Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention

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Abstract

European participation in controversial aspects of the 'war on terror' has transformed the question of the extraterritorial scope of the European Convention on Human Rights from abstract doctrine into a question with singularly pressing political and legal ramifications. Yet the European Court of Human Rights has failed clearly to articulate when and why signatory states' extraterritorial actions can be brought within the jurisdiction of the European Convention. The Court has veered between a narrow view of extraterritorial jurisdiction confined to four fixed categories of cases and a broader view which contemplates extraterritorial jurisdiction when a signatory state effectively controls an individual's ability to exercise fundamental Convention rights. Scholars have favoured the latter, arguing that the universality of human rights demands an expansive concept of extraterritorial jurisdiction. This article proposes a different theory: existing categories of extraterritorial jurisdiction can best be understood as limited exceptions to the rule of territorial jurisdiction because they all require some significant connection between a signatory state's physical territory and the individual whose rights are implicated. Properly understood, extraterritorial jurisdiction under the European Convention is and should be limited to such situations to maintain a workable balance between the Convention's regional identity and its universalist aspirations.

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1 Introduction

It is now a commonplace to observe that the European Convention on Human Rights (ECHR) has transformed the landscape of European domestic policy-making, becoming the operative constraint in fields from education policy to national security while deepening its perceived institutional legitimacy. Increasingly, however, signatory states are confronted with the question whether the European Convention applies outside signatory states' borders, and in particular whether the Convention will become the dominant constraint on signatory states' extraterritorial activities as it is for states' domestic policies. Article 1 of the ECHR commands that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[1] Yet the meaning of the words 'within their jurisdiction' remains unsettled and controversial. Persistent questions surround the circumstances under which a state's extraterritorial actions may come under the ambit of the Convention and may be subject to legal challenges before the European Court of Human Rights (ECtHR).

European participation in the 'war on terror' has transformed the question of the Convention's extraterritorial scope from a doctrinal abstraction into an issue with profound and very real political and legal ramifications. The most obvious question is whether the Convention extends to actions taken by state signatories in Iraq and Afghanistan, where several states are occupying territory, administering detention facilities, or conducting more limited military operations.[2] More broadly, while signatory states have been widely derided for participating in America's extraordinary rendition programme through acts on their own territories, including acquiescence in allowing the CIA to use their airspace,[3] it is less clear that participation in the form of extraterritorial acts would fall foul of the Convention. Difficult questions remain as to whether the Convention's scope extends far enough to extend jurisdiction in cases where a signatory seizes a terrorist suspect abroad and renders him to the custody of another country without letting the detainee set foot on European soil. These questions do not merely delineate the scope of signatory states' liability; they define the

[1] Art. 1, European Convention on Human Rights (hereafter ECHR), ETS no. 005.

[2] Faced with the question whether the Convention applied to British military actions in Basra and whether Britain might therefore be liable under the Convention for the deaths of Iraqi citizens killed in cross-fire, England's House of Lords held in *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26 that there was no jurisdiction because Britain lacked sufficient control over the region at the relevant time. However, it also held that Britain was responsible for the death of an Iraqi citizen killed while in British military custody in a British-run prison in Basra. The case was tentative and highly fact-specific; the degree to which signatory states must incorporate Convention rights into their extraterritorial exploits remains an open question.

[3] Dutheillet de Lamothe, 'Extraordinary Renditions: A European Perspective', Speech at Cardozo School of Law, 25 Sept. 2006, available at: hwww.venice.coe.int/docs/2006/CDL(2006)077-e.asp (last accessed 14 Dec. 2008) (summarizing the Venice Commission's report on renditions, Opinion no. 363/2005, CDL-AD(2006)009, available at: www.venice.coe.int/docs/2006/CDL-AD(2006)009e.asp, and emphasizing the importance of international legal norms); see also Hakimi, 'Current Development: The Council of Europe Addresses CIA Rendition and Detention Program', 101 *AJIL* (2007) 442.

capacity of the European Convention to regulate human rights abuses and thereby raise fundamental issues concerning the Convention's identity. Given the degree of public outrage surrounding revelations of the US-led rendition programme, signatory states must assume not only that their actions will be revealed, but that if those acts violate the Convention the Council of Europe will hold them responsible, whether through political condemnation or through individual applications to the European Court.

The European Court's recent extraterritorial jurisprudence has failed to provide clear answers about the scope of extraterritorial jurisdiction under the Convention. This failure not only leaves signatory states with difficulties in anticipating whether their acts comply with the Convention; it also jeopardizes the Court's institutional legitimacy as an arbiter of such questions. At present, the European Court has identified four primary bases for extraterritorial jurisdiction: cases where a signatory state exercises 'effective overall control' over another territory; cases where either state authorities act abroad or their actions produce extraterritorial effects; extradition or expulsion cases involving the risk that an individual's rights will be violated once he leaves the territory of the signatory state; and diplomatic, consular, and flag jurisdiction cases. The Court, however, has left the boundaries of these exceptions undefined and has offered contradictory rationales for the exercise of extraterritorial jurisdiction, producing uncertainty about the ambit of the Convention.

In the face of doctrinal ambiguity and in the wake of recent revelations concerning European acquiescence in controversial dimensions of the US 'war on terror', many human rights law scholars have proposed that jurisdiction under the European Convention should be interpreted more broadly. The prevailing approach holds that jurisdiction should extend anywhere that officials of signatory states exercise control over the deprivation of an individual's fundamental rights as guaranteed by the Convention.[4] This article argues that the European Court's extraterritorial jurisprudence cannot be construed in support of such a theory and that it instead points towards a far narrower interpretation of extraterritorial jurisdiction under the Convention. This article first identifies the inconsistencies in the Court's recent case law and the serious problems stemming from the Court's ambiguity as to the precise boundaries of the Convention. It then turns to interpretive theories proposed in the literature and explains their inadequacies both in providing a cohesive rationale for the Court's existing jurisprudence and in articulating a normatively satisfactory vision of jurisdiction under the Convention. The article closes by proposing an alternate interpretation, and argues that the Court's four categories of extraterritorial jurisdiction ultimately turn on some connection between the physical territory of the state and the individual whose rights are affected. This interpretation suggests that, absent some ultimate connection to state territory, Article 1 does not bring unconnected extraterritorial acts within the scope of the Convention. This notion of extraterritorial jurisdiction, essentially predicated on a state's functional exercise of sovereignty, serves to strike

[4] See *infra* sect. 5.

a flexible balance between the Convention's twin identities as a regional European agreement and as a universalist human rights instrument.

2 The Incoherence of the Court's Recent Extraterritorial Jurisprudence

Whether Article 1 of the European Convention extends to the extraterritorial acts of signatory states and therefore enables affected individuals to challenge their actions before the European Court has been a long-standing subject of debate in the Court's jurisprudence. It has become increasingly contentious of late, as the Court has decided a number of major cases on the subject. Rather than clarifying the meaning of Article 1, however, these cases have instead compounded the incoherence of the Court's jurisprudence.

In 2001, the Grand Chamber gave its most authoritative ruling on the scope of the Convention to date. In *Banković v. Belgium*, the Court was presented with a challenge made by the relatives of victims of a NATO air strike on a radio station in the former Federal Republic of Yugoslavia (FRY) during the Kosovo campaign, who claimed that various signatories to the ECHR, as members of the NATO coalition, had participated in the bombing and were therefore responsible for violations of Articles 2, 10, and 13 of the Convention.[5] The dispositive question in the case was whether, by bombing the part of Belgrade where the radio station was located, NATO exercised 'effective control' of the territory sufficient to confer jurisdiction under Article 1 of the Convention. Alternatively, the applicants argued, the Court could find jurisdiction based on a broader notion of 'effective control': the degree to which a state exercised some form of extraterritorial control should define the degree of Convention rights it was obliged to provide.[6]

The Grand Chamber rejected these arguments and found the applications inadmissible, holding that 'the jurisdictional competence of a State is primarily territorial' and that 'Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.[7] Invoking the traditional bases for extraterritorial jurisdiction in international law, the Court then identified four categories of exceptions to this rule by classifying previous exceptions articulated in the Court's jurisprudence:[8]

[5] Art. 2 protects the right to life. Art. 10 protects freedom of expression. Art. 13 mandates that anyone whose rights under the Convention are violated must have an effective remedy even for acts undertaken by state officials.

[6] App. No. 52207/99, *Banković v. Belgium*, Grand Chamber, 12 Dec. 2001, 44 EHRR (2001) SE5, at paras 31–53.

[7] *Ibid.*, at paras 59 and 61.

[8] In this regard, *Banković*, *supra* note 6, essentially reaffirmed and refined the categories of exceptions first set out in *Loizidou v. Turkey:* App. No. 15318/89, *Loizidou v. Turkey* (Preliminary Objections), 23 Mar. 1995, 20 EHRR (1995) 99, at para. 62.

(1) Extradition or expulsion cases: cases involving the extradition or expulsion of an individual from a member state's territory which give rise to concerns about possible mistreatment or death in the receiving country under Article 2 or 3 or, in extreme cases, the conditions of detention or trial under Article 5 or 6;
(2) Extraterritorial effects cases: cases 'where the acts of state authorities produced effects or were performed outside their own territory';
(3) Effective control cases: cases 'when as a consequence of military action (lawful or unlawful) [a Contracting Party] exercised effective control of an area outside its national territory'; and
(4) Consular or diplomatic cases, and flag jurisdiction cases: 'cases involving the activities of [a Contracting Party's] diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state'.[9]

Banković defined these exceptions narrowly. By its terms, it confined extradition and expulsion cases to instances where the applicant is within the member state's territory and challenging the effects of his transfer abroad.[10] It effectively limited the 'extraterritorial effects' exception to its lone exemplar, a case involving extraterritorial judicial action in a territory jointly controlled by two state signatories.[11] The 'effective control' cases cited in *Banković* require a high threshold and a significant and detailed factual basis to show 'effective control'.[12] Finally, the Grand Chamber characterized consular, diplomatic, and flag jurisdiction cases as exceptions to extraterritoriality primarily because, under customary international law and treaty provisions, states have historically been allowed to exercise extraterritorial jurisdiction in these areas.[13]

Rather than clarifying the scope of and rationale for these exceptions, more recent cases appear to undermine *Banković*'s central proposition, that jurisdiction is primarily territorial, in favour of more expansive interpretations of jurisdiction. The Court found the application in *Issa v. Turkey* inadmissible on the facts, on the ground that the claimants had failed to present sufficient factual evidence that Turkey exercised 'effective control' over the relevant region in northern Iraq for it to be held accountable for the alleged abuses carried out by Turkish security officers.[14] But its doctrinal analysis of past decisions marked a significant departure from *Banković*. The Panel found that

[9] *Ibid.*, at paras 68 (extradition or expulsion); 69 ('extraterritorial effects'); 70 (effective control); and 73 (consular or diplomatic cases).

[10] *Ibid.*, at para. 68 ('[h]owever, the Court notes that liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad').

[11] *Al-Skeini, supra* note 2, at para. 109 (judgment of Lord Brown). The case in question was *Drodz and Janousek v. France and Spain*, discussed *infra* at the text to note 62.

[12] *Banković, supra* note 6, at para. 80, arguably narrowed the 'effective control' exception further by distinguishing between the exercise of 'effective control' of territory within the *espace juridique* of the Convention versus territory outside it, and suggested that in the latter case the Convention might not impose responsibility for guaranteeing rights which residents of the occupied state had not enjoyed previously.

[13] *Ibid.*, at para. 73.

[14] App. No. 31821/96, *Issa v. Turkey* [2004] ECHR 31821/96, 16 Nov. 2004, at paras 74–75.

in addition to 'effective control' over territory the Court's decisions on extraterritorial jurisdiction were based on the premise that:

> [A] state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.[15]

'Accountability in such situations', the Court concluded, 'stems from the fact that art 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.'[16] Under the logic of *Issa*, jurisdiction is not primarily territorial; a state is bound by the Convention wherever it acts, and its obligations abroad are no different from its obligations at home. This premise is diametrically opposed to the Court's conclusions in *Banković*, where the Court declared that '[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States', and that 'the desirability of avoiding a gap or vacuum in human rights protection' is a valid basis for jurisdiction *only* within the *espace juridique* of the Convention.[17]

Furthermore, the most recent extraterritorial jurisdiction case, *Öcalan v. Turkey*, appears potentially to broaden the scope of Article 1 to encompass almost any instance where a state exercises authority or control over an individual outside its own territory in a way which involves Convention rights. Abdullah Öcalan, a Turkish citizen, founded the Kurdish Workers' Party (PKK), a Kurdish liberation group and terrorist organization responsible for a number of armed attacks which killed hundreds in Turkey. After expulsion from Syria in 1998, Öcalan fled to Kenya, where Greek diplomats initially gave him safe harbour at the Greek embassy. The Kenyan government then ordered Öcalan to be removed from the country, and Kenyan officials facilitated Öcalan's capture by Turkish security officers at Nairobi airport. Turkish officers arrested Öcalan and flew to Turkey, where he was tried and convicted. Öcalan then filed an application with the European Court, claiming that Turkey's highly irregular extradition process amounted to kidnapping, and that his treatment at the hands of Turkish security officials on the aeroplane flight back to Turkey amounted to cruel, inhuman, and degrading treatment.[18]

Though the Grand Chamber ultimately found that neither Öcalan's kidnapping nor his treatment on the aeroplane from Kenya to Turkey violated the Convention, the Court considered itself to have jurisdiction over these claims, even though they involved the acts of Turkish security officials abroad in a situation where Turkey clearly lacked effective control over any part of Kenyan territory. Most significantly, the Grand Chamber asserted jurisdiction because 'directly after being handed over to

[15] *Ibid.*, at para. 71.

[16] *Ibid.*

[17] *Banković, supra* note 6, at para. 80.

[18] App. No. 46221/99, *Öcalan v Turkey* (Grand Chamber) [2005] ECHR 46221/99, 12 May 2005, at paras 13–60.

the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Art 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'.[19] On its face, *Öcalan* suggests that the scope of the Convention is very broad indeed, potentially conferring jurisdiction whenever a state exercises effective control over a person outside its own borders. Yet this was precisely the argument the applicants advanced and the Grand Chamber rejected in *Banković*.

Taken together, *Banković*, *Issa*, and *Öcalan* offer little guidance in ascertaining the boundaries of extraterritorial jurisdiction. The four exceptional categories of extraterritorial jurisdiction in *Banković* – effective control, extraterritorial effects, extradition, and diplomatic and consular actions – remain the clearest articulation of the law, but *Issa* and *Öcalan* illustrate the unpredictability with which the Court has subsequently interpreted the underlying logic of its jurisprudence and the scope of these exceptions. Legal scholars have criticized these decisions on the ground that they rob the Court's extraterritorial jurisprudence of any consistency.[20] National courts have likewise found the Court's Article 1 jurisprudence difficult to apply even in the relatively clearly delineated category of 'effective control' cases. As Lord Rodger of Earlsferry commented in *Al-Skeini v. Secretary of State for Defence*, a case which raised the question whether British military action in Basra extended the Convention to Iraqi citizens:

> What is meant by 'within their jurisdiction' in article 1 is a question of law and the body whose function it is to answer that question definitively is the European Court of Human Rights . . . The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.[21]

While *Issa* and *Öcalan* appeared to indicate greater latitude for finding jurisdiction, the House of Lords concluded that, as a national court, it could not exceed the more restricted interpretation of jurisdiction set out in *Banković* without clearer signals.[22]

The consequences of this legal uncertainty are twofold. First, given that the European Court is now recognized as the authoritative interpreter of the Convention's jurisdiction, its failure to provide a clear answer on an issue of pressing legal and policy concern risks undermining its institutional credibility. The scope of jurisdiction under Article 1 is perhaps the most fundamental question for the Convention system.

[19] *Ibid.*, at para. 91.

[20] Roxstrom, Gibney, and Einarsen, 'The NATO Bombing Case (Banković et al. v. Belgium et al.) and the Limits of Western Human Rights Protection', 23 *Boston U Int'l LJ* (2005) 55, at 89–91; Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', 47 *Va J Int'l L* (2007) 839, at 891–895; see also Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights', 14 *J Transnat'l L & Policy* (2005) 159, at 196–197.

[21] *Al-Skeini, supra* note 2, at paras 65 and 67 (Lord Rodger's judgment).

[22] *Ibid.*, at paras 80–83.

The degree to which the Convention regulates extraterritorial acts of its signatories defines the identity of the Convention. If jurisdiction is effectively limited to European territory, the Convention is a primarily regional instrument; if jurisdiction extends to a wide range of extraterritorial acts by signatories, the Convention is instead a global system for protecting human rights. The degree to which the Convention is concerned with extraterritorial acts also defines its relationship with other international systems and the remedies available to individual victims of human rights violations. This is not only exactly the kind of question that only the Court can answer, but also the kind of question that requires the Court to provide clear and workable guidance to national courts.

Secondly, legal uncertainty leaves signatory states unable accurately to include Convention obligations as part of their decisional calculus when assessing the desirability of various extraterritorial undertakings. If *Banković* remains the governing jurisdictional rule, exceptions to territorial jurisdiction are narrow, *Öcalan* is an aberration which can be limited largely to its facts, and with few exceptions extraterritorial acts will not be reviewed by the Court. If *Issa* and *Öcalan* instead reflect a widening of the doctrine articulated in *Banković*, the scope of Convention jurisdiction expands much further, potentially encompassing a host of situations where the only link between the applicant and the signatory state is the state's temporary exercise of control over an individual outside its own territory. This uncertainty creates the twin risks that states will either under-estimate the jurisdictional scope of the Convention and violate human rights which might otherwise be protected, or that they will over-estimate the Convention's reach and refrain from actions which are strategically essential. Either way, the Court's doctrinal ambivalence prevents signatory states from accurately weighing the legal liabilities associated with particular extraterritorial actions, to the detriment of both human rights protection and security.

3 Interpreting 'Jurisdiction' to Reflect Public International Law

Given that the European Convention is an international human rights convention, general principles of international law may seem to provide the most obvious guidance in interpreting the meaning of 'jurisdiction' under Article 1. Indeed, the Court's recent extraterritorial jurisdiction cases, with their common refrain that 'the concept of "jurisdiction" for the purposes of Article 1 . . . must be considered to reflect the term's meaning in public international law', seem to demand this approach.[23] Thus,

[23] *Issa, supra* note 14, at para. 67; *see also Banković, supra* note 6, at para. 59 ('[a]s to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial') and App. No. 45036/98, *Bosphorus v. Ireland*, Grand Chamber, 30 June 2005, 42 EHRR (2005) 1, at para. 1 ('[t]he notion of "jurisdiction" reflects the term's meaning in public international law . . . so that a State's jurisdictional competence is considered primarily territorial (*Banković*), a jurisdiction presumed to be exercised throughout the State's territory').

one approach to interpreting 'jurisdiction' under Article 1 would be to import the recognized exceptions justifying extraterritorial jurisdiction under public international law: (1) nationality, (2) passive personality, (3) the protective principle, and (4) universal jurisdiction.[24]

Beneath this approach is a normative argument: the Court should embrace public international law as its primary metric for defining jurisdiction because the purpose of the Convention and the Court is to integrate its associated body of law into the international legal system. By deferring to customary definitions of jurisdiction under international law, the Court would be fulfilling its proper role as part of an evolving, complementary international legal system, with public international law as the unifying source of norms. By developing public international law in the European Convention context, the Court would contribute to the positive project of developing public international law. As state signatories incorporated the Court's decisions into their domestic law, the Court would create heightened compliance with international legal norms all the way down to the domestic level.

Criticisms: Though public international law offers clear and widely accepted categories to govern extraterritorial jurisdiction, it offers little explanation of why the European Court has consistently divided its own extraterritorial jurisprudence into four different categories based on effective control, extraterritorial effects, extradition cases, and diplomatic, consular, and flag jurisdiction cases. The notion that the European Court's analysis of extraterritorial jurisdiction corresponds to commonly accepted bases of extraterritorial jurisdiction in public international law is untenable.

As Marko Milanović has recently argued, the ways in which the Court has interpreted extraterritorial jurisdiction bear little resemblance to the term's meaning in public international law. Jurisdiction in international law is a more formalistic concept corresponding to the state's power to regulate or enforce rules. While these powers primarily pertain to acts occurring within the territory of a state, extraterritorial jurisdiction is permitted where a strong connection to the state exists. Thus, active personality, passive personality, the protective principle, and universality are all bases for extraterritorial jurisdiction justified by some connection to the nationals of the state or because they involve vital state interests.[25] These bases reflect the functional purpose of jurisdiction in public international law: to regulate relations among states by distinguishing between permissible and impermissible exercises of authority when confronted with an instance of direct or indirect intervention by one state into another.[26]

Were this the prevailing meaning of 'jurisdiction' in the Court's jurisprudence, one might expect the Court to have extended jurisdiction in cases where a member

[24] See, e.g., Kavaldjieva, 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?: Can, and Should, an Iraqi Victim of Human Rights Abuses Inflicted by U.K. Troops Have a Remedy in U.K. Courts Under the European Convention of Human Rights?', 37 *Georgia J Int'l L* (2006) 507.

[25] Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (draft article) (later published in 8 *Human Rts L Rev* (2008) but the page references are to the draft), at 7–17.

[26] *Ibid.*, at 10–12.

state sought to punish one of its citizens who committed a crime overseas, or where it sought to prevent a non-citizen overseas from interfering with its citizens' rights. Yet such cases are virtually absent from the Court's jurisprudence. Moreover, the most frequent basis of extraterritorial jurisdiction under the ECHR, cases involving a signatory state's functional exercise of 'effective control' over territory beyond its borders, is generally not accepted as a basis for jurisdiction in public international law.[27] The European Court is not merely applying the ordinary jurisdictional rules of public international law with a different emphasis; it is applying a different test entirely, one far more concerned with functional characteristics than with formalistic notions of sovereignty.[28] Jurisdiction under Article 1 of the European Convention serves a different purpose from jurisdiction under public international law: it regulates the relationship between signatories to the Convention and the category of persons to whom the state must provide the rights enumerated under the Convention. Conflating 'jurisdiction' under public international law with jurisdiction under Article 1, Milanović concludes, is the fatal flaw of the *Banković* judgment, pushing the European Court to what Milanović sees as an artificially constrained concept of extraterritorial jurisdiction.[29]

It is clear from Milanović's persuasive critique that there are compelling descriptive and normative reasons against reading 'jurisdiction' under Article 1 of the ECHR in light of the meaning of jurisdiction in public international law. Yet *Banković* itself seems to avoid the full tensions inherent in such an approach. *Banković* invokes the meaning of 'jurisdiction' under public international law to define the 'ordinary meaning' of the term in Article 1. But after a brief summary of the primarily territorial nature of jurisdiction under international law and the four exceptions of nationality, passive personality, protective principle, and universality, the Grand Chamber came only to the general, oft-repeated conclusion that the common meaning of jurisdiction requires a territorial basis, 'other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances'.[30] These exceptional bases for extraterritorial jurisdiction, the Grand Chamber suggested, were *not* to be defined with reference to the exceptions under public international law. Instead, the Grand Chamber relied solely on the exceptions already identified in its past cases, and its summary of its practice to date made no claim to consistency with the content of the exceptions under public international law.[31] The Grand Chamber's invocation of public international law, then, seems intended to illuminate a common thread running through the ECHR and the rest of international law at the level of the generality that jurisdiction is ordinarily based on territory, and other bases, whatever their content,

[27] *Ibid.*, at 13–15.

[28] *Ibid.*, at 12, 14–16.

[29] *Ibid.*, at 12, 16–17, 26 ('[o]f course, the reason for my belabouring the obvious is that the European Court in *Banković* simply assumed that the notion of "jurisdiction" in Article 1 of the ECHR is the same as that concept of jurisdiction which determines when a state may apply rules of its domestic law, and relied on that assumption to restrict the extraterritorial application of the ECHR to exceptional circumstances only. Indeed, all of *Banković* rests on that one, colossal *non sequitur*').

[30] *Banković, supra* note 6, at para. 61.

[31] *Ibid.*, at para. 71.

are exceptional. *Banković* thus neither demands nor supports the proposition that the exceptions to territorial jurisdiction under public international law are equivalent to the exceptions to territorial jurisdiction under the European Convention. It uses public international law to confirm rather than impose a general concept of 'jurisdiction' on its jurisprudence. In the absence of any textual foundation for equating 'jurisdiction' in public international law with jurisdiction under Article 1, the normative arguments against such an approach are all the more compelling.

4 Interpreting Jurisdiction Based on Control

Alternatively, the Court's jurisprudence can be read to stand for an expansive but simple rationale for extraterritorial jurisdiction: 'control entails responsibility'.[32] The overarching theme uniting the Court's disparate case-law, Rick Lawson has argued, is that 'the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders is commensurate with their ability to do so – that is: the scope of their obligations depend [*sic*] on the degree of control and authority that they exercise'.[33] Ralph Wilde has proposed a variant of this theory,[34] and numerous other legal academics have adopted its basic premise.[35]

This approach avoids the pitfalls of trying to set out a territorial rule with disparate and numerous exceptions while expressly accounting for much of the Court's prior case law. Excepting *Banković*, the approach is, Lawson argues, 'implicit in the Strasbourg case law, even if it had not really been developed'.[36] In the Court's 'effective control' cases, jurisdiction is most obviously extended on the basis of control; because states exert a high degree of territorial and administrative control, the Court has found

[32] Lawson, 'Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), at 86.

[33] *Ibid.*, at 84.

[34] Wilde subdivides this theory into cases of state control over 'spatial objects' – particular swaths of territory, whether a single prison or an entire country – or cases involving state control over persons. Though Wilde claims that this distinction helps to illustrate the purpose of state action and thus facilitates assessments of its legitimacy, he ultimately reverts to the general notion that jurisdiction in either case depends on the state's capacity to control the territory or individual, and his theory is thus treated as a variant on Lawson's broad premise rather than a discrete alternative: Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', 26 *Mich J Int'l L* (2005) 739, at 770–772, 793–797, and 805 and Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations', 13 *Buffalo Human Rts L Rev* (2007) 87 (applying Wilde's approach).

[35] See, e.g., Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law', New York University Center for Human Rights and Global Justice Working Paper # 5 (2006), available at: www.chrgj.org/publications/wp.html (last accessed 10 Dec. 2008), at 32–33 ('[i]n particular, it may be that negative obligations apply whenever a state acts extraterritorially (at least with respect to intentional human rights violations, as opposed to indirect consequences), but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state.'); Abdel-Monem, *supra* note 20, at 159–162, 196–197, and 213.

[36] Lawson, *supra* note 32, at 105.

states responsible for securing most, if not all, Convention rights.[37] The 'extraterritorial effects' exception, along with consular and diplomatic cases, supports the more general rule that jurisdiction extends where there is a 'direct and immediate link' between the state's extraterritorial act and a violation of an individual's rights.[38] In such situations, the Court has extended jurisdiction where signatories are in a position to foresee and prevent violations of rights within their control, especially where the Convention's most fundamental rights – the right to life and the right to be free of torture and cruel, inhuman, and degrading treatment – are involved.[39] Finally, extradition cases have no real place in the Court's extraterritorial exceptions because they involve no extraterritorial acts by state signatories; expulsion, the act in violation of the Convention, takes place within the state's territory.[40]

This approach also carries a powerful normative justification: it realizes the fundamental object of human rights treaties, the universal protection of human rights. The Court does and should extend jurisdiction when a state is in a position to control the exercise of individual rights, because the exercise of jurisdiction fills gaps in international human rights protection and avoids legal black holes.[41] *Banković* is explained as a mistake and a misreading of the Court's past rulings. The Court should have found jurisdiction because the states involved in the NATO bombing exercised sufficient control over the targeted area in Belgrade that they owed some minimum obligations to the affected individuals in the FRY.[42] *Issa*, and the Court's observation that Article 1 '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', corrects the Court's previous misstep and reflects the essential purpose of the Convention as a human rights instrument.[43]

Criticisms: Though the 'control entails responsibility' approach offers an appealingly simple formula for jurisdiction, it is fundamentally inconsistent with the Court's case law. *Banković*, decided by the Grand Chamber, remains the Court's most extensive analysis of Article 1 to date; it cannot be dismissed as a one-off divergence from the Court's ordinary path. While isolated paragraphs of judgments support a more expansive reading of jurisdiction, neither the facts nor the findings of these cases support this conclusion. *Issa* cannot be read to stand for the broad proposition that Article 1 exists

[37] *Ibid.*, at 120.

[38] *Ibid.*, at 103–105.

[39] *Ibid.*, at 120.

[40] *Ibid.*, at 84; Kamchibekova, *supra* note 34, at 93.

[41] Lawson, *supra* note 32, at 86; Kamchibekova, *supra* note 34, at 145–148; Wilde, *supra* note 34, at 791–792; see also Cerone, *supra* note 35, at 23 (arguing that the universal nature of human rights warrants their universal application even by a regional body such as the ECHR); DeSchutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', New York University Center for Human Rights and Global Justice Working Paper # 9 (2005), at 36–37, available at: www.chrgj.org/publications/wp.html (last accessed 10 Dec. 2008) (concluding that the future of human rights protection arguably demands that the ECHR take a more expansive approach to extraterritorial jurisdiction in order effectively to guarantee human rights).

[42] Lawson, *supra* note 32, at 107.

[43] *Ibid.*, at 120–121 (quoting *Issa, supra* note 14, at para. 71).

to fill the void otherwise created when no form of international law governs a given extraterritorial act. The Court's observations were at the outset restricted to 'effective control' cases and referred only to the legal black hole created if a state could functionally control another state's territory without incurring any legal obligations.[44] The approach also fails to account for one of the four extraterritorial exceptions, extradition cases, on the ground that these are not really extraterritorial in nature; yet the Court has invoked these cases for decades as a rationale for the application of some of its other exceptions.[45]

As a doctrinal matter, the 'control entails responsibility' approach elides the distinction the Court's case law has maintained between jurisdiction and state responsibility.[46] As Michael O'Boyle has argued, jurisdiction under the Convention is a procedural hurdle intended to delineate the scope of the Convention; had the Convention been intended to look only to state responsibility, it could easily have omitted the words 'within their jurisdiction' entirely. Signatory states are clearly responsible under international law for acts outside the *espace juridique* of the Convention in violation of international human rights law, yet the European Court is not necessarily obliged to seize jurisdiction over all such violations.[47]

There are also strong policy arguments against the 'control entails responsibility' approach, which sets the threshold for jurisdiction at such a low level that it would, in practice, transform the current character of the Convention system. A signatory state may bring an individual into its custody overseas for a variety of reasons, including instances where state officials operating abroad violate an individual's rights. But to give thousands, if not millions, of individuals round the world the ability to mount a challenge to such practices in the forum of the European Court would strain the Court's already stretched resources to breaking point.

Resource constraints alone are not a compelling argument against expanding human rights protection. But this strain on judicial resources also seems likely fundamentally to alter the Court's focus. It would transform the Court into an outward-looking entity deluged with petitions claiming extraterritorial jurisdiction at the expense of deepening human rights protections prevailing within signatory states like Turkey and Russia. The European Court can hear only so many cases a year, and facilitating a revolution in extraterritorial jurisdiction appears likely to trade off with adjudicating and monitoring recurrent human rights abuses within the *espace juridique* of the Convention.

[44] *Issa, supra* note 14, at para. 71.

[45] See, e.g., *Banković, supra* note 6, at para. 68 (noting in particular the long-standing importance attached to the *Soering* decision: App No 14038/88, *Soering v. United Kingdom,* 11 EHRR (1989) 439).

[46] See, e.g., *Loizidou, supra* note 8, at para. 61 ('[t]he Court would emphasise that it is not called upon at the preliminary objections stage of its procedure to examine whether Turkey is actually responsible under the Convention for the acts which form the basis of the applicant's complaints. . . The Court's enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the "jurisdiction" of Turkey even though they occur outside her national territory').

[47] O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life After Banković,"', in Coomans and Kamminga, *supra* note 32, at 125–139.

Finally, notwithstanding the obvious appeal of extending human rights protection wherever possible, such a project is not necessarily normatively desirable, given the design of the Convention system. The Court's frequent rejoinders that the Convention is a regional instrument designed primarily to apply within Europe also reflect an opposing vision of the Convention, one which suggests that there is something unique about the *espace juridique* of the Convention and the values shared within it. This argument is not merely a judicial gloss on Article 1; it underscores the nature of the European Convention as a bargain between signatory states and the import of hewing to that understanding. Signatory states arguably signed on to the Convention because they believed they knew the scope of the obligations they were undertaking, and that these obligations, while imposing a high standard of human rights protection, would also not stretch indefinitely to affect the entire course of their foreign affairs. The Convention can be read both as a regional instrument and an international human rights convention, pointing both inward and outward. The problem with the 'control entails responsibility' approach is not that it asserts that the Convention's central purpose is to be an instrument for protecting universal human rights but that it asserts this purpose to the exclusion of other possibilities. A balance must be struck, and the main flaw of the 'control entails jurisdiction' approach is that it tilts too far to one extreme.

5 Revisiting Territoriality as a Basis for Extraterritorial Jurisdiction

Ultimately, the Court's extraterritorial jurisdiction cases seem most explicable on the ground that even exceptions to territorial jurisdiction require a strong nexus to state territory. The European Court has never found jurisdiction in cases involving a state's extraterritorial actions absent some preceding or subsequent nexus to the state's physical territory. Analysed closely, the four identified bases for extraterritorial jurisdiction in *Banković* – effective control, diplomatic and consular cases, 'extraterritorial effects' cases, and expulsion cases – all turn on the state's exercise of some form of functional sovereignty, meaning that the state is, in all instances, exercising functions in another state's territory which are normally associated with the acts of a sovereign state on its own territory. States and their agents do not carry the obligation to uphold and extend Convention rights wherever they go, nor does control, without more, necessarily translate into jurisdiction.

A *'Effective Control' Cases*

The argument that territorial connections also define the scope of extraterritorial jurisdiction is most obvious with respect to the Court's 'effective control' cases, which turn on the premise that jurisdiction flows from the state's functional control over territory outside its borders. Absent a high degree of territorial control, there is no jurisdiction even if a state or its agents unquestionably deprived an individual of fundamental rights. The Court has never considered a lesser degree of control sufficient to confer jurisdiction in these cases. It looks to whether the particular state exercised

effective control over the territory in question and, if the answer is negative, it declines jurisdiction.[48]

The foundational case in this area, *Cyprus v. Turkey*, seems at first glance to support a more relaxed standard. In assessing whether Turkey's unilateral occupation of Cyprus and its numerous violations of individual rights fell under the scope of Article 1, the Commission noted in sweeping terms that 'the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad'.[49] Contrary to the arguments of Lawson and others, this statement, however, lends no support to the argument that control confers jurisdiction.[50] To the Commission, 'actual authority' had little to do with individual officials' violations of particular rights. The object of the sentence is the High Contracting Parties, not state officials, and the Commission relied on this statement to distinguish between formal jurisdiction based on annexation of territory and functional jurisdiction based on Turkey's 'actual' control over the administration of Cyprus. In a later passage, the Commission concluded that the armed forces of Turkey 'bring any other persons or property in Cyprus "within the jurisdiction" of Turkey . . . to the extent that they exercise control over such persons or property' not as a general proposition, but because Turkey had already established functional control over the region. This statement, too, has been generalized in subsequent cases and widely cited for the proposition that the degree of state control defines jurisdiction.[51] But in context, for the Court to have jurisdiction over Turkey's extraterritorial actions, applicants not only had to demonstrate that Turkey effectively controlled the region in question; they also had to show that Turkish agents, 'by their acts or omissions', directly affected the exercise of rights guaranteed under the Convention.[52] The control exercised by Turkish agents did not, of itself, confer jurisdiction; the essential predicate was that Turkey had established so great a presence in Cyprus that it was in a position effectively to control administration in the region. Likewise, *Banković* emphatically suggests that one cannot conflate questions of effective control of a region with subsequent attribution of acts to state officials. NATO clearly lacked effective control over any territory in Belgrade, and even if the air strike brought individuals momentarily 'within control' of state officials, the initial

[48] The question whether the test for 'effective control' is the same within the *espace juridique* and without is still somewhat open; *Banković, supra* note 6, suggested that in cases of 'effective control' of territory outside the *espace juridique* of the Convention, applicants might need to make a further showing that the signatory state, in its exercise of 'effective control', deprived applicants of a right they had previously enjoyed and were entitled to under their prior legal systems, although subsequent cases have arguably softened this requirement.

[49] *Cyprus v. Turkey,* 2 DR (1975) 125, at para. 8.

[50] See Lawson, *supra* note 32, at 95.

[51] See, e.g., App. No. 17392/90, *W.M. v. Denmark*, Commission, 14 Oct. 1992, not yet reported ('[a]uthorized agents of a State . . . bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged').

[52] *Ibid.*, at para. 9.

condition of state 'effective control' was not met.[53] The 'effective control' cases thus suggest that jurisdiction is a functional concept requiring a fairly substantial factual showing that, by virtue of a signatory state's intervention into another country or region, the signatory state has enough of a physical presence that it can exercise real administrative or regulatory powers.

A *Diplomatic and Consular Cases*

Diplomatic and consular cases are not exceptional cases of extraterritorial jurisdiction because they involve particularly obvious and attributable exercises of power by designated state agents. Instead, jurisdiction extends to diplomatic and consular cases because these cases involve a signatory state's enduring administrative obligations to its own citizens and the functional control states possess over the territory of their overseas embassies.

The first category of diplomatic and consular cases fall under Article 1 because they involve diplomats and consular officials performing functions abroad while acting as proxies for a state's home government, dispensing services and providing support to the state's citizens. In this respect, at least, extraterritorial jurisdiction under the Convention appears to track the notion in public international law that a state's diplomats and consuls are obliged to represent and protect the rights of citizens in overseas territory.[54] Thus, in *X v. Germany*, X, a German citizen living in Morocco, complained that the German consul and other consular officials conspired to force his expulsion from Morocco in violation of Article 3, since the expulsion did not follow the proper legal procedure. He also asserted violations of Convention rights. The Commission found the application inadmissible on the ground that deportation, without some threat of ill-treatment, was not covered under the Convention, and none of X's arguments offered any evidence to substantiate violations of Convention rights. It did, however, suggest that X was theoretically 'within the jurisdiction' of Germany, but its reasoning drew wholly on the special relationship between citizens of a state and the state's official representatives. Citizens, the Commission concluded, comprised a special class over whom a state might exercise jurisdiction even when they were outside the state's territory, by virtue of the enduring obligations of citizenship and the state's acceptance of various administrative responsibilities on their behalf. Among these obligations, the

[53] It is true that *Issa, supra* note 14, at para. 70, suggests the possibility that overall effective control of the territory may be sufficient to trigger state responsibility under the Convention even if there is no proof that the state 'actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory'. On the facts of *Issa*, however, the Court found insufficient evidence either that Turkey exercised effective control over the region in Iraq where the shepherds were located, or that the Turkish armed forces were responsible for the shepherds' deaths. The English House of Lords considered this issue in *Al-Skeini, supra* note 2, and concluded that the language in *Issa* provided an insufficient foundation for assuming that the Court would extend jurisdiction in cases where state agents did not possess custody or direct control over an individual whose rights were then violated.

[54] This premise is specifically enshrined in the Vienna Convention on Diplomatic Relations, in Art. 3(1) ('[t]he functions of a diplomatic mission consist, inter alia, in . . . (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law . . .').

Commission suggested, were the 'certain duties that a state's diplomats and consuls might perform for citizens resident abroad'.[55]

Similarly, while *X v. United Kingdom* stands for the proposition that '[t]he acts of State officials, including diplomatic or consular agents, bring persons or property under the jurisdiction of that State, to the extent that they exercise their authority in respect of these persons or that property', the authority in question was the authority of the British consul to intervene on behalf of X, a British citizen engaged in a domestic dispute with her Jordanian husband over the custody of her child. The authority, in other words, derived from the fact that representatives of the British state were taking overseas acts to administer and adjudicate rights for a citizen overseas just as they would for citizens at home. British authorities in Jordan had no effective control over any other category of persons or territory in Jordan, but they did retain and exercise an administrative function in relation to British citizens. Because the British consul met the Jordanian family and listed the name of X's child on her passport, the Commission concluded that the consul had adequately fulfilled his obligations.[56]

Another strand of diplomatic and consular cases extends jurisdiction on the basis of the functional control signatory states possess over their overseas embassies. *W.M. v. Denmark* involved claims made by W.M., a German citizen, who with 17 others had illegally entered the Danish embassy and stayed in the building in an effort to emigrate from the former German Democratic Republic to the Federal Republic of Germany. Danish diplomats originally made repeated requests for the 18 Germans to leave; the Danish ambassador ultimately called the GDR police when negotiations proved fruitless, resulting in the detention and interrogation of the Germans in the GDR. W.M. accordingly claimed that the Danish ambassador's actions had deprived him of his liberty in violation of Article 5, that Danish diplomats had confined him in the embassy, depriving him of the right to free movement under Article 2 of Protocol No 4, and that he had been expelled from the embassy without sufficient process, in violation of Article 1 of Protocol No 7. The judgment in *W.M.* cited the ostensibly sweeping language from *X v. United Kingdom* quoted above. Yet all of W.M's claims turned on the assumption that the Danish embassy was essentially Danish territory and that W.M. had accordingly been the victim of an unlawful extradition from Danish territory to the custody of the GDR. The Commission rejected this proposition – embassies are not, as a matter of law, the sovereign territory of the state occupying them – but they do enjoy a special legal status in international law which appears to explain the Commission's underlying position in the case. The Commission found that it had jurisdiction over the acts of the Danish ambassador under Article 1, on the ground that the Danish ambassador had brought W.M. and the others within Denmark's jurisdiction through his 'exercise [of] authority over such persons or property'. His authority, however, depended on the fact that, while embassy territory is not formally part of the occupying state, the Danish mission was inviolable to Germany without Danish consent.

[55] App. No. 1611/62, *X v. Germany*, 25 Sept 1965, 8 *Yrbk ECHR*, at 168.

[56] App. No. 7547/76, *X. v. United Kingdom*, ECommHR, 15 Dec. 1977, 12 DR (1977) 73.

Germany was thus not capable of exercising control over W.M. or his compatriots as long as they remained within the Danish embassy.[57]

The embassy, then, is territory over which a sending state possesses something close to 'effective control', albeit with the consent of the receiving state.

Viewed in this way, the case of *Hess v. United Kingdom*, though not technically a case involving diplomats or consular officials, fits the general logic of this exception. *Hess* involved a challenge to Britain's administration of Spandau Prison, a facility outside Berlin which the four Allied victors had established at the end of the war to house German war criminals. By the mid-1960s, Rudolf Hess was the sole remaining prisoner, and thus he was held for years in solitary confinement by default. His widow claimed that this violated Britain's obligations under the European Convention. The Commission found the case to be outside the boundaries of Article 1 on the ground that Britain was only one of four Allies administering the prison and therefore lacked any conclusive control over its administration.[58] *Banković* made no effort to fit *Hess* within the four extraterritorial exceptions it articulated, while scholars like Ralph Wilde have suggested that *Hess* was really about the Allies' extraterritorial control over the person of Rudolf Hess.[59] However, *Hess* turns on the special nature of Spandau Prison as an island of non-sovereign territory in the middle of Germany. Germany had no ability to control any aspect of Spandau Prison; only the four Allied powers could dictate its administration, and it was functionally under their joint sovereign control. Had Britain been the only Allied power in charge, Spandau Prison would have come under its jurisdiction for the purposes of the Convention.[60] *Hess* thus confirms a general principle running through the Court's diplomatic and consular cases: jurisdiction extends in these cases because they involve a signatory state's functional exercise of sovereignty, whether in performing state administrative functions on behalf of its own citizens abroad or in its functional control over its overseas embassies.

B *'Extraterritorial Effects' Cases*

The 'extraterritorial effects' exception to territorial jurisdiction is a misnomer born of a historical misinterpretation of the underlying case law. Its sole exemplar is *Drozd and Janousek v. France and Germany*; the exception derives from the Court's assertion in that case that '[t]he term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory'.[61] On its face, the exception appears enormously broad, potentially providing a justification for extraterritorial jurisdiction over virtually any extraterritorial act.

[57] *W.M. v. Denmark*, *supra* note 51.

[58] App. No. 6231/73, *Ilse Hess v. United Kingdom*, ECommHR, 28 May 1975, 2 DR 72.

[59] See Wilde, *supra* note 34, at 797.

[60] See *Hess*, *supra* note 58, at 73.

[61] App. No. 12747/87, *Drozd and Janousek v. France and Spain*, ECommHR, 26 June 1992, 14 EHRR (1992) 445.

Nor do the facts of *Drozd* illuminate the contours of the exception, since, as the Court recognized, the facts of the case were *sui generis*. The applicants were two criminals convicted of theft in the Andorran courts. Though not itself a signatory to the Convention, Andorra enjoys a peculiar status in international law as a state administered jointly by two state signatories, France and Spain. The applicants accordingly challenged the legality of the criminal proceedings on the ground that the French and Spanish judges in the case were acting as representatives of their home judiciaries and essentially treating the Andorran proceedings as if they were a joint Franco-Spanish judicial effort, thereby bringing the proceedings 'within the jurisdiction' of France and Spain.[62] The case, then, certainly had nothing to do with actions taken inside France and Spain, producing effects in Andorra; it concerned the effects of extraterritorial actions taken in Andorra by French and Spanish judicial officers, and thus it offers no sense of the exception's limitations at all.

More broadly, the Court's pronouncement on 'extraterritorial effects' seems incongruous with the facts of *Drozd* because it was never intended as an exception to fit that case in particular. Instead, as the citations in *Drozd* make clear, the Court was attempting to articulate a general rule uniting all its extraterritorial jurisprudence to date, including cases now classified under 'effective control' and diplomatic and consular cases.[63] Having articulated a general rule for extraterritorial jurisdiction, however, the Court failed to explain why *Drozd* resembled any of the accepted instances of extraterritorial jurisdiction. Given the Court's emphasis on the singular nature of the case, it did at least suggest that *Drozd* would require some other justification beyond the existing categories of extradition, effective control, or diplomatic and consular cases, but it failed to provide any further analysis.[64] Rather than clarifying this missing logic, subsequent cases instead simply treated the general 'extraterritorial effects' rule articulated in *Drozd* as if it were the specific and discrete justification tailored to that case. Thus, the exception has now evolved to extend jurisdiction where acts by the authorities of a signatory state, whether inside or outside its territorial boundaries, produce extraterritorial effects.[65] The 'extraterritorial effects' exception is thus not an exception which may swallow the rule; it is the poorly incorporated legacy of a single case which attempted to provide a broader justification for the principle of extraterritorial jurisdiction.

For all the misinterpretation involved in establishing the 'extraterritorial effects' exception, *Drozd* nonetheless merits its own category. *Drozd* concerns another form of 'effective control' distinct from the functional control extended by military action: effective

[62] *Ibid.*, at para. 77.

[63] *Ibid.*, at para. 91 ('[t]he term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory (see the Commission's decisions on the admissibility of Applications no. 1611/62, X v. the Federal Republic of Germany, 25 September 1965, Yearbook, vol. 8, p. 158; no. 6231/73, Hess v. the United Kingdom, 28 May 1975, Decisions and Reports (DR) no. 2, p. 72; nos. 6780/74 and 6950/75, Cyprus v. Turkey, 26 May 1975, DR 2, p. 125; nos. 7289/75 and 7349/76, X and Y v. Switzerland, 14 July 1977, DR 9, p. 57; no. 9348/81, W. v. the United Kingdom, 28 February 1983, DR 32, p. 190)').

[64] *Ibid.*, at para. 89.

[65] See, e.g., *Loizidou v. Turkey, supra* note 8, at para. 62; *Banković, supra* note 6, at para. 69.

control of another country's administrative institutions by virtue of custom and long-standing sovereign arrangements. The Court found *Drozd* inadmissible because, as a factual matter, it determined that France and Spain did not exercise 'effective control' over Andorra's judicial institutions; the French and Spanish judges were instead separated from their ordinary functions in the French and Spanish systems and appropriated into the distinct operations of the Andorran judiciary. Had France and Spain instead treated the Andorran judiciary as a jointly administered annex of their own judicial systems, the Court suggested, the outcome would have been different.[66] Thus, *Drozd* suggests a corollary to the conventional 'effective control' cases: where a signatory state has effective control over a defined sovereign or institutional function of another state, it brings the administration of that function within its jurisdiction, and it may be liable for breaches of the Convention taken in the course of its administration. Like 'effective control' established by military action, this form of 'effective control' is territorial in the sense that a signatory state is effectively incorporating another state's institution and treating it as if it were a subset of its own domestic institutions, as part of its own state.

C *Expulsion and Extradition Cases*

While the legal scholarship has overwhelmingly seized upon the extraterritorial acts in so-called 'irregular extradition' cases like *Öcalan* and has treated expulsion cases as a false category of extraterritorial jurisdiction, extradition and expulsion cases in fact share a common rationale for counting extraterritorial acts under Article 1. Both consider an individual entitled to allege violations of Convention rights because the wrongful act occurs either immediately before (extradition) or immediately after (expulsion) the individual is within a signatory state's territory. Jurisdiction extends in these cases, in other words, because the wrongful act – whether it is a procedurally flawed extradition or an expulsion contemplated without sufficient guarantees of humane treatment in the receiving country – is directly connected to the individual's territorial presence in a signatory state, and the signatory state is accordingly responsible for the conditions under which it brings someone into its country and forces him to leave.

Expulsion cases appear on their face to be solely concerned with events within a signatory state's territory because the thresholds for signatory states' culpability for violations of the prohibitions on torture (Article 3) and the right to life (Article 2) are so low. In many of these cases, the signatory state is responsible for violating the Convention when it fails to show with a high degree of certainty that the individual in question would not face a risk of torture if returned to the would-be receiving country.[67]

[66] *Ibid.*, at paras 92–98.

[67] See, e.g., App. No. 37201/06, *Saadi v. Italy*, 28 Feb. 2008, not yet reported (holding that Italy could not expel the applicant to Tunisia consistently with its Art. 3 obligations where Tunisia's human rights record and its relatively unspecific assurances failed to offer sufficient certainty that Saadi would not be tortured on his return); App. No. 22414/93, *Chalal v. United Kingdom*, 15 Nov. 1996, 23 EHRR (1996) 413 (holding that the UK could not expel the applicant to India consistently with its Art. 3 obligations even where India conveyed fairly specific assurances as to his humane treatment where India lacked sufficient control over regional security officials).

In such cases, the individual in question is in the signatory state and has not suffered any actual harm; all harm is prospective, and thus scholars have considered these cases essentially territorial rather than extraterritorial.[68] However, the Convention would be violated in graver variants as well. For instance, if a signatory state managed to expel an individual without establishing a sufficient certainty that he would not be subject to torture or cruel, inhuman, or degrading treatment and he proceeded to suffer such harms at the hand of the receiving country's authorities, the individual would still be 'within the jurisdiction' of the Convention for the purposes of Article 1. Though the signatory state is not actually engaging in the prohibited conduct itself, it incurs responsibility under Article 1 because it is the termination of its territorial ties with the individual which provokes the subsequent, foreseeable violation. As the Commission noted in *Soering v. United Kingdom*, the landmark case establishing this exception, Article 1 'sets a limit, notably territorial, on the reach of the Convention'. It does not impose a duty on signatory states to control the acts of non-signatories in order to secure Convention rights to those 'within their jurisdiction'. Yet, the Commission concluded, 'These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for any and all foreseeable consequences of extradition suffered outside their jurisdiction.'[69]

Extradition cases, then, should not be read as cases where jurisdiction extends to isolated extraterritorial acts taken by a signatory state outside the *espace juridique* of the Convention; they are instead the inverse of expulsion cases, and fall under the extraterritorial exception for similar reasons. The acts of the Turkish officials in *Öcalan* could be brought before the European Court for the same reason that the British officials in *Soering*, seeking to extradite Soering to the United States, would have been responsible had the United States proceeded with its plans to impose the death penalty. The principle is the same: when a signatory state forcibly brings an individual within its territory or forcibly expels him from it, it must in both instances comply with the procedures and rights enshrined in the Convention. It is because the individual is ultimately *present* in the state – whether as a result of extradition or pending expulsion – that related acts fall 'within the jurisdiction' of signatory states under Article 1.

Thus, in *Stocké v. Germany*, one of the earliest irregular extradition cases, the Commission was willing to consider Stocké's claim that he had been tricked into boarding an aeroplane in Luxembourg which ultimately took him to Germany to face trial because it considered that the justness of his ultimate imprisonment in Germany would have been impugned if his extradition had been carried out in violation of international

[68] See *supra* note 49.

[69] See *Soering v. United Kingdom, supra* note 45, at para. 86. In *Soering*, the applicant, who was accused of conspiring with his American girlfriend in the killing of her parents, successfully argued that Britain could not extradite him to the US without violating Arts 2 and 3 of the Convention, since US authorities were unwilling to guarantee that Soering would not face the death penalty and the ECtHR further concluded that the 'death row phenomenon' would constitute cruel, inhuman, and degrading treatment contrary to Art. 3.

law.[70] Similarly, in *Sanchez-Ramirez v. France*, the case regarding the irregular extradition of Carlos the Jackal from Sudan to France, the Commission suggested that the manner in which French authorities apprehended Carlos the Jackal was problematic only in so far as France's actions violated either French domestic arrest procedures or international law. In other words, because Carlos the Jackal was first taken into French custody in Sudan and remained in French custody all the way up to his trial and imprisonment, the Commission undertook an examination of whether French authorities followed the proper procedures for his apprehension.[71] Though the French authorities seized him abroad, by examining whether they complied with the terms of a French arrest warrant the Commission essentially treated Carlos the Jackal's apprehension in Sudan as if it had occurred within France. As the Commission observed:

> According to the applicant, he was taken into the custody of French police officers and deprived of his liberty in a French military aeroplane. If this was indeed the case, from the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction, of France, even if this authority was, in the circumstances, being exercised abroad.

France's subsequent prosecution and imprisonment of Carlos the Jackal effectively converted its authorities' extraterritorial actions in arresting him into acts within its jurisdiction for purposes of Article 1.[72]

Under this interpretation, *Öcalan* emerges not as the European Court's boldest endorsement of jurisdiction purely based on a signatory state's extraterritorial control over an individual but as a further confirmation of the principles set out in *Stocké* and *Sanchez-Ramirez*. The Grand Chamber in *Öcalan* presumed jurisdiction under Article 1 in little more than a sentence, an almost inconceivable move if the Grand Chamber were intending dramatically to expand the scope of Article 1 jurisdiction. Instead, the Grand Chamber could so quickly consider Öcalan under Turkish authority and jurisdiction from the moment of his apprehension in Kenya because it was relying on established law. Indeed, the Grand Chamber borrowed the language from *Sanchez-Ramirez* almost verbatim to conclude that it had jurisdiction to consider the conditions of Öcalan's seizure in Kenya because 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Art 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'.[73] When making extraterritorial arrests and captures, then, the signatory state is treated as if it is exercising the sovereign function of arrest in its own country; the fact that the capture is the initial part of a process of trial and imprisonment within the signatory state converts it into the equivalent of a sovereign act.

[70] App. No. 11755/85, *Stocké v. Germany*, 11 EHRR (1989) 46, at paras 158–166. Specifically, the Commission framed its Art. 1 analysis by noting that 'the lawfulness of the applicant's deprivation of liberty must also be established in the light of the events resulting in this act, namely the alleged activities of German authorities before the arrest of the applicant who was resident in France': at para. 166.

[71] App. No. 28780/95, *Illich Sanchez Ramirez v. France*, ECommHr, decision of 24 June 1996, DR 86, at 155–162.

[72] *Ibid.*, at 161–162.

[73] *Öcalan*, *supra* note 18, at para. 91.

Like the other categories of extraterritorial jurisdiction under the Convention, then, extradition and expulsion cases illuminate a fundamental assumption: extraterritorial jurisdiction extends only where the state is exercising something close to functional sovereignty. In 'effective control' cases, this functional sovereignty takes the form of *de facto* control over another state's territory. In diplomatic and consular cases, it takes the form of quasi-sovereign functions within an embassy or in relation to a signatory state's own citizens. In *Drozd*, the 'extraterritorial effects' case, jurisdiction would have extended only if the signatory states involved had possessed effective control over another state's administrative organs. Finally, in extradition and expulsion cases, signatory states bring extraterritorial acts within their jurisdiction because of the subsequent or preceding territorially based control they exercise over an individual within their borders; the extraterritorial acts are so foreseeably and inextricably linked to the individual's presence in the state's territory that they become within the state's jurisdiction.

6 Conclusion

The European Court's seemingly inconsistent treatment of exceptions to territorial jurisdiction becomes a coherent body of law when these cases are viewed as manifestations of a territorially centred rule. While this reflects a descriptive effort to construct meaning and consistency from the case law, it ultimately points towards a normative justification for the Court's extraterritorial jurisprudence as well. By extending extraterritorial jurisdiction only to cases where a signatory state is essentially exercising functional sovereignty abroad, the Court strikes a balance between the twin, competing purposes of the Convention as a regional, European instrument and as a universalist charter for human rights. The balance struck by the case law is flexible, extending jurisdiction beyond the default rule of pure territoriality but limiting it short of treating all extraterritorial acts as if they occurred within the *espace juridique* of the Convention. The meaning of 'jurisdiction' under Article 1 is thus an intensely pragmatic definition, reflecting the realistic constraints of the system and a sense of comity; it eliminates some, but not all, categories of legal black holes. Yet it is also a sufficiently flexible definition to be able, over time, to evolve outwards further, as European signatories expand not only the nature and number of their extraterritorial acts but their degree of involvement in other countries. 'Within their jurisdiction' is a phrase which serves as the rudder of the European Convention, expanding in response to perceived needs and novel factual scenarios but refusing expansion when to do so might overwhelm the system and overstep the limitations perceived and accepted by signatory states. The European Court, having assumed the power to define instances of extraterritorial jurisdiction on the basis of little more than an ambiguous text and a sense of practical need, is trusted by signatory states to proceed pragmatically and avoid the imposition of unrealistic obligations.

For those hoping to extend the current scope of the Court's extraterritorial jurisdiction, this analysis suggests that the Court's case law offers few grounds for attempting to extend jurisdiction to a 'control entails responsibility' rule. If jurisdiction is to

be expanded further abroad and signatory states are to avoid legal black holes, the answer may come not from the Court but from the political sphere, as signatory states are pressured voluntarily to assume that Convention obligations apply beyond where the law has drawn the line. Britain, for instance, accepted as a matter of policy that the European Court could hold it accountable for violations of the Convention which occur while Iraqis are in the custody of the British military in a British detention facility in Basra.[74] As the European Convention becomes the fundamental document governing the permissible scope of state action for signatory states at home, its principles look increasingly sacrosanct and the political costs of violating these principles abroad, even if legally permitted, can only grow larger. It would be a mistake to see the European Court as a means of imposing an unnaturally expansive view of extraterritorial jurisdiction on signatory states, yet this does not suggest that the project of extending human rights protections beyond the heart of Europe has no place in the Convention's future.

[74] See *Al-Skeini, supra* note 2, at para. 88 (Baroness Hale's judgment).