The Human Rights of the Other – Law, Philosophy and Complications in the Extra-territorial Application of the ECHR

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This Article addresses different perspectives on the extra-territorial applicability of the European Convention on Human Rights (ECHR). Section 2 focuses on the different interpretations of the concept of State jurisdiction attempted by the Strasbourg Court and academics. Through the guidance of article 31 of the Vienna Convention on the Law of Treaties, a legal interpretation of the term ‘jurisdiction’ is suggested. A conception of ‘jurisdiction’ disconnected from territorial boundaries and focused on the relationship of power between the State and the individual seems required by the meaning of the term ‘jurisdiction’ in the context of human rights law, its coherence with the object and purpose of the ECHR, and its belonging to international human rights law. Section 3 questions some of the current philosophical understandings and groundings of human rights. Departing from the idea that the groundings of current theories justifying the extra-territorial applicability/non-applicability of the ECHR are not completely justified from a philosophical perspective, the present Article tries to propose different foundations. Through the works of Arendt and Levinas and critiques to cosmopolitanism, this Article suggests different foundations for the extra-territorial application of the ECHR, in harmony with and in support of the legal interpretation proposed in Section 2. Section 4 addresses some of the practical complications deriving from the extra-territorial application of the ECHR, such as the relationship between human rights and international humanitarian law, the relationship between human rights and Occupation Law, and the risk of human rights imperialism. In conclusion, an overall appraisal of the issues covered in this Article warrants a process of extra-territorial application of the ECHR based on an actual recognition of the human rights of the Other.

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I. INTRODUCTION

International law’s energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded. This can not mean fixing the law’s content permanently to definite institutional or normative structures. It is a formal idea that seeks community by understanding that every community is based on an exclusion and that therefore it must be a part of an acceptable community’s self-definition that it constantly negotiates that exclusion, widens its horizon [sic].

Martti Koskenniemi

In Al-Skeini, Lord Rodger observed that the application of the European Convention on Human Rights (ECHR) in Iraq would have been inappropriate because the Court could have run the risk of being accused of human rights imperialism. This is an interesting perspective that casts shadows on the sanctity of human rights, although in the case of Al-Skeini the argument may appear ironic. Naturally, in the research conducted on the topic of extra-territorial application of the ECHR and its potential down-side of human rights imperialism, many other and more general themes have emerged. For example, there exists the danger of the collapse of the entire building by referring to, in Douzinas’ words, ‘a strange and almost metaphysical’ existence of human rights, ‘even when they have not been legislated’. Through three different threads of research, which may at times appear incomplete or inconclusive, it is hoped that it will be possible to clutch at some hints for overcoming current obstacles to a coherent extra-territorial application of the ECHR.

Historically, rights have been limited to the members of a community, fostering dynamics of inclusion-exclusion from protection. The concept of statehood itself is essentially related to the concept of territory. Thus, human rights are

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2 *R (Al-Skeini) and others v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [78].
3 As if respecting the right to life of Iraqi citizens would annihilate their cultural differences from the UK.
5 ibid.
often understood as territorial rather than extra-territorial\textsuperscript{8} and the extra-territorial extension of human rights obligations may be considered anomalous.\textsuperscript{9} However, a feature of past and contemporary human rights violations is the detachment from State territory. For instance, in current times States involved in the “war on terror” use ‘extra-territorial loci’ to detain and interrogate suspected terrorists, in order to avoid public scrutiny.\textsuperscript{10} Significantly, the ECHR prescribes that ‘[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.\textsuperscript{11} Similar provisions may be found in other treaties on civil and political rights.\textsuperscript{12} The reference to the word ‘jurisdiction’ and not ‘territory’ is a common feature of international human rights treaties in the post-WWII era.\textsuperscript{13} International supervisory bodies of certain human rights treaties agree on the point that ‘jurisdiction’ and ‘territory’ are not one and the same.\textsuperscript{14} Thus, \textit{mutatis mutandis} and with due precaution, the analysis and main argument of this Article might be relevant for other human rights treaties.\textsuperscript{15}


\textsuperscript{9} Craven, ‘Human Rights’ (n 8) 241.

\textsuperscript{10} Wilde, ‘Legal “Black Hole”?’ (n 8) 741-52.


\textsuperscript{14} UN Human Rights Committee, ‘General Comment 31’ in ‘Nature of the General Legal Obligation on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add.13. See also Coomans and Kamminga (n 8) 3.

\textsuperscript{15} For the difference between human rights treaties and other treaties in international law, see Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 European Journal of International Law 489. In the European context, the EComHR stated that State obligations ‘are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves’: \textit{Austria v Italy} App no 788/60 (Commission Decision, 11 January 1961). As to the extra-territorial application of economic, social and cultural rights, see ICJ, \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (Advisory Opinion) [2004] ICJ Rep 136.
This Article will focus on cases in which individuals are outside of the territorial borders of State parties to the ECHR. Indeed, what is decisive in order to determine if the application is extra-territorial, is the fact that the affected individual finds herself/himself outside of the national territory at the moment of the violation. Accordingly, the extra-territorial application of the ECHR is not relevant in cases of expulsion or extradition from the territories of State parties towards non-state parties. In these cases, affected individuals are normally still within national borders at the moment of the violation. However, similar cases may have extra-territorial relevance if the conduct happens extra-territorially, but within a State party’s jurisdiction. Correspondingly, cases of interception of migrants and transfer to third parties’ authorities may be relevant, because before the transfer, individuals are usually within the jurisdiction of a State party. Similar questions arose in cases concerning British soldiers operating abroad as victims, in particular in two cases brought before the United Kingdom (UK) Supreme Court and one case that made its way to the European Court of Human Rights (ECtHR).

Section 2 addresses different legal perspectives on the extra-territorial applicability of the ECHR. The Section focuses on the interpretation of the concept of jurisdiction attempted by the Court and by academics. At the end of Section 2, a legal interpretation of the term jurisdiction through the guidance of article 31 of the Vienna Convention on the Law of Treaties (VCLT) is suggested. A conception of jurisdiction disconnected from territorial boundaries and focused on the relationship of power between the State and the individual seems required by the meaning of the term ‘jurisdiction’ in the context of international human rights law (IHRL), its coherence with the object and purpose of the ECHR, and its belonging in IHRL.

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17 Soering v UK (1989) 11 EHRR 439. For a recent example, see Othman v UK (2012) 55 EHRR 1.


19 Milanovic gives the example of transfer of Iraqi detainees to Iraqi authorities by the UK: see Milanovic, Extraterritorial Application (n 16) 8-9.


22 Pritchard v UK App no 1573/11 (ECtHR, 18 March 2014) was a case which was eventually struck out of the list of cases by reason of friendly settlement.
Section 3 questions some of the current philosophical groundings of human rights. Departing from the idea that in the current legal debate the ideas proposed for the extra-territorial application/non-application of the ECHR are not justified from a philosophical perspective, the present Article tries to offer different foundations. Through critiques of cosmopolitanism and through Arendt’s and Levinas’ works, the present Article suggests a different foundation for the extra-territorial application of the ECHR, in harmony with and in support of the legal interpretation proposed in Section 2.

Section 4 addresses the practical complications deriving from the extra-territorial application of the ECHR. For example, the relationship between articles 1 and 56 of the ECHR reveals its colonial present. Moreover, the interpretative criteria applicable to solve norm conflicts arising from the interplay between the ECHR and international humanitarian law (IHL) are becoming far from certain. The interest in this particular area of the fragmentation of international law is renewed by recent judgements of the ECtHR such as Hassan v UK.23 Finally, Section 4 concludes with some observations about the fact that the extra-territorial application of human rights in times of armed conflict and occupation may simultaneously protect human rights and serve the political goals of the occupiers. In these scenarios, the issue of human rights imperialism may appear.

It must be noted that the division of research into three Sections does not suggest that the different matters dealt with are to be observed as separate. The main planning corresponds to the idea that law, philosophy, and praxis are, or should be, intertwined.

In conclusion, basing its legal argument on legal interpretative criteria contained in relevant laws and drawing on previous scholarship and international and regional authorities, this Article understands the concept of State jurisdiction as a relationship of power between the State and the individual, regardless of other temporal, geographical or spatial requirements. As explained in Section 3 this notion of State jurisdiction finds its philosophical foundations in the relationality of human rights. In particular, late-Arendtian and Levinasian perspectives on human rights conduct to an elaboration which allows for the co-existence of human rights both as a fact of being and as law, reconnecting physei and nomos. Additionally, this Article addresses some of the legal and political complications deriving from the extra-territorial application of the ECHR. Through the combination of legal, philosophical and political

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23 Hassan v UK App no 29750/09, (ECtHR, 16 September 2014); for recent domestic case law, see, eg, Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB).
analyses, this Article contributes to many of the possible levels of discussion on the extra-territorial application of the ECHR.

II. LEGAL INTERPRETATIONS

2.1 NOTIONS OF JURISDICTION

The phrase ‘within their jurisdiction’ in article 1 of the ECHR functions as a trigger mechanism for the application of the Convention or, in the Court’s words, ‘a threshold criterion’. But jurisdiction is ‘not a simple, technical admissibility requirement’. In fact, the existence of the rights protected in the Convention depends on the subsistence of jurisdiction. In this context, jurisdiction is the crucial term through which States and courts perpetuate a similar ‘dilemma between outsiders and insiders’ reproduced at the origins of every new polity. Thus, ‘jurisdiction’ is the crucial term through which the existence of the human rights enshrined in the ECHR may be recognised or not.

Some scholars maintain that ‘the question whether an individual was in the jurisdiction of a State … is a relational or contextual matter’. In practice, the distinction between admissibility and merits may be blurred. In accordance with article 29 of the ECHR, the Rules of the Court explicitly allow for the possibility to examine admissibility and merits simultaneously. Other scholars prefer to keep a clear distinction between admissibility and merits maintaining that ‘extraterritorial application is not a question of the content of the substantive rights’. At any rate, it has to be noted how not only the judicial proceedings, but also the existence of substantive rights is essentially tied to the subsistence of State jurisdiction in each case.

24 Al-Skeini v UK (2011) 53 EHRR 18, para 130.
25 Milanovic, Extraterritorial Application (n 16) 20.
27 As underlined in sub-section 2.4, ‘European’ has a particular meaning.
29 Rules of the Court, rules 54-54A.
30 Dominic McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ in Coomans and Kamminga (n 8) 41, 42.
31 Milanovic, Extraterritorial Application (n 16) 20. Eg the ECtHR deemed that ‘jurisdiction is inextricably linked to the facts underlying the allegations. As such, it must be taken to have been implicitly reserved for the merits stage’ Issa v Turkey (2005) 41 EHRR 27, para 55. Also in subsequent case law the question of jurisdiction was addressed together with the facts of the cases, Ivanjoc and others v Moldova and Russia App No 23687/05 (ECtHR, 15 November 2011), paras 98-120; Al-Skeini (n 24) para 102; see also Hassan (n 23).
In one of the most controversial cases on the matter, the Grand Chamber of the European Court of Human Rights (GC) affirmed that ‘the Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part’.\(^\text{32}\) The Court maintained that in international law ‘the jurisdictional competence of a State is primarily territorial’.\(^\text{33}\) This is the main ground on which, in 2001, the ECtHR delivered its decision of inadmissibility in the Bankovic case, which involved the killing of civilians resulting from an aerial bombardment of a TV station in Belgrade by NATO forces. In this context, some scholars question the assumed identity between the notion of jurisdiction in international law and the notion of jurisdiction in the ECHR.\(^\text{34}\) In particular, the argument is made that first, there are many different concepts of State jurisdiction in international law\(^\text{35}\) and second, the notion of jurisdiction normally used in international law differs from the idea of jurisdiction employed in IHRL.\(^\text{36}\) The concept of jurisdiction in IHRL would actually mean ‘not the jurisdiction to prescribe rules of domestic law and to enforce them, but control over a territory and persons within it’\(^\text{37}\). Otherwise, drawing on the reasoning of Bankovic, one may argue that ‘a state acting beyond its “jurisdiction” in the former sense, i.e., beyond its powers as recognized under international law, could not be held responsible for the consequences resulting from these acts under the treaties it has agreed to’\(^\text{38}\).

\(^{32}\) Bankovic and others v Belgium and others (Admissibility) App no 52207/99 (ECtHR, 12 December 2001), para 51.

\(^{33}\) Bankovic (n 32) para 58.

\(^{34}\) Milanovic, Extraterritorial Application (n 16) 22, 26.


\(^{36}\) Milanovic, Extraterritorial Application (n 16) 26. Gondek argues that the ordinary international legal notion of jurisdiction is inappropriately applied in the context of the ECHR in Gondek (n 35) 361, 367. The decision has been criticised also for a misinterpretation of the travaux préparatoires of article 1 of the ECHR: see Lawson, ‘Life after Bankovic’ (n 16) 110. In addition, in Bankovic the Court’s approach of exchanging the exception of extra-territorial jurisdiction ‘as a matter of fact’ with the exceptionality of extra-territorial jurisdiction ‘as a matter of law’ is debatable: see Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’ (2007) 40(2) Israel Law Review 503, 515.

\(^{37}\) Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 513-514.

\(^{38}\) Olivier De Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’ in Carin Laurin and others (eds), Baltic Yearbook of International Law: Volume 6 (Koninklijke Brill 2006) 194. Wilde uses the adjective ‘perverse’ to describe such consequence: see Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 514.
A divergence between the ‘ordinary meaning to be given’ to the concept of jurisdiction in public international law and the ‘ordinary meaning to be given’ to the term jurisdiction in the context of IHRL has been confirmed in the case law of the Human Rights Committee (HRCtee) and the International Court of Justice (ICJ). Fundamentally, the interpretation of jurisdiction by the HRCtee is that ‘the reference … is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred’. Additionally, the ICJ observed that in extra-territorial cases, ‘[c]onsidering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions’.

Finally, as recognised by the same ECtHR, the notion of State jurisdiction present in the ECHR differs from the ordinary meaning of State jurisdiction in international law.

### 2.2 THE COURT’S CASE LAW ON STATE JURISDICTION

The purpose of this Section is not to find an almost impossible path to coherence through the jurisprudence of the Court. Rather, contradictions in the case law will be highlighted. Indeed, some scholars contend that the Strasbourg Court case law does not offer legal certainty on the issue of extra-territorial application.

The relevant case law is usually classified by the Court through the distinction between a ‘spatial connection’ and a ‘personal connection’ triggering state
jurisdiction – in other words, situations of control over territory and situations of control over individuals.\textsuperscript{49} This Section aims to demonstrate that in reality the essence of jurisdiction is a relationship of power between the state and the individuals involved, regardless of the two aforementioned criteria.

The first sub-section addresses the concept of jurisdiction as effective overall control over an area, as elaborated by the Court and commentators. The second sub-section focuses on developments and regressions regarding the interpretation of jurisdiction as control over individuals. The legal argument of this Article will then be articulated in the final sub-section.

\textbf{2.2.1 JURISDICTION ARISING FROM CONTROL OVER SPACE}

In the case law regarding the Turkish occupation of Northern Cyprus, the GC established that jurisdiction is triggered when, as a result of lawful or unlawful military operations, the State:

\begin{quote}
[E]xercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.\textsuperscript{50}
\end{quote}

In 2004 the GC decided a case involving ECHR violations which occurred in the separatist Transdniestria, a region within the territory of Moldova but outside its \textit{de facto} control.\textsuperscript{51} The Court found that jurisdiction over the State’s territory is presumed. But in exceptional cases, the State is not considered to be exercising jurisdiction if it ‘is prevented from exercising its authority in part of its

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\textsuperscript{49} Eg \textit{Al-Skeini} (n 24) paras 133-140; Milanovic, \textit{Extraterritorial Application} (n 16) 54-117. Some authors refuse this categorisation and refer to the exercise of authority as the core of State jurisdiction. In this view, the division between control over territory and control over persons is useful only in order to apply a presumption of jurisdiction (control over territory): see Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 877. Other authors disagree with the categorisation in spatial and personal links, proposing instead to view the ECtHR case law through the lens of a territorially-centred rule which presumes that the State is ‘exercising functions in another state’s territory which are normally associated with the acts of a sovereign state on its own territory’: Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 18) 1236. Some other scholars avoid the distinction by finding a communal transnational application of a general principle of effective control by national and international fora: see Oona A Hathaway and, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’ (2011) 43 Arizona State Law Journal 389.

\textsuperscript{50} \textit{Loizidou v Turkey} (1997) 23 EHRR 513, para 52; \textit{Cyprus v Turkey} (2002) 35 EHRR 30, para 77.

\textsuperscript{51} \textit{Ilaşcu v Moldova and Russia} (2005) 40 EHRR 46, para 330.
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As examples of exceptional situations, the Court mentioned, *inter alia*, ‘acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned’. Finally, the Court recognised that the applicants fell within Russian jurisdiction at the time of the violations, for a number of reasons. The most interesting one is that the administration of Transdniestria was ‘under effective authority, or at the very least under the decisive influence’ of Russia and the survival of Transdniestria was tied to Russian economic, military and political support. The reference to a ‘decisive influence’ test seems to be a slightly different standard from the one elaborated in earlier case law and it stretches the extra-territorial reach of the ECHR. In brief, in *Ilaşcu* the first innovation lies in the principle that there might be a shared jurisdiction of two States over the same area. The Moldovan jurisdiction was territorial, whereas the Russian one was extra-territorial. The second innovation is the dilution of the effective overall control over territory test, by reference to a decisive influence standard which was subsequently confirmed in *Ivanțoc*.

In the decision on the admissibility of *Al Saadoon* the control over territory standard was developed further. State jurisdiction is triggered not only when an ‘area’, but also ‘premises’ fall under State control. In the relevant case, the ‘premises’ in question were prisons in Iraq under *de facto* and *de jure* UK control. As noted by Milanovic, this development may be relevant in the context of the so-called black sites built during the “war on terror”. In fact, one of the objections raised against the applicability of certain human rights treaties that rely only on the control over territory as a trigger for their application, is that

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52 ibid para 312.
53 ibid. The Court repeated the principle contained in *Loizidou* (n 50), by which State obligations descend from ‘overall control’ and not from ‘detailed control over the policies and actions of the authorities in the area’. A similar principle was laid down by the Court in *Assanidze v Georgia* (2004) 39 EHRR 32, para 139. In *Ilaşcu* (n 51), this did not mean that Moldova was not obliged to secure the rights of the Convention, to the extent possible.
54 *Ilaşcu* (n 51) para 394.
55 ibid para 392.
56 See *Ilaşcu* (n 51) para 392. This line of reasoning was reiterated in a case involving two of the applicants of the *Ilaşcu* case, but on facts occurred after the *Ilaşcu* judgment. See also *Ivanțoc* (n 31) paras 98-120.
58 De Schutter, ‘Globalization and Jurisdiction’ (n 38) 226.
59 This is an innovation also in relation to *Assanidze*, which may appear *prima facie* a similar case, but it is not because no other State jurisdiction but Georgia’s was involved. See *Assanidze* (n 53) paras 137-143.
60 *Ivanțoc* (n 31).
61 *Al-Saadoon and Mufdhi v UK* App no 61498/08 (ECtHR, 2 March 2010).
62 ibid para 88.
the black sites constitute mere places, not territories over which States have jurisdiction.\textsuperscript{63} Arguably, the criterion developed in \textit{Al-Saadoon} blurs the borders between a jurisdiction based on control over space and a jurisdiction based on control over individuals, because the more the size of the area diminishes, the more it becomes artificial to imagine control over space rather than control over persons.\textsuperscript{64}

Finally, according to the ECtHR’s case law, jurisdiction under article 1 of the ECHR subsists whenever the State exercises control of an area (arguably ‘premises’). This spatial control may be exercised lawfully or unlawfully, directly, through armed forces, through subordinate local administrations or forces under the decisive influence of the State. It must be noted that an exclusive reliance on the spatial model of jurisdiction would lead to situations where the mere non-existence of spatial control by the State would mean the non-existence of the rights enshrined in the ECHR. Moreover, as argued by the Court, control over territory seems to be useful for establishing a presumption of jurisdiction.\textsuperscript{65} In other words, the establishment of the existence of control over territory by the Court may be a tool for establishing jurisdiction, but not a necessary element of it.

\subsection*{2.2.2 JURISDICTION ARISING FROM CONTROL OVER PERSONS}

The jurisprudence of the ECtHR is constant in recognising extra-territorial jurisdiction in cases of physical control exercised over individuals, such as arrest and detention, but it is doubtful whether the interpretation of article 1 of the ECHR goes further. For example, as recently confirmed in the GC judgment \textit{Jaloud v The Netherlands},\textsuperscript{66} the Court has clearly refused a “cause and effect” type of jurisdiction.\textsuperscript{67} As shown below, this may lead to unacceptable consequences.

In \textit{Issa}, the facts under scrutiny occurred in Northern Iraq during Turkish anti-terrorism military operations. The Court abandoned the limitations resulting

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\item\textsuperscript{63} Milanovic, Extraterritorial Application (n 16) 129-134.
\item\textsuperscript{64} ibid 135. The GC in \textit{Al-Skeini} cited \textit{Al-Saadoon} as an example of control over individuals through extra-territorial use of force: see \textit{Al-Skeini} (n 24) para 136.
\item\textsuperscript{65} See, eg, \textit{Ilaşcu} (n 51). A contrario \textit{Cyprus} (n 50) para 78.
\item\textsuperscript{66} \textit{Jaloud v The Netherlands} App no 47708/08 (ECtHR, 20 November 2014).
\item\textsuperscript{67} As noted by Sari, the argument made by the Netherlands that opening fire against a person in an extra-territorial setting is not sufficient to bring that person within State jurisdiction was not dismissed by the Court. Aurel Sari, ‘Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations’ (\textit{EJIL Talk!}, 24 November 2014) <http://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/> accessed 28 November 2014.
\end{itemize}
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from the use of the notion of \textit{espace juridique} elaborated in \textit{Bankovic}.\textsuperscript{68} As to the foundation of its reasoning, the Court constructed a ‘diametrically opposed’ premise. In particular, citing case law from the European Commission of Human Rights (EComHR), the Inter-American Commission of Human Rights, and the two HRCtee’s \textit{Lopez Burgos} and \textit{Celiberti de Casariego} landmark decisions, the ECtHR agreed that ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’.\textsuperscript{70}

In a subsequent case, \textit{Öcalan v Turkey}, the applicant was arrested by Turkish forces at the Nairobi airport, in Kenya. The GC held that Öcalan fell within Turkish jurisdiction as soon as he was handed over by the Kenyan officials to the Turkish authorities.\textsuperscript{71} This approach has been criticised by some authors for its inconsistency and unpredictability.\textsuperscript{72} However, it must be observed that the ECtHR jurisprudence is quite constant in recognising extra-territorial jurisdiction in cases of control over individuals in the forms of arrest or detention. The approach taken in \textit{Issa} and \textit{Öcalan} followed the line of previous case law\textsuperscript{73} and it has been confirmed by subsequent case law. For example, in 2006 the Court recognised Turkish jurisdiction in a case concerning an individual who was beaten to death by both Turkish Cypriot police and demonstrators in a UN buffer zone.\textsuperscript{74}

Moreover, a potentially different outcome for the interpretation of article 1 of the ECHR resulted from \textit{Pad and Others v Turkey}.\textsuperscript{75} During a military operation at the border between Turkey and Iran, Turkish helicopters fired at a group of suspected terrorists in the mountains. Interestingly, the Court deemed that:

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\textsuperscript{68} Bankovic (n 32) para 80. The notion of \textit{espace juridique} of the Convention has been re-interpreted by the GC in \textit{Al-Skeini} (n 24) para 142.

\textsuperscript{69} Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 18) 1228.

\textsuperscript{70} Issa (n 31) para 71.

\textsuperscript{71} Öcalan v Turkey (2005) 41 EHRR 45, para 91. In that occasion, the Court invited to ‘see by converse implication, \textit{Bankovic}’. This invitation is at least not justifiable, Milanovic, \textit{Extraterritorial Application} (n 16) 166. For a previous similar case see Ramirez Sanchez v France (2007) 45 EHRR 49.

\textsuperscript{72} Miller, ‘Revisiting Extraterritorial Jurisdiction’ (n 18) 1229-1230.

\textsuperscript{73} The same principles have been applied to an Italian police operation in Costa Rica: see Freda v Italy App no 8916/80 (Commission Decision, 7 October 1980). See also M v Denmark (1993) 15 EHRR CD 28 (Commission Decision).

\textsuperscript{74} Although in the UN buffer zone the Court considered the individual ‘under the authority and/or effective control of the respondent State through its agents’: see Issak v Turkey App no 44587/98 (ECtHR, 28 September 2006).

\textsuperscript{75} Pad v Turkey (Admissibility) App no 60167/00 (ECtHR, 28 June 2007).
\end{footnotesize}
[I]t was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives.76

It may be argued that Pad completely disregards Bankovic, because in Pad it was not important to establish the exact location of the events (whether Turkish or Iranian territory), as the killings committed by the Turkish military by firing from helicopters have been considered sufficient to draw the individuals within Turkish jurisdiction.77 This “cause and effect” criterion seems to contradict the interpretation of Bankovic, in which an aerial bombardment has not been sufficient to establish a jurisdictional link. In Pad, instead, the Court seemed to believe that the discharge of fire from helicopters was sufficient to entail State jurisdiction. It seems that in Pad, the Court has substantially overcome the limitations to extra-territorial jurisdiction designed in Bankovic, unless an aerial bombardment can be considered different from the discharge of fire from helicopters. In any case, Pad was declared inadmissible by a section of the Court whereas Bankovic was declared inadmissible from the GC. Thus, even if Pad resulted from a different interpretation of the extension of the concept of jurisdiction, the interpretation given in Bankovic still prevailed.78 Additionally, subsequent case law from the GC appears to distinguish between instantaneous acts (that are not sufficient for triggering State jurisdiction)79 and prolonged control.

In a case involving the interception in high seas and transfer to France of a Cambodian vessel believed to carry narcotics, the GC considered that France ‘exercised full and exclusive control’80 over the vessel and the crew. The Court contrasted the facts of Bankovic with the facts of Medvedyev,81 considering that in

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76 ibid para 54.
77 Milanovic, Extraterritorial Application (n 16) 185.
78 Another interpretation of Pad is that, given the fact that none of the Parties contested Turkish jurisdiction, it was at any rate useless to ascertain facts, eg their location. Another counter argument against a “cause and effect” interpretation may be the fact that Turkey did not contest extra-territorial jurisdiction, therefore the point had not been decided upon by the Court. The fact that Turkey did not question its jurisdiction in the specific case would not mean that similar cases may be generally accepted as extra-territorial jurisdiction cases.
79 Instantaneous acts are similar to the ones examined in Bankovic (n 32) and Pad (n 75).
81 The comparison has been criticised because the two cases have poor commonalities, Milanovic, Extraterritorial Application (n 16) 164.
the former case the extra-territorial act was instantaneous, whereas in the latter the acts constituted a prolonged *de facto* control.\(^{82}\) Therefore, the GC differentiates between a form of prolonged control and cases such as *Bankovic*, where ‘what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a “cause and effect” notion of “jurisdiction”’.\(^{83}\)

Is the instantaneousity of the act enough for it not to amount to authority and control over a person? Or would it be possible to carry out an instantaneous exercise of authority and control over individuals? Moreover, since it is consistent jurisprudence that arrest and detention are traditional forms of control over persons entailing State jurisdiction and that a “simple” killing does not itself generate State jurisdiction, some authors critique the approach, because practically it would encourage State actors to kill rather than carry out arrests. In fact, following this interpretation, arresting someone would trigger State jurisdiction, whereas rapidly killing an individual before arresting her/him would not trigger State jurisdiction.\(^{84}\)

In sum, the ECtHR is persistent in recognising the existence of State extra-territorial jurisdiction in cases of exercise of authority and control over individuals through acts of arrest and detention. But uncertainty remains for cases involving instantaneous acts, such as the discharge of fire from helicopters or aerial bombings. Although a section of the Court seemed to be open to a flexible approach in *Pad*, the GC implicitly overruled such an approach through a somewhat arbitrary distinction between instantaneous acts and prolonged control. In fact, the distinction between instantaneous acts and prolonged control does not hold water, in so far as it seems to encourage killings instead of arrests.

The question of jurisdiction has been a ground for contention in a case regarding the killing of six Iraqi nationals by British troops during security operations in Basra, south-eastern Iraq.\(^{85}\) In *Al-Skeini*, with specific regard to State agent authority and control over the person cases, the GC found that extra-territorial jurisdiction exists, amongst other cases, ‘where, in accordance with custom,

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\(^{82}\) *Medvedyev* (n 80) para 67.

\(^{83}\) *ibid* para 64.

\(^{84}\) This unacceptable contradiction has been anticipated before *Issa* by Lawson, ‘Life after *Bankovic*’ (n 16) 123. See also Judge Bonello’s Separate Opinion in *Al-Skeini* (n 24) para 15.

\(^{85}\) *Al-Skeini* (n 24). For a detailed analysis of the story of one of the applicants’ case in national and international fora, see Gerry Simpson, ‘The Death of Baha Mousa’ (2007) 8 Melbourne Journal of International Law 340. For another case on Iraq, see *Al-Jedda v UK* (2011) 53 EHRR 23, which involved an individual’s detention in a prison run by British forces. Predictably, the case demonstrated less problematic than *Al-Skeini* on the question of authority and control, although the UK claimed that the detention was to be attributed to the UN.
treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State'. The GC established that in the actual case the UK exercised certain public powers regarding security in some areas of Iraq and deemed that British soldiers exercised authority and control over individuals during security operations. Avoiding the question of territorial control and occupation, the GC concentrated on the transfer of public powers and its exercise by the UK in the relevant area. Therefore, some scholars deem that the judgment was based on a "public powers" principle of jurisdiction, elaborated for the first time in *Al-Skeini*. Following this interpretation, the GC confined the extra-territorial application of human rights to the exceptional circumstances of the case. The reference to *Al-Skeini* made by the GC in *Hassan* seems to allow for such an interpretation, in which the official assumption of 'authority for the maintenance of security in South East Iraq' and the fact that 'the relatives were killed in the course of security operations carried out by United Kingdom troops pursuant to that assumption of authority' are the reasons why State jurisdiction arose. Therefore, apart from possible labels used to define the doctrine developed in *Al-Skeini*, the judgment seems to merge the two different elements of exercise of authority over a certain area and control over persons, which combined together are able to trigger State jurisdiction. In addition, two real novelties may be found in *Al-Skeini*. Firstly, in stark contrast with *Bankovic*, the GC maintained that the rights can be 'divided and tailored' to the situation. Secondly, the GC endorsed a case by case approach. Thus, the GC failed to establish definite principles on the matter of extra-territorial application, especially in grey areas of the issue. But as underlined by some scholars, it appears quite sure that the GC in *Al-Skeini* confirmed the rejection of a "cause and effect" type of jurisdiction.

The last part of the saga (for the time being) is represented by *Jaloud*, which concerns the killing of a person passing through a vehicle checkpoint in south-eastern Iraq. In this case the GC dismissed again a "cause and effect" type of

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86 *Al-Skeini* (n 24) para 135.
87 ibid paras 149-150.
89 Reynolds, ‘Human Rights in the Line of Fire’ (n 88) 404.
90 *Hassan* (n 23) para 75.
91 ibid para 75.
92 If compared with *Jaloud* (n 66), in *Al-Skeini* the exercise of certain public powers by the UK in a given area appears to be crucial in order to determine state jurisdiction.
93 This approach has been confirmed by subsequent case law, *Hirsi Jamaa* (n 20) paras 73-74.
94 *Al-Skeini* (n 24) para 132.
95 Reynolds, ‘Human Rights in the Line of Fire’ (n 88). See also section 2.4.
96 *Jaloud* (n 66) paras 10-16.
jurisdiction, confirming Bankovic and Medvedyev.\textsuperscript{97} Indeed, the Court found that, although it could not be defined as an occupying power in the area where the killing took place, The Netherlands exercised jurisdiction through ‘asserting authority and control over persons passing through the checkpoint’.\textsuperscript{98} However, this approach breeds a series of unanswered questions about the difference in juridical terms, for example, between a vehicle checkpoint and a patrol outside of any public powers framework.\textsuperscript{99}

To conclude, in cases of control over individuals the ECtHR accepts the extra-territorial application of the ECHR within certain limits, but unfortunately the Court has not defined the concept in detail, yet. One certainty is that, as also confirmed lately by the GC in Hassan, extra-territorial arrests and detentions trigger State jurisdiction.\textsuperscript{100} In contrast, as demonstrated by the recent Jaloud judgment, it remains doubtful whether extra-territorial killings committed by State agents are able \textit{per se} to entail State responsibility, since the Court does not accept a “cause and effect” type of jurisdiction. In this regard, it is still unclear how a killing that happens at a mobile checkpoint may be different from a killing that happens during a patrol operation or an aerial bombing. What is sure, for now, is that the Strasbourg Court will have a case by case approach and it will most likely continue to surprise.

### 2.3 THE ACADEMIC DEBATE

This sub-section outlines some of the features of the current academic debate on the extra-territorial application of the ECHR. In short, until recently the majority of scholars has criticised the Strasbourg Court’s inconsistency. In this setting, Besson tries to overcome the scepticism towards the Court’s case law with the elaboration of a conceptual framework for the justification of the Court’s jurisprudence. Drawing on the theories of Raz and Benhabib, Besson argues that the overarching principle of the Court’s case law lies in the requirement of an effective, overall \textit{and normative} control or power.\textsuperscript{101} In other words, jurisdiction corresponds to a ‘normative relationship’\textsuperscript{102} and without a normative dimension, State jurisdiction does not exist. In addition, referring to Milanovic’s work on extra-territorial application of human rights treaties, Besson criticises ‘vague claims about the universality of human rights’.\textsuperscript{103} In effect, Milanovic claims that

\textsuperscript{97} Sari, ‘Jaloud v Netherlands’ (n 67).

\textsuperscript{98} \textit{Jaloud} (n 66) para 152.

\textsuperscript{99} Sari, ‘Jaloud v Netherlands’ (n 67).

\textsuperscript{100} Hassan (n 23) para 80.

\textsuperscript{101} Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 865.

\textsuperscript{102} ibid 860.

\textsuperscript{103} ibid 884.
since the philosophical foundation of human rights is their universal nature, negative obligations to respect human rights should be applied regardless of territory, because this is implicit in human rights treaties. The spatial model of effective control over areas and places should be then applied for positive obligations. Arguably, this model reconciles universality and effectiveness, which in Milanovic’s vision are the two forces that guide the interpretation in the context of extra-territorial application of treaties in general.

Besson’s article fostered an online debate, where Ryngaert responded by highlighting the fact that the reference to ‘normative subjectedness’ does not clarify the notion of jurisdiction, unless one adheres to Al-Skeini’s ‘loose territorial model of jurisdiction’. The scholar also quite rightly underlined that the distinction between ‘mere coercion’ and ‘normative subjectedness’ does not hold water because generally cases of de facto exercise of control include a normative dimension too. Finally, Ryngaert proposes a model in which

[A]ny individual whose rights are compromised by a State’s actions should in principle fall within that State’s jurisdiction, whether this jurisdiction is normatively grounded or amounts to mere coercion, provided that there is a strong nexus between the individual and that State.

This is not far from Judge Bonello’s interpretation of jurisdiction proposed in Al-Skeini. What is different is the reference to ‘reasonableness’ for the establishment of the ‘strong nexus’, that would be assessed on a case-by-case basis.

104 Milanovic, Extraterritorial Application (n 16) 209-219.
105 ibid 220-222.
108 ibid.
109 ibid.
110 ibid.
111 ibid.
112 See Section 2.4.
113 ibid.
114 ibid.
Finally, this online debate falls within a similar on-going broader debate. Generally, the field of discussion may be divided between “expansionists” and “restrictivists”. In sum, for the first group of scholars and practitioners the argument is that of expansion of the extra-territorial application of the ECHR in light of the speciality of human rights treaties in the realm of public international law and/or by reasons of concern for a potential lack of protection. For the second group, since doctrinal soundness and/or realism are more important, the restrictive consequences of a certain type of interpretation are somewhat negligible on a moral level. To summarise with McGoldrick words, ‘they are questions of law, not of philosophy or ethics’.

Although Besson’s position is “restrictivist”, the scholar implicitly acknowledges the essentiality of a philosophical foundation. This Article agrees with this first methodological point, but it draws on a different philosophical framework that eventually leads to an “expansionist” solution.

The legal model proposed in this Article is not completely new, yet in a sense, its philosophical foundations elaborated upon in Section 3 are.

2.4 JURISDICTION AS A RELATIONSHIP OF POWER

This sub-section proposes a legal interpretation of the concept of jurisdiction as describing a relationship of power between State and individuals. The argument is two-fold and it is generated by the application of the criteria suggested by article 31 of the VCLT. This interpretation is reconcilable with Judge Bonello’s concurring opinion in Al-Skeini. In order to overcome a potentially incoherent and unpredictable case by case approach to the matter of extra-territorial jurisdiction, Judge Bonello proposed a “functional” test for establishing State jurisdiction in Al-Skeini and in subsequent case law. After summarising the ‘basic minimum functions’ of States parties, Judge Bonello suggested that State jurisdiction exists ‘whenever the observance or the breach

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118 McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ (n 30) 42.
119 Al-Skeini (n 24) para 10 (Judge Bonello).
of any of these functions is within its authority and control’.\textsuperscript{120} In this interpretation any distinction between territorial and extra-territorial is unwarranted.

A seemingly persuasive critique of an approach which boldly disregards the distinction between territorial and extra-territorial jurisdiction, is that the clause ‘within their jurisdiction’ would become redundant if compared with the clause ‘in all circumstances’ in the Geneva Conventions of 1949.\textsuperscript{121} In particular, the argument was made that ‘[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949’.\textsuperscript{122} However, as shown by the commentaries on the Geneva Conventions, the reference to ‘all circumstances’ was inserted in order to avoid the non-application of the Geneva Conventions in times of peace or depending on the ‘character of the conflict’.\textsuperscript{123} Therefore, this clause is not related to the territorial or extra-territorial scope of application of the Geneva Conventions.\textsuperscript{124}

Additionally, the functional approach may be criticised because it would not distinguish between the legal concept of jurisdiction and the feasibility or capability of violating human rights. For Besson, there is a clear distinction between jurisdiction as a legal concept and the feasibility of a violation. Since jurisdiction is a pre-condition of the existence of rights, they may not be violated if they do not exist.\textsuperscript{125} Therefore, the logic of the functional test might collapse on a theoretical level. In fact, if the existence of rights depends on jurisdiction, the feasibility of rights violations may not substitute the concept of jurisdiction. Without the existence of jurisdiction, the object of violations would be something that is not codified as a right. Ergo, the substitution of the concept of jurisdiction with the mere feasibility or capability to violate rights may result in a circle. Simply put, rights would not exist without the recognition of jurisdiction. Therefore jurisdiction must be something different from the

\textsuperscript{120} ibid para 11.
\textsuperscript{121} Bankovic (n 32) paras 25, 40, 75. See also O’Boyle, ‘Comment on Life after Bankovic’ (n 117) 131.
\textsuperscript{122} Bankovic (n 32) para 75.
\textsuperscript{123} Jean Pictet, Commentary on the Geneva Conventions of 12 August 1949 (ICRC 1952) 26-27.
capability of violating them, for the simple fact that they do not legally exist before and outside of State jurisdiction.\textsuperscript{126}

Some scholars argue that jurisdiction is also different from the two ‘elements of an internationally wrongful act of a State’,\textsuperscript{127} i.e. the ascription of the act to a State and the wrongfulness of the international act.\textsuperscript{128} Although jurisdiction is a \textit{condicio sine qua non} of State responsibility,\textsuperscript{129} the distinction remains clear because ‘the imputability of a situation to a State is therefore not a substitute for this situation falling under its jurisdiction’.\textsuperscript{130} Persuasively, it is argued that if jurisdiction should have equated responsibility, the drafters of the ECHR would have avoided inserting article 1 into the Convention.\textsuperscript{131}

All conceptions of jurisdiction proposed in the context of extra-territorial application, including the one proposed here, may show strengths and weaknesses at the same time. Thus, a choice arises between interpretations of the phrase ‘within their jurisdiction’ that are more focused on their own doctrinal soundness and/or political viability on the one hand, and interpretations that are more attentive to the principles as well as the purposes underpinning IHRL, i.e. the effective protection of human rights,\textsuperscript{132} on the other hand.

The legal foundation of the argument proposed here is that the reference to jurisdiction in the ECHR should be read in the context of the specific type of treaty.\textsuperscript{133} From a literal point of view it is worth noting how the phrase ‘everyone within their jurisdiction’\textsuperscript{134} generates a scope of application concentrated on the relationship between the State and the individual.\textsuperscript{135} The

\begin{flushleft}126 This reasoning uncovers a hiatus between \textit{physe} and \textit{nomos} (between reality and law) which will be addressed in Section 3 of this Article.\textsuperscript{127} ILC Draft Articles on State Responsibility, art 2; De Schutter, ‘Globalization and Jurisdiction’ (n 38) 187-88.\textsuperscript{128} ibid.\textsuperscript{129} De Schutter, ‘Globalization and Jurisdiction’ (n 38) 187-88.\textsuperscript{130} ibid; see also Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (n 13) 867.\textsuperscript{131} McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’ (n 3) 43.\textsuperscript{132} Bantekas and Oette, \textit{International Human Rights Law and Practice} (n 57) 284.\textsuperscript{133} In support of this claim, López Burgos (n 41) para 12.2 and Celiberti de Casariego (n 41) para 10.2. See also Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ (n 28) 78-80.\textsuperscript{134} ECHR, art 1.\textsuperscript{135} In this sense, art 1 of the ECHR seems to be one of the permitted exceptions to the basic rule of territorial application of a treaty provided by art 29 of the VCLT. On the absorption of jurisdiction as territorial control into a conception of jurisdiction intended as exercise of authority and control by the State, see Judge Rozakis’ Separate Opinion in \textit{Al-Skeini} (n 24).\end{flushleft}
assumption is that the ECHR, either as an instrument for individual justice or a tool of public policy, operates as a limit to State power over individuals. Consequently, interpreting jurisdiction as equal to the existence of a power relationship between State and individuals seems to fit with the overall design of the treaty, in harmony with the constitutional tradition and in accordance with IHRL. In this vision, ‘facticity creates normativity’.

Following the guidance of articles 31 of the VCLT, a two-fold argument may be proposed in support of an interpretation of the phrase ‘within their jurisdiction’ which allows for the applicability of the ECHR whenever there is a relationship of power between States and individuals. This is similar to the functional approach suggested by Judge Bonello.

Firstly, the ‘ordinary meaning to be given to the term’ jurisdiction in the context of human rights appears to be the one of a relationship of power between States and individuals. In the context of the ECHR, this kind of relationship occurs between States parties and individuals, regardless of the territorial or extra-territorial character of State acts. In this sense, the Convention would be a global instrument because it is applicable wherever a State party establishes a power relationship with an individual. At the same time, the ECHR would maintain its regional character because it would be coherently applicable only to State parties. Thus, ‘European’ in the title of the ECHR is not intended as reflecting cultural-specific rights excluding outsiders, the “extra-territorials”. ‘European’ means that the obligation to ‘secure

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136 Basilico interprets the ECHR as similar, in this respect, to legal texts such as the Magna Carta, the Bill of Rights, and the French Declaration: see Basilico, ‘Giurisdizione’ (n 116) 19.
137 The assumption is that IHRL is designed to protect the individual. Arendt argues that ‘throughout the nineteenth century, the consensus of opinion was that human rights had to be invoked whenever individuals needed protection against the new sovereignty of the state and the new arbitrariness of society’: see Arendt, The Origins of Totalitarianism (n 6) 369.
139 Although with opposite results, the same approach has been taken by the Court (partially): see, eg, Bankovic (n 32) paras 55-66. See also Gondek, ‘Extraterritorial Application of the European Convention on Human Rights’ (n 35) 361.
140 VCLT, art 31. Art 31 requires one to interpret the meaning of terms ‘in their context’.
141 Basilico, ‘Giurisdizione’ (n 116) 19.
142 The reference to territorial jurisdiction makes sense if referred to in a factual and possibly a quantitative way. In fact, according to the interpretation proposed in this Article there is no difference between the type of jurisdiction exercised domestically and the one exercised extra-territorially.
reconnaître] the rights and freedoms\textsuperscript{144} defined in the Convention is undertaken by European States. The term ‘human’ signifies the entitlement to those rights and freedoms for ‘everyone’\textsuperscript{145} who entertains a relationship of power with States parties, even an individual killed randomly through an instantaneous act, regardless of any public powers or vehicle checkpoint kind of framework. What more than the capability of \textit{jus-dicere} on someone’s life depicts power?

Secondly, the preamble as well as the ‘object and purpose’\textsuperscript{146} of the treaty suggest that jurisdiction should be interpreted by considering ‘the universal and effective recognition and observance’\textsuperscript{147} of the rights contained in the Universal Declaration of Human Rights. Likewise, the purpose of taking ‘the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’\textsuperscript{148} is relevant. It appears inherently contradictory to apply the ECHR in a way that would practically trump the universal recognition of human rights in situations where States parties have the authority and control to observe or breach the rights enshrined in the Convention.\textsuperscript{149}

In conclusion, if the premise of \textit{Issa}\textsuperscript{150} and the principle set out in \textit{Lopez Burgos} and \textit{Celeberti de Casariego}\textsuperscript{151} are true, an interpretation of State jurisdiction as power exercised by States over individuals, without further temporal (\textit{Medvedyev}), geographical (\textit{Bankovic}) or spatial requirements, would describe the essence of State jurisdiction. This interpretation of article 1 of the ECHR conforms with the criteria set by article 31 of the VCLT, i.e. ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context’\textsuperscript{152} and ‘in light of the object and purpose of the treaty’.\textsuperscript{153}

\begin{footnotesize}
\textsuperscript{144} ECHR, art 1. \\
\textsuperscript{145} ibid. \\
\textsuperscript{146} VCLT, art 31(2). \\
\textsuperscript{147} Preamble of the ECHR. \\
\textsuperscript{148} ibid. \\
\textsuperscript{149} Argument similar to the main argument made in Milanovic, \textit{Extraterritorial Application} (n 16). For an interpretation of art 1 of the ECHR through the guidelines of art 31 of the VCLT see Gondek, ‘Extraterritorial Application of the European Convention on Human Rights’ (n 35). \\
\textsuperscript{150} See \textit{Issa} (n 31) para 71: ‘Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’. \\
\textsuperscript{151} See \textit{López Burgos} (n 41) para 12.2 and \textit{Celeberti de Casariego} (n 41) para 10.2: ‘the reference … is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred’. \\
\textsuperscript{152} VCLT, art 31. \\
\textsuperscript{153} ibid.
\end{footnotesize}
III. PHILOSOPHICAL FOUNDATIONS

In Besson’s words, this Section aims to suggest ‘a philosophical understanding of jurisdiction to bear on legal debates about the extra-territoriality of international and European human rights and so doing to contribute to the existing debate among lawyers albeit from a different angle’. 154

3.1 PHILOSOPHY AND LAW

The reason for this Section departs from the idea that HRL and practice is often wrongly separated from philosophy. In this sense, Jacobs’ premise is embraceable: ‘[u]ltimately, it is a question of methodology and how we perceive our role as legal scholars’.155 But the unnecessary consequences of that premise are partially refused:

Law is a language that has its own logic in creating meaning and predictability. While this language can of course be discarded as a fiction, like any language, I believe that any belief in the possibility of legal science must be accompanied by adopting this fiction as a methodological starting point.156

Simmons underlines how theoretical discussions of human rights and human rights practice seem to be completely different worlds that do not communicate to each other.157 A separation of law from philosophy and the treatment of the former as sealed off from the latter, may cause, for example, unawareness ‘of the extent to which human rights may be founded on an invisible ideology that conceals an original violence’.158 For example, Douzinas claims that the political philosophy of cosmopolitanism supporting human rights has given the theoretical framework for imperialism to push its frontiers further and become a widely accepted phenomenon.159 The background of this Article is not a position for which ‘human rights grounded in universal human dignity are a good thing’,160 let alone that it is just ‘frustrating’ to have a gap of protection.161

156 ibid.
157 William Paul Simmons, Human Rights Law and the Marginalized Other (CUP 2011) 5.
158 ibid 5.
159 Douzinas, Human Rights and Empire (n 4).
160 Milanovic, Extraterritorial Application (n 16) 6.
161 Besson, ‘LJIL Symposium: A Response by Samantha Besson’ (n 154).
The purpose of this Article, apart from legal interpretations, is the affirmation of, above all, the existence of the other. An intricate and non-theoretically-grounded body of law on extra-territorial application of human rights may serve the interest of maintaining the status quo instead of recognising the other as human through her/his inclusion in the protection provided by the ECHR. In this context, the doubt is alive that human rights ‘promotion by Western states and humanitarians turns them into a palliative: it is useful for a limited protection of individuals but it can blunt political resistance’. Therefore, it is worth engaging in a theoretical debate, which might foster a non-definitive and philosophically-based conception of human rights.

The current debate on extra-territorial application of human rights suffers from a ‘crisis of legal interpretation’, which scholars try to solve through the recourse to extra-legal values or Dworkin’s reliance on the process of interpretation itself. As suggested by Rosenfeld, Dworkin’s concept of integrity is important because it avoids the ‘reduction of law to mere politics’. At the same time, it is fundamental to highlight the fact that law is ‘not self-contained, as it borrows and incorporates elements from other social practices, and as it partially overlaps with such other practices’.

3.2 PHYSEI AND NOMOS

In the context of extra-territorial application of human rights, the dilemma of the ‘right to have rights’ elaborated by Arendt is often cited. With the

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162 Douzinas, Human Rights and Empire (n 4) 293.
163 Michel Rosenfeld, ‘Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism’ in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds) Deconstruction and the Possibility of Justice (Routledge 2008) 152.
164 Milanovic refers to ‘universality and effectiveness’ to justify its interpretation.
165 In general on the crisis of legal interpretation, see Rosenfeld, ‘Deconstruction and Legal Interpretation’ (n 163) 152-56.
166 ibid 156. An example of the tension between political decisions and legal interpretative integrity may be found in the contrast between the majority’s decision and Judge Spano’s dissenting opinion in Hassan (n 23). In this case, any kind of accuracy in the legal interpretation elaborated in order to ‘accommodate’ the simultaneous application of IHL and the ECHR has been disregarded in favour of an extra-legal values-driven decision. See in particular Judge Spano’s Dissenting Opinion attached to the Hassan judgment and Section 4 of this Article.
167 ibid 188.
168 Arendt does not limit this to a legal plane, by suggesting that ‘the calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever’: see Arendt, The Origins of Totalitarianism (n 6) 375. See also Judge Pinto’s Concurring Opinion in Hirsi Jamaa (n 20).
foundation of the State, only citizens become entitled to rights. Not all humans are entitled to human rights just because of their humanity. ‘The alien is the gap between human and citizen’.169 There is then a hiatus between physei (the reality of the natural status of humans who possess only their humanity) and nomos (law, in this case the interpretation of the concept of State jurisdiction that allows for the nonexistence of human rights of “extra-territorials”). In other words, Arendt tried to ‘bridge the ontic-ontological gap embodied in the notion of human rights’.170

In the context of the extra-territorial application of the ECHR, drawing on Benhabib’s work, Besson suggests to accept with ‘courage’171 the paradox of the boundaries of human rights. After all, ‘one can never hope for one state’s institutions to respect the human rights of all’.172 Otherwise, in Besson’s opinion, by interpreting jurisdiction in a way that would render the concept too thin, the entire project of democracy would be threatened and ‘our own human rights’173 would be violated.

As for the foundations of Besson’s argument, the scholar cited Benhabib’s work based on the concept of ‘democratic iterations’,174 which, combined with a cosmopolitan human right of hospitality, should overcome the dilemma of the ‘right to have rights’.175 However, this ‘concrete universalism’,176 as noted by Simmons, might actually ‘cauterize the other’177 through an undemocratic and exclusive discursive democracy.178 In other words, the attempt to put forward a democratic proposal collapses when ‘the voiceless will not be in a position to push for their rights, and they most likely will not be given a voice’,179 in that democracy. Inclusion in a discursive community may lead those who do not speak the same “universal” idiom, accepted within the community, to lose their voice.180

169 Douzinas, Human Rights and Empire (n 4) 99.
172 ibid 844.
173 ibid.
176 Simmons, Human Rights Law and the Marginalized Other (n 157) 6-9.
177 ibid 72.
178 ibid 72-73.
179 ibid.
180 ibid 121-22.
Indeed, cosmopolitan proposals often encounter limits of responsibility for the other\(^{181}\) and this is reflected in Besson’s article. This occurs through the conceptualisation of a ‘normative subjectedness’\(^{182}\) which excludes from the entitlement to human rights whoever is not under a State’s ‘normative guidance’.\(^{183}\) In this sense, the responsibility towards the other reaches a limit because ‘the cosmopolitan establishment of some sphere of indifference to the other constrains the achievement of the more just and caring global order to which cosmopolitans aspire’.\(^{184}\) In Besson’s case, this global order is represented by one based on liberal discursive democracies, which is consistent with the Kantian tradition transmitted by Benhabib with a Habermasian touch. As highlighted below, the indifference to which cosmopolitan perspectives induce may be superseded in the Levinasian ethics of the other.

### 3.3 (BEYOND) LEVINASIAN PERSPECTIVES

A gap between \textit{physei} and \textit{nomos}, which corresponds to a gap in the protection of human rights, may be overcome through the adoption of combined late-Arendtian and Levinasian perspectives.\(^{185}\) Arendt’s late work may be used for an attempt to explore the theoretical foundation of human rights, although some scholars claim that Arendt did not deeply explore the theoretical foundations of human rights.\(^{186}\) Both Arendt and Levinas recognised the crucial aspect of ‘plurality and interdependence’,\(^{187}\) by exploring hendiadys such as ‘the Rights of Man and the Citizen’\(^{188}\) and ‘the Rights of Man and the Other’.\(^{189}\) In hendiadys, the first word is comprised in the second term.\(^{190}\)

As proposed by Topolski, Arendt’s notion of plurality based on the ontic and Levinas’ notion of alterity which is essentially ontological, may be combined together in order to bridge the gap between \textit{physei} and \textit{nomos}, between the fact that human rights seek to exist outside of the law, but at the same time they need a recognition in law. Arguably, both authors deemed that the foundation

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\(^{183}\) ibid 872-73.

\(^{184}\) Jordaan, ‘Cosmopolitanism, Freedom, and Indifference’ (n 181) 84-85.

\(^{185}\) For the same approach in the context of the global poor, see Jordaan, ‘Cosmopolitanism, Freedom and Indifference’ (n 181).

\(^{186}\) Simmons, \textit{Human Rights Law and the Marginalized Other} (n 157) 97.

\(^{187}\) Topolski, ‘Relationality as a ‘Foundation’ for Human Rights’ (n 170) 12.

\(^{188}\) Referring to the French \textit{Déclaration des Droits de l’Homme et du Citoyen}, 1789.

\(^{189}\) Emmanuel Levinas, ‘The Rights of Man and the Other’ in Emmanuel Levinas, \textit{Outside the Subject} (Michael B Smith tr, SUP 1993) 116-125.

\(^{190}\) Simmons, \textit{Human Rights Law and the Marginalized Other} (n 157) 92-99.
of rights was to be found in *relationality*. Arendt elaborated an ontic political
concept of plurality, Levinas an ontological transcendental concept of alterity.\textsuperscript{191} A clarification may be useful at this point:

Rather than equate plurality with terms such as pluralism, diversity
or multiculturalism – all rooted in the discourse of individualism
dominant in liberalism – it is fundamental to understand Arendt’s
goal was to go *beyond* singularity and in so doing explore the
possibility of plurality, a social-ontology, as a new foundation for the
‘right to have rights’.\textsuperscript{192}

In other words, human rights find their essence *in between relations* among
people. Arguably, this is reconcilable with the Levinasian ‘social-ontology of the
other’.\textsuperscript{193} Levinas found an infinite responsibility for the other, whose rights
exist before the rights of the self.\textsuperscript{194} Levinas rooted his ethics on the
transcendence of the other.\textsuperscript{195} As noted by Simmons, the face-to-face
relationship with the other questions all institutions, HRL included.\textsuperscript{196}
Arguably, Levinas did not develop further the implications of the infinite
responsibility for the other, but certainly posited ethics as ‘prior to ontology,
politics, and human rights’.\textsuperscript{197} Levinas’ *a priori* may be interpreted as the
‘disinterestedness of the loving response of the ego to the face of the concrete Other’.\textsuperscript{198}

3.4 **THE EXTRA-TERRITORIALITY OF HUMAN RIGHTS**

To translate these philosophical foundations in legal practice is not a simple
task and, inevitably, legal fictions are needed. The argument proposed here is
that, in the particular context of the extra-territorial application of the ECHR,

\textsuperscript{191} Topolski, ‘Relationality as a ‘Foundation’ for Human Rights’ (n 170) 2.
\textsuperscript{192} ibid 4.
\textsuperscript{193} ibid 7.
\textsuperscript{194} ibid 10.
\textsuperscript{195} Simmons, *Human Rights Law and the Marginalized Other* (n 157) 91.
\textsuperscript{196} ibid 91.
\textsuperscript{197} ibid 92, 97.
\textsuperscript{198} ibid 98. As demonstrated by a radio interview to Levinas on the Sabra and Chatila massacre
the transcendental, unreal, and ‘non-thematizable Other’ struggles to cope with reality’s
complicated phenomena. (A transcript of the interview is published in Seán Hand, ‘Ethics and
ontological other and the ontic is not yet filled. To overcome this impasse, Simmons proposes a
‘phenomenology of the Saturated Other, drawing on the work of Marion who criticised Derrida
because of the unreality of the objects he used in his elaborations: see Simmons, *Human Rights*
(n 157) 109.
the State needs to recognise the existence of human rights as ontic, as a fact of being, whenever a State agent falls in a relation with the other, i.e. the individual in legal terms. It is in between the relationship of the State agent and others that the existence of human rights in legal terms should correspond to the ontic notion of rights as existing in the ontological alterity of the other, metaphorically triggered by the view of the other’s face. This might be a non-definitive way of allowing for a bridge between the ontic (human rights that exist in relationality) and the ontological (legal fictions that need to reconcile with the existence of rights on the transcendental level of relationality). The existence of HRL should not exist separately from the existence of human rights as a fact of being. The law (in this case the interpretation of the rule on State jurisdiction) needs to make sure legal fictions conform to physei and the relationality of human rights. Otherwise, exclusions and dilemmas will continue to exist in different forms, one of which is an interpretation of article 1 of the ECHR that disregards the existence of human rights whenever there is a relationship between a State agent and “an-other”. This philosophical foundation of the extra-territorial application of the ECHR enables overcoming the hiatus between physei and nomos, because in this Article, ontological law complies with ontic human rights. No formal limits are admitted when the existence of human rights is, extra-territorial. They are, outside the territory of the self. Not recognising human rights in any relationship, especially when State power intervenes, would create a hiatus.

In conclusion, as shown in this Section, a philosophical foundation of human rights, different from a superficial reference to universality, is needed. The paradoxes of cosmopolitanism do not allow for a comprehensive philosophical foundation of the (extra-territorial) application of the ECHR. A Levinasian perspective instead might be appropriate for reconnecting nomos and physei.

IV. COMPLICATIONS OF EXTRA-TERRITORIAL APPLICATION

This Section focuses on issues that reveal themselves problematic in the extra-territorial application of the ECHR. Complications are often provoked by the simultaneous application of norms different from article 1 of the ECHR or laws different from HRL. The first sub-section exposes the potential collapse resulting from the interaction of articles 1 and 56 of the ECHR. The second sub-


200 Douzinas criticises cosmopolitanism as a political philosophy legitimising imperialism, Douzinas, Human Rights and Empire (n 4).
section explores tensions resulting from the interaction of HRL and other bodies of law, such as IHL and Occupation Law (OL). The third sub-section focuses on the risk of human rights imperialism in extra-territorial settings.

4.1 COLONIAL “REMNANTS”

Apart from article 1 of the ECHR, another highly relevant provision is article 56, that allows States parties to ‘declare … that the present Convention shall … extend to all or any of the territories for whose international relations it is responsible’.\(^{201}\) This kind of mechanism legally sanctions and fits within the typical structure of colonial powers: ‘internally divided, yet externally unitary’.\(^{202}\) The colonial clause contained in article 56 ‘represents a significant regression from the early visions of uniform Convention application by permitting the optional extension of the Convention to dependencies’ [emphasis added].\(^{203}\) As illustrated, the presence of article 56 in the Convention clashes with the current jurisprudence on article 1, and the positioning of the ECHR in IHRL.

The overlap between articles 1 and 56 ECHR proved itself problematic. As shown by Miltner, the drafting history of both articles highlights a certain contrast between the presumptive exclusion of dependencies from the ECHR’s application under article 56 and the expansion granted by article 1.\(^{204}\) In fact, article 56 has been read narrowly as requiring States’ formal declarations in order to extend the application of the ECHR to dependencies.\(^{205}\)

As underlined by some scholars, an inconsistency may arise from the fact that, for instance, the ECHR is applicable to Northern Cyprus under article 1, whereas States with a colonial history may freely decide to apply the Convention to their dependencies.\(^{206}\) Therefore, a differentiation occurs between individuals who find themselves in dependencies for which the colonial State has not made any declaration according to article 56, and individuals who live in extra-territories within the jurisdiction of States parties under article 1.\(^{207}\)

\(^{201}\) ECHR, art 56. Similar provisions can be found in the Protocols to the ECHR, eg art 4 Prot No 1, art 5 Prot No 4 and art 5 Prot No 6.


\(^{204}\) ibid 722.

\(^{205}\) Quark Fishing Ltd v UK App no 15305/06 (ECtHR, 19 September 2006); Yonghong v Portugal App no 50887/99 (ECtHR, 25 November 1999).

\(^{206}\) ECHR, art 56. Milanovic, *Extraterritorial Application* (n 16) 16.

\(^{207}\) Milanovic, *Extraterritorial Application* (n 16) 34.
For reasons of length and scope, this sub-section refers only to *Chagos Islanders v UK*. In line with *Al-Skeini*, the ECtHR repeated that the situations falling under the scope of application of article 1 are ‘clearly separate and distinct from circumstances falling within the ambit of Article 56’. The Court dealt with a case in which the UK did not make any declaration under article 56 to extend the application of the ECHR to the relevant territory. The Court rejected the argument that the personal and territorial models of jurisdiction under article 1 may be applied also to overseas territories. In fact, the Court considered that the application of article 1 of the ECHR to situations which fall under the scope of article 56 would render the provision ‘largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories’.

Furthermore, the Court considered that:

> Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result [emphasis added].

This passage clearly illustrates the tension between the need to reform a systematically incoherent norm and the “powerlessness” of the Court to interpret otherwise article 56 of the ECHR. What is certain is that it is extremely contradictory and manifestly discriminatory to consider individuals who find themselves in territories under the effective control of States parties as entitled to such protections.

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209 *Al-Skeini* (n 24) para 140.

210 *Chagos Islanders* (n 208) para 73.

211 Although in reality the situation is more complicated than this, see Milanovic, ‘Update on the Extraterritorial Application of Human Rights Treaties’ (n 208).

212 *Chagos Islanders* (n 208) para 75.

213 ibid para 74. The (unconscious?) intent to absolve inconsistency and the colonial present must be noted. It might be important to understand ‘how and why did this new international norm emerge? What forces brought it about and what are the stakes behind its adoption?’ (referring to more general norms): see Douzinas, *Human Rights and Empire* (n 4) 189. In order to put article 56 in context, Chagos is an archipelago that includes Diego Garcia, an island used for rendition CIA rendition flights: see David Vine, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (PUP 2009).
to human rights and individuals who find themselves in territories for which colonial powers arbitrarily decided not to extend the application of the ECHR, as not entitled to rights. Ironically, the Court even recognised that the State exercises authority and control over the relevant territories. This span between physei and nomos invites to question this type of provision present in the ECHR, its colonial present and, if any, the role of the judge.

Finally, the tenability of article 56 and analogous colonial clauses in the protocols is extremely questionable. The presence of article 56 of the ECHR offers States strong legal arguments against the extra-territorial application of the ECHR. However, the artificial separation between overseas territories and newly acquired ones does not hold water from an anti-discrimination perspective. The solution seems to be reserved to a reform of the text by political actors, much needed to save the ECHR from unacceptable inconsistency and complicity with the colonial present.

4.2 EXTRA-TERRITORIAL APPLICATION IN ARMED CONFLICT

The extra-territorial application of the ECHR becomes regularly relevant in the context of military interventions by States, whether the intervention is lawful or unlawful, whether it constitutes occupation or it amounts to international armed conflict. The framework is inevitably complicated by the relevance of IHL and OL. As demonstrated by recent case law, the uncertainty in the criteria applicable to solve conflicts between norms of HRL and other bodies of international law may, in some cases, hamper the actual application of HRL norms allowing instead for the application of weaker regimes of protection.

4.2.1 ECHR AND IHL

As for the relationship between HRL and IHL, a recurring argument is that IHRL does not apply in armed conflict because IHL is the only law applicable in this realm. The persistent claim is that since IHL is designed to set norms for armed conflict, it excludes the application of HRL that would be applicable solely in times of peace. This interpretation derives from the separation theory that starkly distinguishes the laws of war and the laws of peace. Although

214 Chagos Islanders (n 208) para 75.
anachronistic, this theory is constantly used by States to avoid the application of HRL during armed conflicts.

A counter-argument to this theory is that human rights treaties contain clauses, such as article 15 of the ECHR, that oblige States to follow procedures in order to derogate from human rights treaties. Following this line of reasoning, the conclusion is that the application of HRL ‘does not cease in times of war’, unless formal derogation procedures are followed by States. Confining HRL to times of peace would render such norms completely redundant. This specific point has been addressed with legally unsatisfying results in the Hassan case, which will be briefly mentioned at the end of this sub-section.

The cumulative application of IHL and HRL recognised by different international fora may cause conflicts between norms, arguably to be solved through the lex specialis derogat generali maxim. The classical example of this doctrine is to be found in the Nuclear Weapons Advisory Opinion where the concept of arbitrariness has been interpreted applying IHL as lex specialis, with regards to the prohibition of arbitrary deprivations of life. The ICJ repeatedly stated that there are:

[T]hree possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of

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218 See for example, Hassan (n 23) paras 87-88 and Al-Skeini (n 24) para 119. See also Cerone, ‘Human Dignity in the Line of Fire’ (n 16) 1451. On more theoretical grounds, see Giorgio Agamben, State of Exception (UCP 2005).

219 The ECHR leaves States a wide, although not unlimited, margin of appreciation in the assessment of the existence of a public emergency: see Ireland v UK (1979-80) 2 EHRR 25 para 207 and Lawless v Ireland (1979-80) 1 EHRR 15 paras 36-38. Provisions similar to art 15 of the ECHR can be found at art 4 of the ICCPR and art 27 of the ACHR.

220 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (n 15) paras 102-106.


222 It is interesting to note that a similar argument is made for the non-application of art 1 of the ECHR to colonial dependencies. This uncovers law’s ‘formal predictability and substantive indeterminacy’: see Martti Koskenniemi, ‘Letter to the Editors of the Symposium (1999) 93 (2) American Journal of International Law 351, 355. See also Douzinas, Human Rights and Empire (n 4) 189.

223 ICJ, Nuclear Weapons (n 217) para 25.
human rights law; yet others may be matters of both these branches of international law.\textsuperscript{224}

Scholars suggest avoiding blunt approaches in this context, because of the unsuitability for all situations of the \textit{lex specialis} canon. For example, some scholars warn on the fact that the interaction between IHRL and IHL may involve conflicts of norms that are not solvable solely through the application of a legal maxim, especially when the same can be interpreted in different manners.\textsuperscript{225} Some authors propose applying different principles depending on the situation: ‘the most favourable principle’\textsuperscript{226} of HRL in cases of international territorial administration; the application of HRL \textit{tout court} in internal armed conflicts;\textsuperscript{227} the use of HRL for interpreting the substance of IHL norms.\textsuperscript{228} In a more systematic fashion, other scholars propose pre-established sets of rules to assure harmony in the cumulative application of IHL and HRL.\textsuperscript{229}

Moreover, some scholars argue that merging IHL and HRL adulterates both bodies of law, by blurring definitions and introducing strange principles in the domain of HRL, e.g. military necessity.\textsuperscript{230} This critique argues that the Bush and Obama administrations ‘developed a number of legal strategies that depended on diluting the boundaries between various fields of International law and diminishing the clarity of binding rules and fields of legal application’.\textsuperscript{231}

Despite this convincing critique, in principle and from a practical perspective, the extra-territorial application of human rights standards in armed conflict seems to

\textsuperscript{224} ICJ, \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (n 15) para 106.
\textsuperscript{225} Milanovic, \textit{Extraterritorial Application} (n 16) 234-35.
\textsuperscript{227} ibid 275.
\textsuperscript{228} ibid 276.
provide minimal legal tools to demand that States comply with HRL through currently available legal instruments, not as clearly provided under IHL.\textsuperscript{232}

As to the purposes of this Article, the cumulative application of HRL and IHL has been confirmed by the Strasbourg Court in several occasions.\textsuperscript{233} The relevance of IHL in situations of armed conflict does not hinder, in general, the extra-territorial application of the ECHR. For instance, in the jurisprudence on the use of lethal force in internal armed conflict, the Court borrowed interpretative criteria from IHL.\textsuperscript{234} In international armed conflicts, the role of IHL may be more prominent in the interplay with European HRL, since IHL is considerably more specific than European HRL in internal conflicts.

In \textit{Al-Skeini}, the GC confirmed the cumulative application of HRL and IHL through the \textit{lex specialis} canon.\textsuperscript{235} In line with the case law from international fora,\textsuperscript{236} the overall approach seems to be that HRL applies in situations of armed conflict and IHL may serve as \textit{lex specialis}. For instance, in \textit{Al-Skeini} the GC deemed that the duty to investigate imposed by article 2 of the ECHR should have focused on the Rules of Engagement of British soldiers, in order to assess the legality of certain acts.\textsuperscript{237} \textit{Vice versa}, HRL might be the \textit{lex specialis}, for instance when HR standards require the investigations to be ‘independent’ and not only ‘official’.\textsuperscript{238} In conclusion, the (extra-territorial) application of the ECHR does not seem to be impeded by the applicability of IHL, but the complementarity of HRL and IHL may produce concrete mutual limitations.

In this complex legal framework, the recent GC judgment in the \textit{Hassan} case has not added clarity to the debate and apparently it is not certain anymore that the \textit{lex specialis} canon, with all its grey areas, is the criterion to be applied in case of

\textsuperscript{232} In some instances IHL may provide higher standards of protection, but remedies are scarce: see Yoram Dinstein, \textit{The Conduct of Hostilities under the Law of International Armed Conflict} (CUP 2010) 25.

\textsuperscript{233} There is a tendency to use the HRL machinery to enforce IHL, see Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ (n 216) 798-813.

\textsuperscript{234} eg \textit{Ergi v Turkey} (2001) 32 EHRR 18, para 79.

\textsuperscript{235} \textit{Al-Skeini} (n 24) paras 90-94.

\textsuperscript{236} ibid.

\textsuperscript{237} ibid para 170.

\textsuperscript{238} ibid paras 168-177.
conflicts between norms. The issue of cumulative application of the ECHR and IHL in context of armed conflict has arisen in the Hassan case, which mainly concerned the alleged violation of the applicant’s right to liberty protected in article 5 of the ECHR. Surprisingly, the applicant’s argument on the importance of article 15 of the ECHR has not really been taken into account by the GC. The Court seemingly recognised the relevance of article 15 and the fact that ‘the United Kingdom did not purport to derogate under article 15 from any of its obligations under article 5’. In reality, following a unique approach in the realm of possible criteria of legal interpretation, the Court went on to consider that:

[B]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraph (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

In practice, in this case, the so-called accommodation equals the non-application of the ECHR in favour of an IHL regime which is weaker in terms of protection.


240 Hassan (n 23) para 98.

241 ibid para 18 (Judge Spano).

242 ibid para 104.
of individuals’ rights. Indeed, as highlighted in the dissenting opinion of Judge Spano, joined by three other Judges:

[W]hatsoever this purported method entails, it bears reiterating that there is simply no available room to “accommodate” the powers of internment under international humanitarian law within, inherently or alongside Article 5 § 1. Furthermore, as the disapplication option is off the table, since no derogation from the Convention has occurred, this novel method of accommodation cannot be implemented in such a manner as to have effectively the same legal effects as disapplication. However, by concluding, as the majority does, that the grounds of permitted deprivation of liberty under Article 5 § 1 should be “accommodated, as far as possible”, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions, the majority, in essence, does nothing else on the facts of this case. It effectively disapplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision.243

Finally, the extra-territorial application of the ECHR is regularly relevant in armed conflict scenarios. This entails clashes between HRL norms and IHL norms. As demonstrated by the Hassan case, there is still no certainty as to the criteria to be used to solve norm conflicts. Despite the formal recognition that the ECHR applies extra-territorially, in practice, uncertainty and methodological incoherence may cause the extra-territorial non-application of the ECHR in favour of weaker protection regimes.244

4.2.2 ECHR AND OCCUPATION LAW

In cases of simultaneous application of OL245 and extra-territorial application of the ECHR,246 the overlap between the two bodies of law may cause tensions. In

243 Hassan (n 23) para 18 (Judge Spano).
244 See Hassan (n 23) and Judge Spano’s Dissenting Opinion.
particular, article 43 of the Hague Convention (HC) prescribes that the occupying State ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.247

Arguably, this norm may be seen as limiting the applicability of HRL in situations of occupation because local norms may be incompatible with the ECHR.248 However, as observed by some scholars, the Strasbourg Court did not consider OL as a general obstacle to the application of the ECHR in occupied territories, as demonstrated for instance in Loizidou and Al-Skeini.249

It must be observed that during occupation HR may be double-edged. Although some scholars maintain that occupying Powers might genuinely establish new laws to implement IHRL,250 it must be recognised that HRL may also be used to impose new orders and legitimise them. Indeed, one major and convincing critique is that the application of IHRL during occupation may be highly inappropriate from the perspective of the local population.251 Modirzadeh states as follows:

[While I understand the short-term gains of demanding that the British respect human rights law in their actions in Iraq (one could perhaps argue that it would result in better trials, or less torture, though again this has yet to be convincingly demonstrated by any argument about how human rights law would materially change the current panoply of rules under IHL), I do not want an occupying power that has invaded my State to be recognized by the international community as having a “rights-based” relationship with my population. I do not want that State to be in a position to argue that it has to engage in certain institutional changes in order to be able to comply with its human rights obligations back home. I do not want a State that has no relationship to civil society in my country, has no long-term understanding of my population, its

246 Possible in both cases of control over territory and control over individuals: see sub-sections 2.2.1-2.2.2.
247 HC (IV), art 43.
248 Milanovic, Extraterritorial Application (n 16) 257-59.
251 It may be argued that the invaded would correspond to Simmons’ ‘marginalized Other’, although the author warns from formulaic applications of this phenomenology: see Simmons, Human Rights (n 157) 1-16.
history, its religious values, etc., to have a hand in shaping its human rights framework simply by virtue of its choice to invade.\(^{252}\)

This critique is certainly embraceable and it highlights a potential conflict between the right to self-determination and new laws established after war and occupation, especially when the occupation is prolonged. In fact, the right to self-determination, which is not part of the ECHR but more generally of IHRL, should play an essential role in assessing why and how the ECHR might apply.\(^{253}\) Simplistic approaches in these situations, in both ways, may disguise a replication of colonial structures, where both the ‘full differentiation and full identification’\(^{254}\) of the non-European were used to expand European influence.\(^{255}\)

Although in certain cases HRL may appear as the emperor’s new clothes due to specious assessments of the interplay between HRL and OL,\(^{256}\) it is also true that, as argued by the applicants in *Al-Skeini*:

> [T]he duty on an occupying State under international humanitarian law to apply the domestic law of the territorial State and not to impose its own law could not be used to evade jurisdiction under the Convention, since the “effective control of an area” basis of jurisdiction applied also to unlawful occupation.\(^{257}\)

The ECtHR’s case law on control over territory shows that the ECHR is generally applicable in occupation contexts. In fact, the criteria triggering both the application of OL and State jurisdiction under the ECHR are similar, since they depend on a spatial connection of the occupying Power with the territory. The variable overlap between the two bodies of law might depend on different interpretations of article 1 of the ECHR and article 42 of the HC. The latter prescribes that:

> [T]erritory is considered occupied when it is actually placed under the authority of the hostile army.

\(^{252}\) Modirzadeh, ‘The Dark Sides of Convergence’ (n 230) 375.


\(^{254}\) Koskenniemi, *The Gentle Civilizer of Nations* (n 1) 130.

\(^{255}\) ibid.


\(^{257}\) *Al-Skeini* (n 24) para 127.
The occupation extends only to the territory where such authority has been established and can be exercised.\(^{258}\)

The effective overall control doctrine developed by the ECtHR surely includes situations of occupation. Moreover, the criterion developed in *Issa*,\(^{259}\) based on ‘whether at the relevant time Turkish troops conducted operations’ in a certain area,\(^{260}\) does not require the same level of authority required by article 42 of the HC. Additionally, the criterion developed in *Ilascu*, where jurisdiction was triggered by the decisive influence exercised by Russia on the separatist Transdniestreria, is most likely dissimilar from the level of authority required by article 42 of the HC. Thus, the scope of extra-territorial application of the ECHR seems larger than the scope of application of OL. In other words, there might be cases where the ECHR applies extra-territorially due to the exercise of control over an area and OL does not apply; but not *vice-versa*.

### 4.3 HUMAN RIGHTS IMPERIALISM

Concerns about the inappropriateness of the application of the ECHR in extra-territorial settings have been raised in the *Al-Skeini* proceedings.\(^{261}\) In the House of Lords, Lord Brown observed how ‘[o]ften (for example where *Sharia* law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied’.\(^{262}\) In the same judgment, Lord Rodger affirmed:

> [T]he essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court’s jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the

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258 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations, Concerning the Laws and Customs of War on Land (Signed 18 October 1907) 205 CTS 277 (HC (IV)), Art 42.

259 Admittedly to be read as control over territory and not over individuals.

260 *Issa* (n 31) para 76; Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 524-25.

261 See ibid for a thorough account.

262 *R (Al-Skeini and others) v Secretary of State for Defence* (n 2) [129].
European court in the utterly different society of southern Iraq is manifestly absurd … If it went further, the court would run the risk … of being accused of human rights imperialism.263

In this regard, some observations have been made by scholars. First of all, positing Islam and Europe as incompatible normative frameworks would correspond to ‘cauterize’ the Muslims who live in the Council of Europe. Secondly, States such as Iraq are bound by other treaties that enshrine most of the rights contained in the ECHR. Third, obliging the UK to respect HRL during occupation may have ‘the effect of mitigating, not exacerbating, the colonial nature of the occupation’.264 Additionally, in the context of the ECHR, the margin of appreciation doctrine may be used to accommodate distinctions between the law applicable at home and the law applicable elsewhere.265 Furthermore, the assumption that human rights and Sharia are not compatible is one that needs be challenged, not least because it is challenged within the current academic debate on the matter.266

Purely legalistic approaches may not achieve the goal of including the other in the protection provided by the ECHR without infringing the right to self-determination.267 Legalistic approaches risk leaving the other outside of the discussion. Discursive democracy did not seem to work either, as shown in recent affairs, although hoped for by Benhabib.268 As underlined by Simmons, if the marginalized other has no voice, it is impossible to hear her/him. As suggested by Wilde, as a closed system, the law may offer solutions to reconcile local and “external” norms. For example, the law may solve conflicts between norms through the lex specialis doctrine, even for situations evoking a ‘clash of civilizations’,269 for example where the UK could not apply the ECHR in Iraq

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263 ibid.
264 Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 521-22. This however goes together with critiques Modirzadeh and, in a more general context, Douzinas make about the use of HRL to legitimise neo-colonial practices. Modirzadeh, ‘The Dark Sides of Convergence’ (n 230) and Douzinas, Human Rights and Empire (n 4).
265 Wilde, ‘Triggering State Obligations Extraterritorially’ (n 36) 523.
266 On human rights and Sharia, see eg Mashood Baderin, International Human Rights and Islamic Law (OUP 2003).
267 For example, Judge Bonello’s Separate Opinion in Al-Skeini (n 24) may appear too direct in this respect.
268 Simmons, Human Rights Law and the Marginalized Other (n 157) 44-84.
because it was allegedly too different from local norms. However, the application of solely legal solutions may seem too formalistic. Indeed, from the point of view of the affected, deciding in the House of Lords which is the best solution for a potential conflict between “European-imported” norms and Iraqi local norms, may seem inadequate.

V. CONCLUSION

The structure of the Article corresponds to the idea that law, philosophy and praxis should be inter-twined.

Section 2 showed how article 1 of the ECHR functions as a trigger mechanism for the extra-territorial application of the ECHR. Through the interpretation of article 1, practices of inclusion-exclusion are (inevitably) carried out. As to the Court’s interpretation, State jurisdiction means either control over territory or control over persons. The current interpretation of article 1 of the ECHR may generate inconsistencies and unacceptable consequences. A different interpretation seems required. Drawing on already existent suggestions, an interpretation that descends from the application of article 31 of the VCLT is proposed. An interpretation of jurisdiction as a relationship of power between the State and the individual seems the more natural outcome if article 1 of the ECHR is interpreted in harmony with the reality on which HRL wants to be a norm. Furthermore, the object and purpose of the ECHR and article 1 belonging to IHRL suggest the same interpretation based on a conception of jurisdiction as a relationship of power between States and individuals.

Section 3 challenged current theories underpinning the legal interpretation of article 1 of the ECHR by proposing renewed philosophical foundations for an extra-territorial application which acknowledges the relationality of human rights as a fact of being. This suggestion may bridge the gap between physei and nomos, which in the past and in current times causes the paradox of exclusive human rights. Levinasian perspectives in this context may appear helpful to overcome the limits of cosmopolitanism and provide for an ‘infinite responsibility for the other.’ Beyond Levinasian perspectives, other paths are

271 ‘Solidarity with the Other’s proyecto’ which means ‘listening to the aneu logou and working with them to realize their rights based on their own priorities’ may be an interesting path to explore, although this may seem utopian, for example, in a situation of resistance against occupying Powers: see Simmons, Human Rights Law and the Marginalized Other (n 157) 123-25.
272 Topolski, ‘Relationality as a ‘Foundation’ for Human Rights’ (n 170).
available and worth exploring, such as the ‘phenomenology of the marginalized Other’. At the same time, these proposals are not to be taken as formulae, but simply as new theoretical foundations for human rights, which need to be constantly questioned in order to evolve and adapt to new circumstances.

Section 4 has shown some of the practical complications of the extra-territorial application of the ECHR. The colonial present of the ECHR needs to be tackled, either in the political sphere or by new legal interpretations. In addition, as demonstrated by recent case law on the right to liberty in extra-territorial armed conflicts, the interplay between IHL and the ECHR may cause the extra-territorial non-application of the ECHR which would have the same practical consequences of interpretations which exclude the extra-territorial application of the ECHR. Moreover, the extra-territorial application of the ECHR in situations of occupation may generate phenomena of human rights imperialism. Also, the use of human rights to legitimise military occupations and new orders should be taken into account. These are fears that need to be considered seriously, if the credibility of human rights is a matter of concern for practitioners. Solutions attentive to the other and her/his needs are again warranted.

In conclusion, an overall appraisal of the issues covered in this Article warrants a process of extra-territorial application of the ECHR which listens to the voice of the other. When it comes to the translation into legal terms and practical solutions, following philosophical theories becomes more complicated. However, the main argument of this Article is that it is important not to lose sight of the theoretical origins of human rights and not to treat them as static, immutable or even worse, untouchable. Questioning and deconstructing foundations built in the past and norms of the present may uncover contradictions and injustices. At the same time, while allowing for more coherent understandings of the law and its origins, this process may also build concrete proposals for the present and the future.

273 Simmons, Human Rights Law and the Marginalized Other (n 157).
BIBLIOGRAPHY

BOOKS
Agamben, *State of Exception* (UCP 2005)
Kalshoven F, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999) *2 Yearbook of International Humanitarian Law*
Levinas E, ‘The Rights of Man and the Other’ in Levinas E, *Outside the Subject* (Smith MB tr, SUP 1993)
Rosenfeld M, ‘Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism’ in Cornell D, Rosenfeld M & Gray Carlson D (eds) *Deconstruction and the Possibility of Justice* (Routledge 2008)
Ryngaert C, *Jurisdiction in International Law* (OUP 2008)
Simmons WP, *Human Rights Law and the Marginalized Other* (CUP 2011)

**JOURNAL ARTICLES**

Jordaan E, ‘Cosmopolitanism, Freedom, and Indifference: A Levinasian View’ (2009) 34 Alternatives 83
—— ‘Occupied Zone – ‘A Zone of Reasonableness’?’ (2008) 41 Israel Law Review 13

CASES
EUROPEAN COMMISSION OF HUMAN RIGHTS
Austria v Italy App 788/60 (Commission Decision, 11 January 1961)
Freda v Italy App no 8916/80 (Commission Decision, 7 October 1980)
M v Denmark (1993) 15 EHRR CD 28 (Commission Decision)

EUROPEAN COURT OF HUMAN RIGHTS
Al-Saadoon v UK (Admissibility) (61498/08) (2009) 49 EHRR SE11
Al-Jedda v UK, (2011) 53 EHRR 23
Al-Skeini v UK (2011) 53 EHRR 18
Bankovic v Belgium (Admissibility) (52207/99) (2007) 44 EHRR SE5 57
Chagos Islanders v UK (Admissibility) (35622/04) (2013) 56 EHRR SE15
Cyprus v Turkey (2002) 35 EHRR 30 para 77
Ergi v Turkey (2001) 32 EHRR 18
Hassan v UK App No 29750/09 (ECtHR, 16 September 2014)
Hirsi Jamaa v Italy (2012) 55 EHRR 21
Ireland v UK (1979-80) 2 EHRR 25
Issa v Turkey App No 44587/98 (ECtHR, 28 September 2006)
Ivančo v Moldova App No 23687/05 (ECtHR, 15 November 2011)
Al-Skeini v UK (2011) 53 EHRR 18
Bankovic v Belgium (Admissibility) (52207/99) (2007) 44 EHRR SE5 57
Chagos Islanders v UK (Admissibility) (35622/04) (2013) 56 EHRR SE15
Cyprus v Turkey (2002) 35 EHRR 30 para 77
Ergi v Turkey (2001) 32 EHRR 18
Hassan v UK App No 29750/09 (ECtHR, 16 September 2014)
Hirsi Jamaa v Italy (2012) 55 EHRR 21
Ireland v UK (1979-80) 2 EHRR 25
Issa v Turkey App No 44587/98 (ECtHR, 28 September 2006)
Ivančo v Moldova App No 23687/05 (ECtHR, 15 November 2011)
HUMAN RIGHTS COMMITTEE
INTERNATIONAL COURT OF JUSTICE
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226
UK
Mohammed v MOD [2014] EWHC 1369 (QB)
R (on the application of Al-Skeini) v Secretary of State for Defence [2007] UKHL 26
R (Smith) v Secretary of State for Defence [2010] UKSC 29
Smith (and Others) v MOD [2013] UKSC 41
INTERNATIONAL LAW SOURCES AND TREATIES
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations, Concerning the Laws and Customs of War on Land (Signed 18 October 1907) 205 CTS 277 (HC(IV))

WEBSITES AND OTHER SOURCES

