. 12.1; HRC, *Celiberti de Casariego v. Uruguay*, Communication no. 56/1979, Views of 29 July 1981, at para. 10.2.

¹⁵⁶ As here: Lawson, *loc.cit.* (note 99), at p. 104, fn. 46.

¹⁵⁷ But see the statement in *Hirsi Jamaa*, where the ECtHR ruled out that an "instantaneous extra-territorial act" may establish jurisdiction, because the wording of Article 1 did not accommodate such an approach to jurisdiction: *Hirsi Jamaa*, *supra* note 41, at para. 73.

¹⁵⁸ *Banković*, *supra* note 3, at para. 36.

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 ECtHR 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

* Doctoral Candidate, Lund University, Sweden; adv.LLM, Leiden University, the Netherlands. For more information: vladislava.stoyanova@gmail.com and vladislava.stoyanova@jur.lu.se. I would like to thank Prof. Gregor Noll and prof. Johanna Niemi for their support and comments. Responsibility for the views expressed is only mine. The title of this article was inspired by Prof. Audrey Macklin's article 'Dancing Across Borders: Exotic Dancers, Trafficking, and Canadian Immigration Policy' which is cited below.