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Extraterritoriality in the European Convention on Human Rights and the case law of the European Court of Human Rights: between expansion and restriction

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A mia nonna Tittina,
mio pilastro, maestra di vita e angelo custode.

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List of abbreviations

ACHR	American Convention on Human Rights
CoE	Council of Europe
CM	Committee of Ministers
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ENMOD	Environmental Modification Convention
ESC	European Social Charter
EU	European Union
FRY	Federal Republic of Yugoslavia
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Right
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organization
ISAF	International Security Assistance Force
MRT	Moldavian Republic of Transdniestria
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OTP	Office of the Prosecutor
PACE	Parliamentary Assembly of the Council of Europe
PRT	Provincial Reconstruction Team
RTS	Radio Televizije Srbije

TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	UN Convention on the Rights of the Child
VCLT	Vienna Convention on the Law of Treaties

Introduction

"Our success as an Organisation – and as a continent – relies on our member states' determination to do the right thing: to invest in human rights, democracy and the rule of law as the basis of a just future"[1].
(Marija Pejčinović Burić, Secretary General of the Council of Europe)

The effective protection and safeguarding of individual human rights is still to this day a fundamental mission, not to say a continuous challenge, for modern society. Indeed, the Western civilisation is still witnessing gross and continued human rights violations, even many decades after the atrocities which had inspired and triggered the institutionalization of systems of human rights protection. Even if States still represent important actors in the safeguarding of human rights, being the main sovereign and independent subjects of international law[2] and in light of their proximity to individuals, international organizations also have implemented their role in this field, both at the universal and regional levels[3]. In this respect, their courses of actions could be categorised in raising awareness, standard-setting, monitoring and enforcement. While the first aspect is self-explanatory, the second consists of the elaboration of body of laws enshrining the individual human rights, while the monitoring and enforcement activity has the purpose of verifying and boosting, with judicial or non-judicial instruments, the compliance of States' conduct with the human rights norms and procedures. In this regard, at the universal level, it is fundamental to mention the work of the United Nations. This has consisted so far of the adoption of the Universal Declaration of Human Rights ('UDHR') which, together with the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR') forms what can be conceived as an International Bill of Human Rights[4]. Beyond its engagement in human rights standard-setting, the monitoring and enforcement activities are carried out both by charter-based bodies, like the Human Rights Council, and treaty-based bodies, like the Human Rights Committee ('HRC') for the ICCPR[5]. At the regional level, it is necessary to refer to the work of the Organization of American States ('OAS'), the African

[1] Council of Europe, 4 May 2022, *Secretary General - Europe must remain resilient in the face of aggression and war*, Newsroom, accessed 28 May 2022, https://www.coe.int/en/web/portal/-/secretary-general-europe-must-remain-resilient-in-the-face-of-aggression-and-war.
[2] RONZITTI (2016: 16).
[3] KLEIN (2007: no pagination).
[4] *Ibid.*
[5] *Ibid.*

Union, while, for what concerns the European continent, the activities of the European Union ('EU') but, most importantly, of the Council of Europe ('CoE').

This latter represents the institutional framework of this thesis, whose main focus is on the notion of jurisdiction and extraterritoriality in the European Convention on Human Rights ('ECHR') and the case law of its respective judicial body, the European Court of Human Rights ('ECtHR'). Against this background, the main research question of the current study concerns to what extent a more or less territorial interpretation of the notion of jurisdiction with respect to the ECHR would entail a narrower or wider scope of application of the Convention itself and, therefore, a more restrictive or extensive system of human rights protection. In order to answer to this research question, the analysis will proceed as follows.

Chapter I will be dedicated to outlining and defining the relevant institutional framework in which the European Convention on Human Rights is inserted and the activity of the European Court of Human Rights. The first part of the chapter will focus on investigating the historical path which led to the establishment of the Council of Europe, from the post-war period, through the first instances of European unity and collaboration, also in the field of human rights protection, until the signature and ratification of the CoE Statute. Subsequently, the analysis will concern the structure and main bodies of the Council of Europe, its Member States, its activities in general and those most closely related to the safeguarding of human rights. The second part of the chapter will be dedicated to the examination of the European Convention on Human Rights itself, its historical background and significance, its evolution and enlargement through the Protocols and the actual catalogue of rights, categorised according to different criteria, enshrined inside of the Convention. Finally, the third part of this first chapter will focus on the European Court of Human Rights, its historical evolution, its structure and functioning and finally its judiciary and advisory role.

Chapter II will focus on the concepts of jurisdiction and extraterritoriality within the European Convention on Human Rights. The former will be analysed after having outlined the relevant interpretative framework, comprising the norms set out in Vienna Convention on the Law of Treaties and the specific guidelines concerning human rights treaties and the ECHR itself. The notion of jurisdiction will then be studied from an objective perspective, without referring to the ECtHR jurisprudence or to the academic debate. Indeed, the jurisdiction clause of the Convention, Article 1 ECHR, will be introduced, compared to other jurisdiction clauses and examined in light of its wording itself, the object and purpose of the Convention and its *travaux préparatoires*. The concept of jurisdiction, as employed in the above-mentioned provision, will then be distinguished from other similar notions, like jurisdiction under public international law, judicial

jurisdiction, attribution and admissibility. Finally, the concept of extraterritoriality will be defined as well.

Chapter III will be dedicated more closely to the case law of the European Court of Human Rights concerning State jurisdiction, as in Article 1 ECHR, its extraterritorial exercise and therefore the scope of application of the Convention itself. Different reports and judgments issued respectively by the European Commission of Human Rights and the European Court of Human Rights will be examined, in order to show the evolution in the jurisprudence. These are *Cyprus v. Turkey*; the landmark case *Loizidou v. Turkey*, also in comparison to some other international jurisprudence for what concerns attribution and State responsibility; *Banković and others v. Belgium and others*, a decisive case for the ECtHR position on extraterritorial jurisdiction. Subsequently, the post-*Banković* jurisprudence will be examined, namely *Ilaşcu and Others v. Moldova and Russia*, *Issa and Others v. Turkey*, *Al-Skeini and Others v. the United Kingdom*, *Hassan v. The United Kingdom* and the most recent *Hanan v. Germany*. These particular cases were selected because they are among the most significant ones to show how the ECtHR's approach towards State jurisdiction and the extraterritorial application of the ECHR changed throughout its case law.

Chapter IV will tackle, instead, the doctrinal debate concerning jurisdiction in the ECHR and extraterritoriality. In this regard, the most significant scholarly interpretations of State jurisdiction as employed in Article 1 ECHR will be introduced, with their respective critiques and integrations. This is to show the diversity in the doctrine and how this reflects the changes in the ECtHR case law.

Finally, the conclusion will summarize the results of the analysis and attempt to answer to the research question, presenting also in the end new insights coming from academia and the international jurisprudence, in order to suggest a further development and evolution of the position of the European Court of Human Rights on the issue of the extraterritorial exercise of jurisdiction and, therefore, application of the ECHR.

Chapter I. The European Convention on Human Rights and the Strasbourg Court

1.1 The institutional framework: the Council of Europe

In the wake of the atrocities of World War II, the need for a system to prevent future attacks against democracy and human rights began to be perceived more and more urgently on the European political scene[6]. In this regard, the shared viewpoint was to turn to new and more effective international arrangements. However, despite this community of purpose, the path towards the establishment of an organization such as the Council of Europe (CoE) was not clearly defined from the beginning nor smooth and easy. In fact, the "embryonic"[7] political project at the root of the Council can be traced as far back as the Franco-British Union of 1940. This design involved prominent figures of both the British and French governmental and diplomatic spheres, such as Winston Churchill, Charles De Gaulle, the French Prime Minister Paul Reynaud and Jean Monnet. The core of this innovative political project was enshrined in a Declaration submitted in Bordeaux to the French Council of Ministers. This statement envisaged an instrumental "fusion [or] absorption"[8] between the two nations, regulated by a constitution and expressed in joint institutions and citizenship. While ultimately proving unsuccessful, this first and circumscribed experiment of "European unity"[9] paved the road for subsequent initiatives and ideas. Some significant examples would be the program adopted by resistance movements in 1944 mentioning a federal union, Spaak's suggestion of a Western European association of countries, or Churchill's words foreshadowing, already in 1942, a "council of Europe"[10] and the "United States of Europe"[11]. Along these same lines, Churchill held his famous speech at the University of Zurich four years later, again suggesting a new and structured European arrangement[12]. This shared need for a European unity represented also the basis for another organizational project,

[6] GREER, GERARDS, SLOWE (2018: 5); POLAKIEWICZ (2019: no pagination).
[7] PETAUX (2009: 38).
[8] PETAUX (2009: 36) explains how the Franco-British Union represented a third way compared with the two alternative models – federalism and intergovernmental – which would have emerged later on in the political debate.
[9] POLAKIEWICZ (2019: no pagination).
[10] SCHUMAN (1951: 725); JUDT (2005: 155); PETAUX (2009: 38).
[11] SCHUMAN (1951: 725); PETAUX (2009: 38). The statement referred to here is drawn from a letter written by Churchill to the War Cabinet in October 1942 and first made public in 1949, in which he claimed: "I trust that the European family can act unitedly as one under a council of Europe. I look forward to a United States of Europe in which barriers between the nations will be greatly minimised and unrestricted travel will be possible".
[12] PETAUX (2009: 39-40).

which much later would have translated into today's European Union. However, despite the common cultural heritage and values, as the rule of law, human rights and democracy, the EU path followed a much more functionalist logic, starting from the economic common ground and ending with an international organization *sui generis* with a strong supranational character[13]. Concurrently with Churchill's speech in Zurich, a lively political debate on the matter arose and started showing a first major division. On the one hand, there were the so-called "unionists"[14] or "intergovernamentalists"[15], advocating for a looser form of inter-state cooperation, not involving transferred or shared sovereignty. On the other hand, instead, the "federalists"[16] supported a fully integrated organization of supranational nature, despite showing different nuances within them. There were, indeed, federalists who identified as "maximalists"[17] or "hard-liners"[18] and were in favor of a strong central authority established at once, while the "moderates"[19] affirmed a more gradual[20] path towards federalism. This ideological fragmentation could also be found on the occasion of the well-known Hague Congress of 1948. At this conference, Churchill himself renewed his proposal of a European organization, as mentioned in the Zurich speech. Finally, the Hague Congress ended with a general agreement to "establish a kind of federal structure of the various pan-European initiatives"[21], which led to the creation of the European Movement in October 1948. It was exactly this association which triggered the process of establishment of the Council of Europe, whose first protagonists were the countries of the Western Union– Belgium, France, Luxembourg, the Netherlands and the United Kingdom –, created after the signing of the Brussels Treaty in 1948. These five Brussels Treaty powers finally agreed in London on the establishment of an intergovernmental Council of Europe with two main bodies and the involvement of other European nations. Not too long after, on 5 May 1949, the Statute of the Council of Europe was signed in London by ten founding States: the Brussels Treaty nations, Ireland, Italy, Denmark, Sweden and Norway[22].

[13] VILLANI (2017: 1-25).
[14] PETAUX (2009: 41).
[15] GREER, GERARDS, SLOWE (2018: 6).
[16] PETAUX (2009: 41); GREER, GERARDS, SLOWE (2018: 6).
[17] PETAUX (2009: 45).
[18] *Ibid.*
[19] *Ibid.*
[20] YOUNG (2010: 51).
[21] PETAUX (2009: 47).
[22] SCHUMAN (1951: 729); PETAUX (2009: 49); GREER, GERARDS, SLOWE (2018: 8); POLAKIEWICZ (2019: no pagination).

The CoE Statute, also referred to as Treaty of London, constitutes a multilateral written agreement concluded by States and governed by public international law[23], establishing a full-fledged intergovernmental organization endowed with international legal personality[24]. Hence, the Council of Europe qualifies as international organization and its purpose, core values and aim are expressed both in the Preamble and Article 1 of its Statute. Indeed, on the one hand, the Preamble affirms the signatory countries' "devotion"[25] to common European values as freedom and the rule of law, their interest in "economic and social progress"[26] and the necessity for a closer form of cooperation. On the other hand, in a more specific way, Article 1 (a) of the Treaty of London states: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress"[27]. Being the "first political organization in the post-war Europe"[28], the aim of the Council of Europe is presented in quite broad terms. However, as set out in paragraph c of the same provision, the Council's mission is not to interfere with the activity of other international organizations. In addition, Article 1 (d) specifies that "matters relating to national defence do not fall within the scope of the Council of Europe"[29]: in fact, at the time, they were already within the remit of the North Atlantic Treaty Organization ('NATO'), established in April 1949[30].

Nowadays, the Council of Europe counts forty-six Member States[31], all belonging to the same regional area: in this respect, it could be considered an international organization with "limited membership"[32] on a geographical basis. The only exceptions to this pattern, that are not Members of the Organization, are Kosovo and Belarus, due to the latter's deficiencies in the protection of human rights. However, at the same time, non-European countries enjoy the status of observer: Japan, Canada, the United States of America, Israel – only to the Parliamentary

[23] KLABBERS (2015: 11).
[24] KLABBERS (2015: 46).
[25] Council of Europe, 5 May 1949, ETS 1, *Statute of the Council of Europe*.
[26] *Ibid.*
[27] *Ibid.* Article 1(a).
[28] POLAKIEWICZ (2019: no pagination).
[29] Council of Europe, *Statute of the Council of Europe*. Article 1(d).
[30] GREER, GERARDS, SLOWE (2018: 9); POLAKIEWICZ (2019: no pagination).
[31] Council of Europe, 2022, *46 Member States*, accessed 28 March 2022, https://www.coe.int/en/web/portal/46-members-states. The number of the Council of Europe's Member States underwent a recent change: on 15th March 2022, the Russian Federation was in fact expelled from the Council, pursuant to Article 8 of the CoE Statute, bringing the total number of Member States from forty-seven to forty-six.
[32] KLABBERS (2015: 24).

Assembly –, the Holy See and Mexico[33]. The membership issue is regulated from Article 2 to Article 9 of the CoE Statute. In particular, Article 3 sets out the conditions – besides the geographical factor – to become a Member of the Council:

> "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1"[34].

According to this provision, which reintroduces the important legal term 'jurisdiction' which is also mentioned in Article 1 ECHR, the applying State thus undergoes a strict scrutiny[35]. Furthermore, the fundamental requisites mentioned, namely the respect of individual rights and freedoms and the rule of law, obviously represent the conditions to access to but also to remain in the Council. Once verified that these requirements are fulfilled by the applicant State, the implementation of the accession procedure is based on the final decision of the Committee of Ministers[36] upon favorable opinion of the Parliamentary Assembly[37]. It is interesting to see how the CoE Statute even foresees a limited form of involvement, the associate membership[38], which entails the right to representation only in the Parliamentary Assembly. By contrast, as for many other international organizations[39], a CoE Member State could withdraw[40] from the Council or, in case of serious violations of Article 3, be suspended or expelled[41], as in the recent case of the Russian Federation[42].

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[33] Council of Europe, 2022, *46 Member States*, accessed 28 March 2022, https://www.coe.int/en/web/portal/46-members-states.
[34] Council of Europe, *Statute of the Council of Europe*. Article 3.
[35] POLAKIEWICZ (2019: no pagination).
[36] Council of Europe, *Statute of the Council of Europe*. Article 4, indeed, states: "Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute".
[37] POLAKIEWICZ (2019: no pagination).
[38] Council of Europe, *Statute of the Council of Europe*. Article 5.
[39] SCHERMERS, BLOKKE (2008: no pagination).
[40] Council of Europe, *Statute of the Council of Europe*. Article 7.
[41] Council of Europe, *Statute of the Council of Europe*. Article 8.
[42] Council of Europe, 16 March 2022, *The Russian Federation is excluded from the Council of Europe*, Newsroom, accessed 28 March 2022, https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe. Moreover, as mentioned in this same press release, "the Government of the Russian Federation informed the Secretary General of its withdrawal from the Council of Europe in accordance with the Statute of the Council if Europe and of its intention to denounce the European Convention on Human Rights".

The political debate that has marked the process of formation of the Council of Europe finally ended in a compromise favoring mostly the intergovernmentalist side. This was perfectly evident from the original CoE Statute and the institutional balance outlined in it. Three bodies are listed in Article 10 of the Statute: "The organs of the Council of Europe are: i. the Committee of Ministers; ii. the Consultative Assembly. Both these organs shall be served by the Secretariat of the Council of Europe"[43]. However, the Committee of Ministers ('CM') appeared to be from the beginning the real policy-making core of the organization, by acting "on behalf of the Council of Europe"[44]. As it can be guessed from its denomination, the Committee of Ministers is composed officially of the Ministers of Foreign Affairs, one for each Member State and endowed with one vote. However, in practice, the Ministers can be and are usually replaced by their permanent alternates[45]. Being the main decision-making and executive body of the Council, the Committee of Ministers adopts recommendations and conventions in order to promote the organization's aim and mission. Moreover, it takes decisions concerning the membership, elaborates internal protocols, manages the budget, and also carries out a monitoring activity[46]. For what concerns the voting procedure, Article 20[47] of the CoE Statute presents four different options:

> "- unanimity of the votes cast and a majority of the representatives entitled to sit on the Committee
> -a simple majority of the representatives entitled to sit on the Committee;
> -a two-thirds majority of the representatives entitled to sit on the Committee;
> -a two-thirds majority of the votes cast and a majority of the representatives entitled to sit on the Committee"[48].

Among these alternatives, the CoE Statute provides for most of the Committee's resolutions to be adopted with a two-thirds majority of the representatives. Nevertheless, in practice, the most important decisions are taken by consensus[49], voting procedure *par excellence* of the intergovernmentalist organizational model. In this respect, it is interesting to highlight that the Committee of Ministers is also

[43] Council of Europe, *Statute of the Council of Europe*. Article 10.
[44] Council of Europe, *Statute of the Council of Europe*. Article 13 states: "The Committee of Ministers is the organ which acts on behalf of the Council of Europe in accordance with Articles 15 and 16".
[45] Council of Europe, *Statute of the Council of Europe*. Article 14.
[46] SCHUMAN (1951: 731); BENOÎT-ROHMER, KLEBES (2005: 48-56); PETAUX (2009: 51-53); GREER, GERARDS, SLOWE (2018: 61-63); POLAKIEWICZ (2019: no pagination).
[47] Council of Europe, *Statute of the Council of Europe*. Article 20.
[48] BENOÎT-ROHMER, KLEBES (2005: 55).
[49] POLAKIEWICZ (2019: no pagination).

responsible for supervising the execution of the judgments of the European Court of Human Rights[50].

The Parliamentary Assembly of the Council of Europe ('PACE') represented a real innovation at the time of its establishment, as it "introduced for the first time the principle of parliamentary participation in international affairs"[51], which later on would have been adopted by many other international organizations. As it represented the only supranational element of a generally-intergovernmental organization, the role of the Assembly was more limited at the beginning[52]. This growth in the Assembly's authority and power in the CoE institutional balance is symbolically reflected in the change of its denomination in 1974, from Consultative Assembly to Parliamentary Assembly[53]. To this day, it is composed of 324 members elected by the national parliaments of the CoE Member States, according to the size and the main political parties of each State. As for its attributions, the Parliamentary Assembly submits recommendations to the Committee of Ministers reflecting the conclusions of its internal debates, takes decisions on matters which do not require the involvement of the Committee and appoints, among many, the CoE Secretary General, the judges of the European Court of Human Rights and the Commissioner for Human Rights[54].

This latter, together with the Secretariat, almost complete the institutional structure within the Council of Europe. If the Secretariat, on the one hand, represents the administrative pillar of the organization, the Commissioner for Human Rights is an innovative and additional tool at the Council's disposal, which well supplements the complex apparatus for the safeguarding of individual rights and freedoms set up under the European Convention on Human Rights.

1.2 The European Convention on Human Rights

The recognition and protection of human rights represented a major concern in post-war Europe and perfectly fitted into the general aim of the Council of Europe of enhancing greater unity as well as social and economic progress[55]. However, the focus on safeguarding individual rights and freedoms emerged even before the establishment of the Strasbourg-based organization. Indeed, apart from the work of the League of Nations – which covered mostly the protection of refugees and

[50] OETHEIMER, PALOMARES (2013: no pagination).
[51] *Ibid.*
[52] BENOÎT-ROHMER, KLEBES (2005: 69); PETAUX (2009: 58-63).
[53] POLAKIEWICZ (2019: no pagination).
[54] POLAKIEWICZ (2019: no pagination).
[55] Council of Europe, *Statute of the Council of Europe*. Article 1.

national minorities[56] – and the limited scope of the guarantees set out in the Constitution of the International Labor Organization ('ILO')[57], the instances for an international codification of individual human rights arose from the civil society at the previously mentioned Hague Congress in May 1948[58]. In this occasion, the adoption of a Charter[59] of human rights was theorized and this proposal was taken up again in 1949 by the European Movement and, later, by the Consultative Assembly of the newly-established Council of Europe in 1949. Despite the shared sentiment that the protection of human rights could not take second place any longer, there were again some disagreements on the project of the convention, both among CoE Member States, and among the Committee of Ministers and the Consultative Assembly. These differences concerned a number of elements: the extension and the accuracy of the catalogue of human rights, the issue of judicial review and the right of individual petition[60]. Nevertheless, after being submitted by the Consultative (now Parliamentary) Assembly to the Committee of Ministers, the proposed agreement on human rights was adopted relatively rapidly[61]. Indeed, the European Convention on Human Rights (ECHR) – officially entitled Convention for the Protection of Human Rights and Fundamental Freedoms[62] – was signed in Rome, at Palazzo Barberini, on 4 November 1950 by all the CoE Member States. Following its ratification by ten States, the Convention later entered into force on 3 September 1953[63]. The ratification of the ECHR is to this day a condition of membership for the Council of Europe[64].

Since November 1950, the European Convention on Human Rights has proved to be a dynamic and "living instrument"[65], to be inserted within the mission of the Council of Europe of safeguarding individual rights and freedoms through the legal tools of standard-setting and monitoring and enforcement mechanisms[66]. Indeed, over time, numerous protocols have expanded "the scope and substance"[67]

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[56] KLEIN (2007: no pagination); GREER, GERARDS, SLOWE (2018: 5).
[57] KLEIN (2007: no pagination).
[58] DÖRR (2017: 466).
[59] PETAUX (2009: 144); DÖRR (2017: 466).
[60] DÖRR (2017: 468); GREER, GERARDS, SLOWE (2018: 11).
[61] PETAUX (2009: 147).
[62] Council of Europe, 4 November 1950, ETS 5, *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.
[63] PETAUX (2009: 147); GREER, GERARDS, SLOWE (2018: 12). The CoE Member States at the time were: the founding States, Greece, Iceland, Turkey and the Saarland Protectorate, which later became part of the Federal Republic of Germany.
[64] SHELTON (2003: 97).
[65] GREER, GERARDS, SLOWE (2018: 21).
[66] KLEIN (2007: no pagination).
[67] DÖRR (2017: 468).

of the ECHR. The main text of the Convention contains nowadays three sections, which follow Article 1 ECHR stating: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms define din Section I of this Convention"[68]. Afterwards, Section I lists a number of positive and negative obligations, which could be categorized according to the human sphere and activities they refer to. Firstly, there are those provisions concerning the individual's personal physical integrity and freedom, with the right to life set out in Article 2, which is to be understood as an obligation for the Member States to refrain from unlawfully depriving an individual of his or her life and to actively engage in the protection of such right. Articles 3 and 4 ECHR, establishing respectively the prohibition of torture and slavery and forced labor, also would belong to the above-mentioned group of obligations, along with Article 5 ECHR, stating the right to liberty and security, except for some lawful procedures of arrest and detention. The second category taken into consideration would be that of the protection of the individual's private and public life, with comprised in it also those obligations concerning political activity and communication. In this regard, one must mention Article 8 ECHR, establishing the right to respect for private and family life, and Article 12 ECHR, which lays down the right to marry. In addition, Articles 9-11 ECHR mention the freedom of thought, conscience and religion, expression and assembly and association, while Article 16 ECHR recalls these latter provisions in stating that "nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens"[69]. A third typology of provisions is related to judicial procedures: in this respect, Article 6 ECHR states the right to a fair trial, Article 7 ECHR establishes that no individual could undergo punishment for an act not considered unlawful when committed, while Article 13 ECHR sets out the right to an effective remedy[70]. The other provisions at the end of Section I concern the implementation of the Convention. Indeed, Article 14 ECHR is the non-discriminatory clause which states the equal "enjoyment of the rights and freedoms set forth in [the] Convention"[71] by all individuals. In addition, Article 15 ECHR regulates the conditions under which a signatory State might derogate from its obligations set forth by the Convention, while Articles 17 and 18 ECHR establish respectively the prohibition of abuse of rights in the name of the application of the Convention and the limitation on the use of restrictions on rights. Section II then regulates the control and enforcement mechanism of the

[68] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 1.
[69] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 16.
[70] DÖRR (2017: 468).
[71] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 14.

ECHR and, therefore, the organization of the European Court of Human Rights (ECtHR), as it will be seen further. Finally, Section III contains miscellaneous provisions concerning: the Secretary General (Article 52 ECHR) and the Committee of Ministers (Article 54 ECHR), the exclusion of other means of dispute settlement (Article 55 ECHR) and the legal relationship between the signatory States and the Convention in terms of territorial application, reservations, denunciation, signature and ratification.

As already anticipated, this main skeleton of the European Convention on Human Rights is enlarged, both in terms of obligations and procedures, by different additional and amending protocols. As for the first aspect, in 1952 the Additional Protocol[72] firstly added the protection of property, the right to education and the right to free elections: these, before the signature of the ECHR itself, represented controversial obligations and, in the end, were not included in the original text of the Convention[73]. Moreover, eleven years later, Protocol No. 4[74] introduced the prohibition of imprisonment for debt, the freedom of movement and of choice of residence and the prohibition of expulsion of nationals and of collective expulsion of aliens. Later on, another historical passage was marked by Protocol No. 6[75] and the historical abolition of death penalty in time of peace, followed by its full elimination, even in time of war[76], with Protocol No. 13[77] in 2002. Finally, always concerning the extension of the catalogue of obligations, Protocol No. 7[78] broadened the section of procedural judicial rights by adding procedural safeguards relating to the expulsion of aliens, the right of appeal in criminal matters, the compensation for wrongful conviction and the right not to be tried or punished twice. To complete the overview concerning the amendment made by protocols, the ECHR was also modified on the procedural level. First of all, Protocol No. 9[79] introduced the right for individual applicant to refer a case to the

[72] Council of Europe, 20 March 1952, ETS 9, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*.
[73] DÖRR (2017: 469).
[74] Council of Europe, 16 September 1963, ETS 46, *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto.*
[75] Council of Europe, 28 April 1983, ETS 114, *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*.
[76] PETAUX (2009: 151); DÖRR (2017: 469).
[77] Council of Europe, 3 May 2002, ETS 187, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*.
[78] Council of Europe, 22 November 1984, ETS 117, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*.
[79] Council of Europe, 6 November 1990, ETS 140, *Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms.*

ECtHR in certain circumstances. Moreover, Protocol No. 11[80] "has had the greatest repercussions on the application of the European Convention on Human Rights"[81]. Indeed, firstly it replaced the temporary European Commission of Human Rights ('EComHR') and Court with the permanent and all-embracing European Court of Human Rights (ECtHR), turning ECHR's supervisory mechanism into a full-fledged judiciary system. Moreover, the protocol made ECtHR's jurisdiction compulsory while resizing the Committee of Ministers' role, from having also a say on the merits of the case to a supervisory activity over the execution of the Court's decisions[82]. Finally, Protocol No. 14[83] improved the efficiency of the judicial system and the managing of applications, by allowing "new judicial formations to deal with the simpler cases"[84] and introducing other admissibility criteria.

Even if the European Convention on Human Rights still represents to this day one of the most efficient standard-setting tools for the safeguarding of human rights at the regional level, other conventions were concluded within the legal framework of the Council of Europe[85]. A first example would be the European Social Charter[86] ('ESC'), entered into force in February 1965, which "provides a system for the promotion and protection of economic, social and cultural rights"[87] and whose scope has also been extended by additional protocols. The CoE States' compliance with the ESC is guaranteed through a double system of supervision, that is to say either through reports or collective complaints. In addition, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[88] entered into force in 1989 and, together with its protocols, promotes the abolition of torture through inspections and visits to detention facilities. Moreover, minorities rights are regulated by the European Charter for Regional or Minority Languages[89] and the Framework Convention for

[80] Council of Europe, 11 May 1994, ETS 155, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*.
[81] PETAUX (2009: 152).
[82] OETHEIMER, PALOMARES (2013: no pagination); DÖRR (2017: 470).
[83] Council of Europe, 13 May 2004, CETS 194, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*.
[84] OETHEIMER, PALOMARES (2013: no pagination).
[85] KLEIN (2007: no pagination); GREER, GERARDS, SLOWE (2018: 74).
[86] Council of Europe, 18 October 1961, ETS 35, *European Social Charter.*
[87] SHELTON (2003: 102).
[88] Council of Europe, 26 November 1987, ETS 126, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.*
[89] Council of Europe, 4 November 1992, ETS 148, *European Charter for Regional or Minority Languages*.

the Protection of National Minorities[90] and their protection is ensured through a reporting system. Finally, it is also important to mention[91] the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine[92] and the Convention on Action against Trafficking in Human Beings[93].

As can be deduced from the above-mentioned list of conventions, the Council of Europe is therefore engaged in the protection of human rights and freedoms on different levels. At the same time, however, the standard-setting and enforcement mechanism linked to the ECHR is particularly innovative and effective, thanks to the progressive building of a real judiciary structure, the European Court of Human Rights, to which the next section of this chapter is dedicated.

1.3 The European Court of Human Rights or Strasbourg Court

The European Court of Human Rights (ECtHR), also informally known as the Strasbourg Court in light of where it is based, is the judicial body of the CoE institutional apparatus, established under the European Convention on Human Rights[94]. As initially anticipated, the ECtHR has not always existed like we know it today. Indeed, at the beginning, the supervision over the CoE States' compliance with the ECHR was entrusted to three institutions: the European Commission of Human Rights (EComHR), the Court and the Committee of Ministers. The first one, established since the beginning under the ECHR, can be considered as the real predecessor of the ECtHR, since it performed the functions that today belong to the Strasbourg Court. Indeed, the Commission received the applications, attempted to reach a friendly agreement between the parties and pronounced itself in a final report not only on the admissibility of the case but also on the merits. The Committee of Ministers had, instead, the responsibility of closing the case – usually according to the conclusions made by the EComHR – in the absence of a referral. It was in this latter circumstance that the Court, established in 1959, actually entered into play: that is to say, when the Commission or the parties involved – and not individuals, up until the entry into force of Protocol No. 9 –

[90] Council of Europe, 1 February 1995, ETS 157, *Framework Convention for the Protection of National Minorities*.
[91] KLEIN (2007: no pagination).
[92] Council of Europe, 4 April 1997, ETS 164, *Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.*
[93] Council of Europe, 16 May 2005, CETS 197, *Convention on Action Against Trafficking in Human Beings.*
[94] OETHEIMER, PALOMARES (2013: no pagination); POLAKIEWICZ (2019: no pagination).

brought the case before the Court. It is important to mention that at this time its functioning was based on a voluntary jurisdiction. This meant that CoE States could agree to it through an *ad hoc* unilateral declaration, which could be limited *ratione temporis* or *ratione materiae* or based on reciprocity[95]. As explained above, this control machinery was revolutionized with the entry into force in 1998 of Protocol No. 11[96].

To date, both the Court's functioning and structure and the contentious and advisory procedures are regulated by Section II of the ECHR, the relevant additional protocols and the Rules of Court[97].

For what concerns the first aspect, the ECtHR is composed of "a number of judges equal to that of the High Contracting Parties"[98], who satisfy specific age, professional and moral criteria. They are elected by the CoE Parliamentary Assembly from a three-candidate list presented by each Member State, and serve, as independent individuals, a single term and full-time office of nine years, incompatible with other external activities[99]. According to Article 24 ECHR[100], the Court also disposes of a Registry and rapporteurs for legal and administrative support. Moreover, the internal arrangements of ECtHR judges may change based on the functions performed[101]. Indeed, pursuant to Article 25 ECHR[102], the plenary formation of the Court is mostly responsible for administrative tasks like nominating the President and the Vice-President(s) or setting up the Chambers with their respective Presidents and the Sections. For what concerns the more strictly legal functions, Article 26 (1) ECHR states:

> "1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a

[95] OETHEIMER, PALOMARES (2013: no pagination).
[96] Council of Europe, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.*
[97] Registry of the Court, 17 March 2022, *Rules of Court* (incorporating amendments made by the Plenary Court on 7 February 2022).
[98] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 20.
[99] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Articles 21-23.
[100] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 24.
[101] OETHEIMER, PALOMARES (2013: no pagination).
[102] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 25.

> Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time"[103].

Therefore, these judicial formations have different competencies. According to Article 27 ECHR[104], the single judge decides on the inadmissibility of an individual application, which otherwise is to be submitted to a committee or a Chamber. On the other hand, as stated in Article 28 ECHR[105], Committees rule on the admissibility and also on the merits when the case relates to a solid ECtHR case law. Alternatively, Article 29 ECHR[106] establishes that Chambers can decide on the admissibility and merits of cases not addressed under the above-mentioned procedures, while Articles 30 and 31 ECHR[107] specify the competencies of the Grand Chamber, to which cases are referred by the Chambers, especially when concerning a serious issue of interpretation or case law consistency.

The European Court of Human Rights enjoys contentious and advisory jurisdiction. As for the first aspect, it can therefore decide on disputes concerning the potential violation of ECHR obligations by a High Contracting Party. The Court cannot take a case *ex officio* but upon request of a party. This latter could be another High Contracting Party, as established for inter-State cases in Article 33[108], or an individual with respect to individual applications regulated by Article 34[109]. All cases brought before and taken up by the European Court of Human Rights must fulfill the admissibility criteria and the main ones are laid out in Article 35 ECHR[110]. These would be first and foremost the exhaustion of all domestic remedies and a four-month limit from the final domestic judicial decision. Moreover, in particular, individual applications are inadmissible if anonymous, irrelevant – not presenting any new elements than a case already decided or under investigation–, incompatible with ECHR provisions, ill-founded or derived from an abuse of the right of individual application and, finally, not

[103] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 26.
[104] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 27.
[105] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 28.
[106] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 29.
[107] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Articles 30-31.
[108] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 33.
[109] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 34.
[110] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 35.

concerning a "significant disadvantage"[111] suffered by the individual applicant. As for the incompatibility aspect, this may show different nuances[112]. The incompatibility *ratione temporis* would concern an act committed before the entry into force of the ECHR, and therefore before the Convention could produce legal effects. Instead, the incompatibility *ratione loci* would relate to a violation of ECHR obligations occurred outside the jurisdiction of a High Contracting Party, while *ratione personae* concerns applicant not being under the jurisdiction of a State party to the ECHR and/or applicants not being a victim of the relevant ECHR violation. Finally, the incompatibility *ratione materiae* occurs when the right invoked is not guaranteed or protected under the Convention and its Protocols entered into force[113]. Once the admissibility criteria are found to be completely satisfied – otherwise, final inadmissibility decisions are taken by single judges, Committees or Chambers – it is usually the responsibility of a Chamber to decide on the merits of the case or the individual application. The judgments of the Chamber are final after the three-month period available for the parties concerned to refer the case to the Grand Chamber and "all final judgments of the ECtHR are binding on the States concerned"[114], whose compliance is supervised by the Committee of Ministers. According to Article 47 ECHR[115], the ECtHR also enjoys the advisory jurisdiction, that is to say the authority of delivering advisory opinions on request of the Committee of Ministers. However, such advisory opinions are quite restrictive as they:

> "[…] shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention"[116].

Finally, the Strasbourg Court can also promote a friendly settlement[117] prior issuing a judgment on the merits of the case.

In sum, the present chapter was aimed at specifying the institutional framework in which to operate, in order to approach more properly the issue of jurisdiction and of the extraterritorial application of the European Convention on Human

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[111] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 35, paragraph 3, letter b.
[112] OETHEIMER, PALOMARES (2013: no pagination).
[113] European Court of Human Rights, 1 February 2022, *Practical Guide on Admissibility Criteria*
[114] *Ibid.*
[115] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 47.
[116] *Ibid*, paragraph 2.
[117] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 39.

Rights. Thus, what emerges from this chapter is that this institutional framework and the system of human rights protection inscribed in it are highly advanced, complex and effective, in light not only of the extensive human rights catalogue of the ECHR but also of the judiciary structure supporting it.

Chapter II. Jurisdiction and extraterritoriality in the European Convention on Human Rights

2.1 State jurisdiction in the European Convention on Human Rights

2.1.1 The Vienna Convention on the Law of Treaties and rules of interpretation in relation to human rights treaties

In order to approach and understand properly the concept of State jurisdiction enshrined in the European Convention on Human Rights, it is essential to identify its interpretative framework. As the ECHR constitutes first and foremost a treaty or "an international agreement concluded between States in written form and governed by international law"[118], the rules for the its interpretation are to be found primarily in the Vienna Convention on the Law of Treaties ('VCLT'). This latter was opened for signature on 23 May 1969 and entered into force on 27 January 1980, subsequent to a UN conference which had been taking place in Vienna since May 1968 and on the basis of a group of draft articles elaborated by the International Law Commission ('ILC')[119]. The VCLT is composed of eighty-five articles and an annex and regulates all the aspects of "the life of [a] treaty"[120], like its conclusion and entry into force, application or invalidity, as well as its termination or suspension. Among these provisions, Articles 31-33 concern the interpretation of treaties. Article 31 VCLT sets out "a general rule of interpretation"[121] and in paragraph 1 states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[122]. This provision is the result of a debate which had taken place before the ratification of the VCLT, also within the ILC. This dispute concerned what was supposed to be the guiding principle for treaty interpretation and saw three different "schools of thought"[123]. In fact, there were those who gave greater weight to the "intention of the parties"[124] and, for this reason, relied mostly on the *travaux préparatoires*[125] of a treaty. In opposition to this subjective approach, there were some who favored an objective or textual method of treaty interpretation and some others who, instead,

[118] United Nations, 23 May 1969, Treaty Series, vol. 1155, *Vienna Convention on the Law of Treaties*, Article 2, paragraph 1 (a).
[119] SINCLAIR (1984: 1); GARDINER (2015: 7); RONZITTI (2016: 201).
[120] RONZITTI (2016: 201), translated by the author.
[121] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31.
[122] *Ibid*, paragraph 1.
[123] SINCLAIR (1984: 114-115); FITZMAURICE (2013: 745).
[124] SINCLAIR (1984: 114-115).
[125] FITZMAURICE (2013: 745).

supported a teleological approach, based on the object and purpose of the treaty[126]. In the end, only these last two interpretative principles ended up being incorporated in the ILC Draft Articles and, subsequently, into the VCLT general rule of interpretation. In fact, as already indicated above, Article 31, paragraph 1 VCLT "widens the scope of ordinary meaning by incorporating the principle of integration"[127] and therefore combines both the textual and teleological methods, without hinting at any kind of hierarchy among the two. The other paragraphs of Article 31 VCLT and the other two following provisions expand further the conceptual framework. Indeed, Article 31, paragraph 2 VCLT defines the context of the treaty, consisting not only of its text, preamble and annexes, but also of:

> "(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"[128].

Afterwards, Article 31, paragraph 3 VCLT elaborates further by stating that, besides the context, other elements are to take into consideration for the interpretation of a treaty and these are:

> "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties"[129].

This paragraph is particularly relevant in two respects. First, due to the reference to "any subsequent agreement [or] practice"[130], it introduced an evolutive approach[131] to treaty interpretation. Moreover, letter c of the provision codifies the principle of systemic integration[132] and clarifies that the interpretation of each treaty cannot prescind from the legal system in which the treaty, as such, is rooted. Article 31 VCLT finally ends with paragraph 4, stating that "a special meaning shall be given to a term if it is established that the parties so intended"[133], in explicit contrast to the "ordinary meaning"[134] mentioned in paragraph 1. To

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[126] SINCLAIR (1984: 114-115); FITZMAURICE (2013: 745).
[127] FITZMAURICE (2013: 747).
[128] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31, paragraph 2.
[129] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31, paragraph 3.
[130] *Ibid.*
[131] FITZMAURICE (2013: 749).
[132] *Ibid.*
[133] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31, paragraph 4.
[134] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31, paragraph 1.

conclude with the VCLT section dedicated to treaty interpretation, Article 32 VCLT brings us back to the above-mentioned debate on the interpretation criteria. The provision establishes that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion"[135], to corroborate the interpretation carried out pursuant to Article 31 VCLT or propose an alternative one in case the former is not exhaustive or not reasonable. Therefore, "the *travaux préparatoires* of a treaty […] are [formally] accorded a secondary or supplementary role in the process of interpretation"[136], despite still representing in practice an important interpretative instrument[137]. Finally, Article 33 VCLT regulates the "interpretation of treaties authenticated in two or more languages"[138].

Taking the next step, it is essential to outline the relationship among the above-mentioned VCLT rules on treaty interpretation and human rights treaties. In fact, some distinctive features attached to human rights treaties have led some scholars to theorize that human rights might represent a self-contained regime[139], in which case "a set of primary rules relating to a particular subject-matter is connected with a special set of secondary rules that claims priority to the secondary rules provided by general law"[140]. The peculiar features of human rights treaties referred to above have both formal and substantive nuances. As for the first aspect, human rights treaties show a 'constitutional' nature, establishing non-reciprocal rights and obligations among the contracting parties[141]. This was supported by the European Commission of Human Rights[142] in its decision for the case *Austria v. Italy*, in which it stated that:

> "[T]he obligations undertaken by the High Contracting Parties in the [European] Convention [on Human Rights] 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"[143].

On the other hand, for what concerns the substantive aspect, it is unquestionable that the subject matter regulated by human rights treaties holds an evident normative value within the general framework of international law and requires a

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[135] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 32.
[136] SINCLAIR (1984: 141).
[137] GARDINER (2015: 25).
[138] *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 33.
[139] FITZMAURICE (2013: 740); JARDÓN (2013: 106).
[140] KOSKENNIEMI (2003: 8).
[141] FITZMAURICE (2013: 759).
[142] JARDÓN (2013: 117).
[143] Decision of the European Commission of Human Rights, 11 January 1961, 788/60, *Austria v. Italy*; additions in brackets by JARDÓN (2013: 115).

certain level of effectiveness. If it is true, therefore, that human rights treaties show peculiarities which could justify a partial deviation from general rules of treaty interpretation, it is also true that considering them a self-contained regime would be inaccurate[144]. Indeed, in the landmark *Golder* judgment, the European Court of Human Rights itself confirmed the applicability of the VCLT provisions on treaty interpretation to the ECHR and laid the groundworks for its interpretative ethic[145]. It therefore stated:

> "The Court is prepared to consider, as do the Government and the Commission, that it should be *guided by* Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. […] In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to 'any relevant rules of the organization'"[146].

Upon this same judgment, the ECtHR further commented on the VCLT provisions on treaty interpretation, adding that:

> "In the way in which it is presented in the 'general rule' in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places *on the same footing* the various elements enumerated in the four paragraphs of the Article"[147].

In other terms, in the *Golder* judgment the ECtHR unequivocally asserted the theoretical equality[148] among the interpretative criteria enshrined in Article 31 VCLT. Furthermore, the Court made another step forward and laid the groundwork for a teleological interpretative approach. Indeed, as the case concerned the 'unenumerated right' of access to a court, the ECtHR stated that this latter had to be guaranteed, even if not explicitly mentioned in the Convention, by referring to the ECHR Preamble and especially to its objective and purpose of promoting the rule of law[149]. This teleological approach endorsed by the Strasbourg court is closely linked to the principle of effectiveness and the evolutive interpretation of the ECHR, which were furtherly developed in the subsequent case law. Put differently, since the interpretation of the Convention is based more on its overall mission rather than the original intention of the signatory States, its provisions, on the one hand, are not to be understood in a static way and, on the other hand, their interpretation should be oriented first and foremost to fulfill that mission. These two latter aspects evolved further in the following

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144 JARDÓN (2013: 120).
145 LETSAS (2010: 515).
146 Judgment of the European Court of Human Rights, 21 February 1975, 4451/70, *Golder v. The United Kingdom*, emphasis added.
147 *Ibid*, emphasis added.
148 FITZMAURICE (2013: 761).
149 LETSAS (2010: 515); FITZMAURICE (2013: 761).

ECtHR case law. For example, the principle of effectiveness[150] was reaffirmed by the Strasbourg court in the *Loizidou* case, in which it specified that the ECHR provisions must be interpreted "so as to make its safeguards *practical and effective*"[151]. The evolutive interpretation framework, instead, was more extensively theorized, together with the 'commonly accepted standards' principle[152], in the *Tyrer* judgment. Indeed, the Court stated:

> "The Court must also recall that the Convention is a *living instrument* which, as the Commission rightly stressed, must be *interpreted in the light of present-day conditions*. In the case now before it the Court cannot but be influenced by the developments and *common accepted standards* in the penal policy of the member States of the Council of Europe in this field"[153].

Finally, other special criteria put forward by the ECtHR concerning the interpretation of the ECHR are the principle of proportionality and, more importantly, the concept of the margin of appreciation[154]. In particular, this latter refers to the role of national courts and tribunals in interpreting and enforcing the ECHR and their degree of discretion, in light of their greater proximity to local needs and conditions[155]. In other terms, one could affirm that the margin of appreciation "reflects and encapsulates the principle of subsidiarity that is much more prevalent in and associated with the EU and ECJ"[156].

To sum up, the European Convention on Human Rights, as every human rights treaty, shows a certain peculiarity in terms of its legal and substantive nature, despite not fully representing a self-contained regime *per se*. This entails that the ECHR interpretive framework is largely based on the general rules enshrined in the Vienna Convention on the Law of Treaties. However, due to the above-mentioned special features, the ECHR provisions are to be interpreted also according to a number of additional and particular criteria set forth by the European Court of Human Rights.

The outlining of this interpretative framework is instrumental to understand Article 1 ECHR, introducing the legal notion of jurisdiction. Indeed, according to the way the VCLT rules of interpretation and the guidelines drawn by the ECtHR

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[150] SHELTON (2003: 127).
[151] Judgment of the European Court of Human Rights, 18 December 1996, 15318/89, *Loizidou v. Turkey*, emphasis added.
[152] FITZMAURICE (2013: 766).
[153] Judgment of the European Court of Human Rights, 25 April 1978, 5856/72, *Tyrer v. the United Kingdom*, emphasis added.
[154] SHELTON (2003: 129); FITZMAURICE (2013: 767).
[155] FITZMAURICE (2013: 767).
[156] SHELTON (2003: 129).

are employed, the essence of State jurisdiction might vary. In other terms, interpreting Article 1 ECHR, for example, favoring either a more textual approach or, instead, the *travaux préparatoires*, might lead to different results concerning the understanding of the concept of jurisdiction and, consequently, the scope of application of the Convention itself. However, before proceeding to analyze this variation in the interpretation of Article 1 ECHR in the ECtHR case law and the scholarly publication, it would be useful to first present objectively the provision itself and attempt to apply autonomously the above-mentioned interpretative rules and principles.

2.1.2 Article 1 of the ECHR: the "prototype jurisdiction clause"

Since the general aim of the present study is to analyze the interaction between the notion of State jurisdiction and extraterritoriality and human rights protection within the legal framework of the Council of Europe and the ECHR, it is essential to examine firstly the notion of jurisdiction as it is enshrined in the Convention itself. In this regard, it is necessary to return to the above-mentioned Article 1 ECHR, which codifies the "obligation to respect human rights"[157] and reads as follows: "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention"[158]. As it is clear from its wording, this latter represents a very essential provision. In fact, it states quite briefly that the commitment ("obligation") voluntarily assumed by the States parties to the ECHR ("High Contracting Parties") is to guarantee and acknowledge, like the verb *reconnaître* used in the French version[159], the rights and freedoms enumerated in the Convention to the individuals coming under their jurisdiction. In its minimalism, this provision constitutes a veritable "prototype jurisdiction clause"[160], since it has been later evoked and expanded in other human rights treaties. It also represented one of the first to be elaborated, together with the one codified in the International Covenant on Civil and Political Rights (ICCPR)[161]. In this latter case, however, the drafters made a further step forward, since Article 2, paragraph 1, of the ICCPR states:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in

[157] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 1.
[158] *Ibid*, emphasis added.
[159] European Court of Human Rights, 31 December 2021, *Guide on Article 1 of the European Convention on Human Rights - Obligation to Respect Human Rights - Concepts of "Jurisdiction" and Imputability*.
[160] MILANOVIĆ (2008: 413).
[161] MILANOVIĆ (2008: 413-416).

> the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[162].

Indeed, this provision integrates the core jurisdiction clause not only with a non-discriminatory condition but primarily with an explicit "territorial requirement"[163], which, however, it is not to be read in a narrow way, in the light of the interpretations put forward by the UN Human Rights Committee (HRC)[164]. As a matter of fact, first in its General Comment No. 3 on Article 2 ICCPR, the Committee spoke of the obligation undertaken by States parties of guaranteeing the rights to "all individuals *under their jurisdiction*"[165], therefore excluding the territorial characterization. This was further supported in General Comments No. 23 on Article 27 of the Covenant, enshrining the rights of minorities, in which the HRC stated "the entitlement, under article 2(1), to enjoy the rights under the Covenant without discrimination applies to all individuals *within the territory or under the jurisdiction* of the State whether or not those persons belong to a minority"[166]. In this comment, the Committee thus presented the territorial criterion in alternation rather than conjunction with the core jurisdiction formula. Moreover, the term 'territory' was again omitted by the HRC in General Comment No. 24 on Article 41 ICCPR, in which it affirmed that "the intention of the Covenant is that the rights contained therein should be ensured to *all those under a State party's jurisdiction*"[167]. The General Comments, as highlighted by Lawson[168], represented one of the occasions in which the HRC expressed itself on the subject of extraterritorial jurisdiction in relation to the ICCPR, with the others being during its monitoring activity and for individual petitions pursuant to Article 1 of the first Optional Protocol to the ICCPR. As for this latter, in particular, it is important to mention the *Lopez Burgos v. Uruguay* case[169]. The application was filed by Mrs. Lopez on behalf of her husband, Mr. Burgos Lopez, on 6 June 1979

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[162] United Nations General Assembly, 16 December 1966, Treaty Series, vol. 999, *International Covenant on Civil and Political Rights*, Article 2, paragraph 1, emphasis added.
[163] MILANOVIĆ (2008: 413).
[164] MERON (1995: 79).
[165] UN Human Rights Committee (HRC), 29 July 1981, *CCPR General Comment No. 3: Article 2 (Implementation at the National Level)*, paragraph 1, emphasis added.
[166] UN Human Rights Committee (HRC), 8 April 1994, CCPR/C/21/Rev.1/Add.5, *General Comment No. 23: The rights of minorities (Art. 27)*, paragraph 4, emphasis added.
[167] UN Human Rights Committee (HRC), 4 November 1994, CCPR/C/21/Rev.1/Add.6, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, paragraph 12, emphasis added.
[168] LAWSON (2004: 172-176).
[169] Communication of the Human Rights Committee, 29 July 1981, Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979, *Lopez Burgos v Uruguay*, *Saldias de Lopez (on behalf of Lopez Burgos) v Uruguay*.

against the State of Uruguay. Mrs. Lopez claimed that her husband had been subject to harassment, mistreatment and torture by the Uruguayan authorities, due to his participation in the trade union movement. As a result, after his arrest in December 1974, he was kept in jail for four months without charge. He then decided to move to Argentina one year later and obtained the recognition as political refugee by the Office of the United Nations High Commissioner for Refugees. In 1976 then he was allegedly kidnapped and taken back illegally to Uruguay, where he stayed in jail for other four months. The applicant also denounced that after the detention, Mr. Lopez was still kept at the disposal of military justice and his access to domestic judicial remedies was delayed and hampered[170]. Mrs. Lopez accused Uruguay of breaching the following obligations of the ICCPR: Articles 7, 9 and 12, paragraph 1 and Article 14, paragraph 3 of the Covenant. Article 7 establishes the prohibition of torture, cruel, inhuman or degrading punishment and non-consensual medical or scientific experimentation, Article 9 sets out the rights to liberty and security of the person. Instead, Article 12, paragraph 1, lays down the right to liberty of movement and freedom to choose his residence and Article 14, paragraph 3, defines the minimum legal guarantees. Concerning the extraterritorial application of the ICCPR, in this case with respect to the arrest and mistreatment allegedly carried out by Uruguayan forces on the Argentinian territory, the HRC stated:

> "The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee *is not barred either by virtue of article 1 of the Optional Protocol ('... individuals subject to its jurisdiction ...') or by virtue of article 2 (1) of the Covenant ('... individuals within its territory and subject to its jurisdiction ...') from considering these allegations*, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.
>
> The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction0 does not affect the above conclusion because the *reference in that article 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"[171].

The Committee therefore clarified that the individual application was admissible since the ICCPR provisions concerning jurisdiction, namely Article 1 of the Optional Protocol and Article 2 of the Covenant, are not to be interpreted from a strictly territorial approach. According to the HRC, in fact, State jurisdiction is to be understood primarily as indicating the condition of authority of the State

[170] *Ivi*, paragraphs 1-2.4.
[171] *Ibid*, paragraphs 12.1-12.2, emphasis added.

towards the individuals coming under its jurisdiction and, therefore, the obligations arising for it towards those individuals. The Committee also added:

> "Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but *it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it*. […]
>
> In line with this, it would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory"[172].

Put differently, according to the HRC, the strictly territorial application of the Covenant would be inacceptable, as it would lead to the impunity of States carrying out human rights violations under the ICCPR outside their national borders, whether with or without the consent of the foreign State where these violations occur. This analysis of the HRC General Comments and case law therefore shows that, even if it might represent a further elaboration of the prototype jurisdiction formulation of Article 1 ECHR, Article 2 ICCPR is not to be associated with an exclusively territorial interpretation of the legal notion of jurisdiction.

The International Court of Justice ('ICJ') also provided interesting insights in this matter. In this regard, it is important to mention its *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[173]. The case concerned the occupation of the Palestinian territory, over which Israel exercised its authority and control. When faced with the issue of State jurisdiction and, therefore, the potential application in particular of the ICCPR, the ICJ stated initially: "The Court would observe that, *while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory*"[174]. Therefore, in the present advisory opinion, the Court first adopted the *Banković* primarily territorial interpretation of the legal notion 'jurisdiction' with respect to the ICCPR, thus still considering its extraterritorial exercises as infrequent. However, continuing its analysis and taking up the practice and case law of the ICCPR's treaty body, namely the HRC, and the *travaux préparatoires* of the relevant provision, the ICJ added:

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[172] *Ivi*, paragraph 12.3, emphasis added.
[173] Advisory Opinion of the International Court of Justice, 9 July 2004, ICJ Rep 136, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.
[174] *Ibid*, paragraph 109, emphasis added.

> "The constant practice of the Human Rights Committee is consistent with this. Thus, *the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory*. It has ruled on the legality of acts by Uruguayan cases of arrests carried out by Uruguayan agents in Brazil or Argentina […].
>
> The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant *did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory*. […]
>
> The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee"[175].

The Court thus took into consideration the non-territorial approach of the HRC and of the ICCPR drafters with respect to the exercise of jurisdiction and the application of the Covenant itself. In light, also, of the Committee's position regarding the Israeli occupation of Palestine, the ICJ finally established that "in conclusion, the Court considers that the International Covenant on Civil and Political Rights *is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory*"[176]. In short, the wider and non-territorial interpretation of Article 2 ICCPR put forward by the HRC was also supported by the ICJ in this landmark advisory opinion.

Other jurisdiction provisions were then elaborated in subsequent human rights treaties[177]. Some of them follow the formulation of Article 1 ECHR and therefore do not include an open territorial condition, as in the example of Article 1 of the Second Optional Protocol to the ICCPR itself, aiming at the abolition of the death penalty, which states:

> "1. No one *within the jurisdiction* of a State Party to the present Protocol shall be executed.
> 2. Each State Party shall take all necessary measures to abolish the death penalty *within its jurisdiction*"[178].

The ICCPR model of jurisdiction clause, instead, is picked up only in Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This provision still contains the non-

[175] *Ivi*, paragraphs 109-110, emphasis added.
[176] *Ibid*, paragraph 111, emphasis added.
[177] MILANOVIĆ (2008: 413).
[178] Resolution of the United Nations General Assembly, 15 December 1989, A/RES/44/128, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, Article 1, emphasis added.

discriminatory clause but however places the territorial requirement in a relationship of alternation with the jurisdiction formula *per se*. It thus reads as follows:

> "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families *within their territory or subject to their jurisdiction* the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status"[179].

On the other side, there are other provisions in human rights treaties which maintain the essential jurisdiction formula introduced by the ECHR, adding just the non-discriminatory condition. This is firstly the case of Article 1, paragraph 1 of the American Convention on Human Rights ('ACHR'), stating:

> "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition"[180].

Another example of this kind would be Article 2, paragraph 1 of the UN Convention on the Rights of the Child ('UNCRC'), which reads as follows:

> "States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction* without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status"[181].

Finally, in order to have a complete and exhaustive picture of the provisions on State jurisdiction contained in human rights treaties, it is also important to recall that there are jurisdiction clauses pertaining to only "specific rights or obligations arising under the treaty"[182], as, for example, in the case of the International

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[179] Resolution of the United Nations General Assembly, 18 December 1990, A/RES/45/158, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 7, emphasis added.
[180] Organization of American States (OAS), 22 November 1969, Treaty Series, No. 36, *American Convention on Human Rights, "Pact of San Jose"*, Article 1, paragraph 1, emphasis added.
[181] UN Commission on Human Rights, 7 March 1990, E/CN.4/RES/1990/74, *Convention on the Rights of the Child*, Article 2, paragraph 1, emphasis added.
[182] MILANOVIĆ (2008: 413).

Convention on the Elimination of All Forms of Racial Discrimination ('ICERD')[183].

It is therefore clear that the ECHR jurisdiction clause represents a benchmark for all the ones contained in subsequent human rights treaties. However, in its essentialness, it is important to examine its implications when put in relation to the issue of extraterritoriality. In order to do so, without turning yet to the jurisprudential understanding of the provision, it is essential to carry out a significant interpretative exercise in light of the rules and guidelines specified previously.

2.1.3 Interpreting the ECHR jurisdiction clause

In accordance with the conceptual framework outlined above, the interpretation of the jurisdiction clause of the ECHR must be carried out following an evolutive and teleological approach, based on the object and purpose of the Convention. These latter can be primarily traced in the Preamble, stating that the ECHR "aims at securing the universal and effective recognition and observance of the Rights therein declared"[184] and, more generally, that "the aim of the Council of Europe is the achievement of greater unity between its members"[185]. This has been widely confirmed by the jurisprudence of the ECtHR[186], which described the object and purpose of the ECHR as "the protection of individual human beings"[187] and the maintaining and promotion "of the ideals and values of a democratic society"[188].

For what concerns the wording of the provision, State jurisdiction is generally known to be "a [*condicio*] *sine qua non* […] for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention"[189]. However, the ordinary meaning of 'jurisdiction', along with its potential territorial characterization, still represents a debated topic both within

[183] United Nations General Assembly, 21 December 1965, Treaty Series, vol. 660, *International Convention on the Elimination of All Forms of Racial Discrimination*; MILANOVIĆ (2008: 413).
[184] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Preamble.
[185] *Ibid.*
[186] HARRIS, O'BOYLE, BATES, BUCKLEY (2014: 7).
[187] Judgment of the European Court of Human Rights, 7 July 1989, 14038/88, *Soering v. The United Kingdom*.
[188] Judgment of the European Court of Human Rights, 7 December 1976, 5095/71, 5920/72, 5926/72, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*.
[189] European Court of Human Rights, *Guide on Article 1 of the European Convention on Human Rights*.

the ECtHR case law and in the doctrine. In this regard, some examples, which will be explored in more detail afterwards, would be the factual interpretations of jurisdiction based on control put forward by scholars like Marko Milanović or, on the other hand, that part of the doctrine more linked to its territorial understanding. However, in an attempt to shed some light on its signification within Article 1 ECHR, it would be convenient to back the teleological approach with the one based on the 'intention of the parties' and hence refer to the *travaux préparatoires*[190]. In fact, the wording of the draft jurisdiction clause as it had been first presented by the European Movement in July 1949 read: "Every State a party to this Convention shall guarantee to all persons *within its territory* the following rights […]"[191]. This had been made furtherly specific within the Committee of Legal and Administrative Questions of the CoE Consultative Assembly in August 1949. Indeed, the Chairman of the Committee, Mr. Teitgen, had proposed to substitute the previous wording according to the following: "The Convention and the procedure to be determined by the Committee later will guarantee to all persons *residing within the metropolitan territory of a member State* the fundamental rights and freedoms enumerated below […]"[192]. Subsequently, the 'metropolitan' qualification was voted to be removed but, most importantly, the territorial reference was changed to the current and broader wording "within their jurisdiction" by the Committee of Intergovernmental Experts[193]. This textual change was in fact in response to the need to have a not too restrictive application of the benefits and obligations established by the ECHR[194].

This circumscribed interpretative analysis of Article 1 ECHR based on the *travaux préparatoires* and the overall object and purpose of the Convention would hence suggest that the ECHR jurisdiction clause should not be understood with a narrow territorial characterization. However, it is essential to analyze also the ECtHR case law and the doctrinal debate concerning the jurisdictional and extraterritorial subject in order to get a complete and exhaustive picture.

2.1.4 Distinguishing the State jurisdiction in the ECHR

Once examined the significance and interpretation of the jurisdiction clause in the European Convention on Human Rights, it is also essential to distinguish this particular use of the legal term 'jurisdiction' from other ways it may be employed.

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[190] GONDEK (2009: 81-91).
[191] European Court of Human Rights, 31 March 1977, *Preparatory work on Article 1 of the European Court on Human Rights*, emphasis added.
[192] *Ibid.*
[193] European Court of Human Rights, *Guide on Article 1 of the European Convention on Human Rights*.
[194] *Ibid.*

a) Distinction between State jurisdiction and the ECtHR jurisdiction, admissibility and attribution

Already by looking at the wording of Article 1 of the European Convention on Human Rights, it is evident that the use of the legal term 'jurisdiction' refers to the "High Contracting Parties"[195] and, therefore, needs to be understood as State jurisdiction. This latter has to be discerned from the judicial jurisdiction[196], mentioned in other parts of the same Convention but referring to the European Court of Human Rights. In fact, on the one hand State jurisdiction is the benchmark for the arising of rights and obligations for the parties to the treaty[197] and entails several considerations about the State's exercise of authority and control[198]. On the other hand, instead, the judicial jurisdiction could be defined generally as the authority of a tribunal or a court to adjudicate controversies[199]. Moreover, judicial jurisdiction, in turn, does not coincide perfectly with the notion of competence, since the former shows a narrower characterization. In other words, a court may have jurisdiction to settle disputes, "but in order to proceed on the merits of the case, [it] must make clear that it possesses the competence to do that"[200]. Furthermore, another distinction needs to be made among the jurisdiction of international courts and tribunals, intrinsically voluntary and founded on the consent of States, and that of national courts, "established by the law and possess[ing] *ipso facto* compulsory jurisdiction within the ambit of their subject-matter competence"[201].

As for the European Court of Human Rights, the key provision regulating its jurisdiction[202] is Article 32 ECHR, stating that:

> "1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
> 2. The event of dispute as to whether the Court has jurisdiction, the Court shall decide"[203].

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[195] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 1.
[196] MILANOVIĆ (2008: 415-417); BESSON (2012: 866-867); NUßBERGER (2012: 243-248).
[197] MILANOVIĆ (2008: 415); BESSON (2012: 862).
[198] MILANOVIĆ (2008: 447); BESSON (2012: 864).
[199] Cornell Law School, Legal Information Institute, *WEX: Jurisdiction*, accessed 16 April 2022, https://www.law.cornell.edu/wex/jurisdiction.
[200] ORAKHELASHVILI (2003: 504).
[201] ORAKHELASHVILI (2003: 504-505).
[202] NUßBERGER (2012: 243).
[203] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*. Article 32.

Here it is interesting to highlight how the ECtHR possesses not only a judicial jurisdiction for what concerns inter-State controversies and individual applications, but also a leading role with respect to interpretation and even an advisory jurisdiction, as anticipated previously. Moreover, according to paragraph 2 of the same provision, the Court is in a way *iudex in causa sua* as it "has the last word in defining its 'own' jurisdiction"[204].

The distinction between State jurisdiction and judicial jurisdiction in the ECHR is fundamental first due to a terminological or conceptual issue, given that the former refers to the States parties to the Convention, the subjects which undertook voluntarily the obligation to secure the fundamental rights and freedoms of the individuals coming under their jurisdiction. The latter, instead, refers to the judicial body in charge of enforcing the ECHR, in a way in the role of 'supervisor' of the same above-mentioned States parties to the Convention. However, these two different uses of 'jurisdiction' also reflect two "distinct steps in the reasoning"[205]. In fact, State jurisdiction under ECHR is somehow ontologically prior to the ECtHR's jurisdiction. Indeed, the former is the trigger or threshold criterion in order for there to be obligations or rights under the treaty. Once these obligations have arisen for the States parties and in the event of an alleged violation of such obligations, the ECtHR is able to exercise its jurisdiction. Put differently, the Court's jurisdiction is consequential to State jurisdiction as employed and understood in Article 1 ECHR[206].

Finally, other two notions do not coincide and must not be associated with that of State jurisdiction, as codified in the ECHR and human rights treaties in general. The first one, in continuity with the discourse on judicial jurisdiction, would be that of admissibility. In other words, the existence or non-existence of State jurisdiction does not have the same value of an admissibility criterion which is not met. In fact, the inexistence of the former would affect the "substantive rights of individuals"[207] *per se*. In the latter case, instead, only the possibility to enforce those rights would be compromised[208]. As for the attribution of an illicit act or a violation of the ECHR provisions, this, like in the case of judicial jurisdiction, represents something consequential to State jurisdiction. Put differently, the obligations and rights protected and guaranteed by the Convention can logically be violated only after having arisen[209].

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[204] NUßBERGER (2012: 244).
[205] BESSON (2012: 867).
[206] MILANOVIĆ (2008: 416); BESSON (2012: 867).
[207] MILANOVIĆ (2008: 417).
[208] *Ibid.*
[209] BESSON (2012: 867).

b) Distinction with State jurisdiction under public international law

Although the notion of State jurisdiction can be found not only in the ECHR and human rights treaties in general, but also in public international law, it must be pointed out that these two concepts are not exactly overlapping. In public international law jurisdiction is an emanation of sovereignty and represents the regulatory authority of the State[210] on "the conduct of persons, both natural and legal, by means of its own domestic law"[211]. The *rationale* behind the law of jurisdiction traces back to the Westphalian outlook of the international scenario, heavily based on the territorial aspect and the principle of non-interference. For this reason, the law of jurisdiction, at least at the beginning, was conceived as "a part of the traditional 'negative' international law of State co-existence"[212]. This asset, arranged for the mutual respect of the national spheres and sovereignties and consisting of negative obligations, has recently underwent some changes, as the positive and extraterritorial dimension seems to have gained some relevance.

For what concerns the essence of State jurisdiction in public international law, this latter is not unitary but rather a three-pronged power[213]. The first and most discussed one would be the legislative or prescriptive jurisdiction[214], also named *compétence normative*[215], which could be defined as the power of the State "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court"[216]. The second typology would be the enforcement or executive jurisdiction[217] or *compétence d'exécution*[218], in other words the power to enforce the rules prescribed. The third and last kind of jurisdiction is the above-mentioned judicial or adjudicatory one[219], which refers to the State's courts and tribunals and their authority to adjudicate controversies. Prescriptive and enforcement jurisdiction are to distinguish not only substantially but also in terms of their territorial and extraterritorial exercise. Indeed, on the one hand, "the territorial character of enforcement jurisdiction is

[210] MILANOVIĆ (2008: 420); MILLS (2013: 194); RYNGAERT (2015: 50).
[211] MILANOVIĆ (2008: 420).
[212] RYNGAERT (2015: 52).
[213] MILANOVIĆ (2008: 420); MILLS (2013: 194); RYNGAERT (2015: 53-54).
[214] MILLS (2013: 195); RYNGAERT (2015: 53).
[215] MILANOVIĆ (2008: 420).
[216] American Law Institute, 1987, *Restatement (Third) of Foreign Relations Law*, § 401 (a); citation in RYNGAERT (2015: 53).
[217] MILLS (2013: 195); RYNGAERT (2015: 55).
[218] MILANOVIĆ (2008: 420).
[219] MILANOVIĆ (2008: 420); MILLS (2013: 195); RYNGAERT (2015: 55).

well established"[220] and its lawful extraterritorial exercise occurs only in the presence of the consent of the other affected State[221]. Instead, prescriptive jurisdiction is not exclusively territorial but the law regulating it "features a number of principles that allow States to exercise jurisdiction on an extraterritorial basis"[222]. These would be the nationality or active personality principle, which prescribes that the State may regulate the conduct of its citizens abroad. On the other hand, according to the passive personality principle, the State may issue prohibitions against activities damaging its nationals. Moreover, there is the protective or security principle, which is based on the premise of political independence and according to which the State may punish persons putting in danger its fundamental structures and interests. Finally, the universality principle is grounded on the gravity of the conduct harming the international community as a whole and that the State may criminalize[223].

As highlighted by Milanović[224], this notion of jurisdiction in public international law is not perfectly equivalent to that used in human rights treaties and, specifically, the one mentioned in Article 1 ECHR. In fact, although, as it will be discussed later, part of the ECtHR case law[225] diverges from this analysis, the two uses of the legal term jurisdiction firstly serve two different purposes. On the one hand, the jurisdiction in public international law is to be intended as a watershed between the spheres of influence and sovereignty of States[226]. Instead, the ECHR State jurisdiction attributes to the States Parties of the Convention the role of duty-bearer in relation to individuals, representing the right-holders[227]. In addition to this, it is evident that extraterritorial gross human rights violations may not, and usually do not, occur under the premise of a lawful exercise of prescriptive or enforcement jurisdiction. In other words, it is more and more frequent for human rights abuses to be carried out by a State off-the-record or in a non-official way[228]. For this reason, "interpreting the notion of jurisdiction in these treaties as being

[220] MILLS (2013: 195).
[221] MILANOVIĆ (2008: 420).
[222] RYNGAERT (2015: 55).
[223] MILANOVIĆ (2008: 421); RYNGAERT (2015: 55).
[224] MILANOVIĆ (2008: 422-426).
[225] The most significant example in this regard would be the Judgment of the European Court of Human Rights, 12 December 2001, 52207/99, *Banković and others v. Belgium and others*. As will be further explored later, in *Banković* the ECtHR affirmed in fact that the legal term 'jurisdiction' of Article 1 ECHR should be interpreted in compliance with its meaning under public international law. This viewpoint was also taken up in part of the following jurisprudence of the Court.
[226] MILANOVIĆ (2008: 420); MILLS (2013: 194); RYNGAERT (2015: 50).
[227] BESSON (2012: 863).
[228] MILANOVIĆ (2008: 425).

identical to the one in general international law would lead to manifestly absurd results"[229].

Therefore, since the notion of State jurisdiction of the ECHR would appear to constitute an autonomous concept[230], it is essential to retrace its essential meaning firstly in the ECtHR case law and then in the doctrine. Before proceeding to do so, it is also necessary to clarify the concept of 'extraterritoriality'.

2.2 The concept of 'extraterritoriality'

The notion of extraterritoriality has been recurring frequently with respect to the application of human rights treaties. In this regard, Besson formally defines the extraterritoriality of human rights treaties as "the recognition by those treaties' states parties of the […] rights of individuals and groups of individuals situated outside their territory and, in a second stage, to the identification of their corresponding duties to those individuals"[231]. In other terms, extraterritoriality would entail the arising of obligations under the treaty, in particular in this case under the ECHR, for its States parties also beyond their national borders, where they are exercising their jurisdiction. This, in fact, still remains the threshold criterion. On the other side, extraterritoriality, or the extraterritorial application of the treaty, would reciprocally entail the arising of enforceable rights for individuals living beyond the national borders of the contracting States.

As for the ECHR, the law regulating its extraterritorial application has become more relevant and necessary due to the increasing cross-border activities carried out by State Parties, which has been reflected also in a growing ECtHR case law on this subject. However, the extraterritorial application of the ECHR still remains a complex issue for a number of reasons, like the discrepancies, both in the jurisprudence and in the doctrine, concerning the essence of State jurisdiction, or the fact that "the nature and extent of the obligations imposed on respondent States, when acting extraterritorially, is unclear"[232].
In light of this complexity and uncertainty, the present study will proceed to analyze first the ECtHR's relevant jurisprudence and then the doctrinal debate, in order to better understand the topic of the ECHR's extraterritorial applicability.

[229] MILANOVIĆ (2008: 426).
[230] *Ibid.*
[231] BESSON (2012: 858).
[232] DEMETRIADES (2020: 159).

Chapter III. Jurisdiction and extraterritoriality in the EComHR and ECtHR case law: an increasingly narrow approach

The picture that emerges from the EComHR and the ECtHR case law concerning the essence of State jurisdiction and the extraterritorial application of the ECHR does not appear homogeneous nor linear. For this reason, it is necessary to carry out an in-depth chronological analysis of the main decisions, respectively reports or judgments, issued by the Commission and, later, the Court.

3.1 Laying the groundwork: *Cyprus v. Turkey*

One of the first occasions on which the predecessor of the ECtHR, the European Commission of Human Rights (EComHR), expressed itself openly about the matter of State jurisdiction is the *Cyprus v. Turkey* cases[233]. Between July and August 1974, Turkey invaded the northern region of Cyprus and established the separatist Turkish Republic of Northern Cyprus ('TRNC')[234]. Consequently, Cyprus filed inter-State applications against Turkey before the Commission, pursuant to former Article 24 of the Convention, now Article 33 ECHR. In these complaints, the Cypriot government accused Turkey and his armed forces of having perpetrated several human rights violations in the occupied territory[235]. In this regard, the respondent Turkish government challenged the Commission's jurisdiction *ratione loci*, by stating that:

> "under Art. 1 of the Convention, the Commission's competence *ratione loci* [was] limited to the examination of acts alleged to have been *committed in the national territory of the High Contracting Party concerned*; *Turkey [had] not extended her jurisdiction* to Cyprus or any part thereof, nor can she be held liable under Art. 63 of the Convention, for any acts committed there"[236].

Instead, the European Commission of Human Rights affirmed in response that:

> "In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone 'within their jurisdiction' (in the French text: '*relevant de leur jurisdiction*'). *The Commission finds that this term is not*, as submitted by the respondent Government, *equivalent to or limited to the national territory* of the High Contracting Party concerned. It is clear from language, in particular of the French text, and the object of this Article, and from the purpose

[233] Report of the European Commission of Human Rights, 10 July 1976, 6780/74 and 6950/75, *Cyprus v. Turkey*.
[234] MILANOVIĆ, PAPIĆ (2018: 785).
[235] DUTTWILER (2012: 141).
[236] Report of the European Commission of Human Rights, 10 July 1976, 6780/74 and 6950/75, *Cyprus v. Turkey*, II, paragraph 7, emphasis added.

> of the Convention as a whole, 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*"[237].

Hence, the EComHR explicitly rejected the narrow territorial reading of the legal term 'jurisdiction' put forward by Turkey. On the contrary, it proposed an alternative interpretation, by merging both the textual and teleological approaches. Indeed, by referring particularly to the French wording of the provision and the object and purpose of Article 1 and of the ECHR in general, the Commission stated that 'jurisdiction' could not be reduced to the territories of the States Parties to the Convention, but instead it could also go beyond national borders. The *rationale* of this statement is to be found in the EComHR's subsequent definition of jurisdiction as the factual exercise of authority. Put differently, according to the Commission here, "there is not inherent geographical limitation to the ECHR's scope of application […] [and its applicability] is not tied to the territory of a Member State, but is triggered by the State's conduct"[238]. This would be strongly supported by the explicit omission of any kind of territorial limitation in the wording of Article 1 ECHR. Even though the concept of authority itself was not further specified in the reports adopted by the Commission, the latter continued to elaborate on it subsequently and backed the authority-based definition of jurisdiction with the additional concept of 'control'[239]. Indeed, by referring to the conduct of the Turkish armed forces in Northern Cyprus, the EComHR stated that: "It follows that these armed forces are authorized agents of Turkey and that they bring any other persons or property in Cyprus 'within the jurisdiction' of Turkey, in the sense of Art. 1 of the Convention, *to the extent that they exercise control over such persons or property*"[240].

The interrelation between jurisdiction, authority and control first introduced in *Cyprus v. Turkey* was also taken up and further clarified in the later EComHR and ECtHR case law. Some examples would be those of the "embassy cases"[241], concerning human rights violations carried out by embassies abroad, and most importantly the case of *Loizidou v. Turkey*, as it will be seen further.

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[237] *Ivi*, II, paragraph 8, emphasis added.
[238] DUTTWILER (2012: 142).
[239] *Ibid.*
[240] Report of the European Commission of Human Rights, 10 July 1976, 6780/74 and 6950/75, *Cyprus v. Turkey*, II, paragraph 10, emphasis added.
[241] Decision of the European Commission of Human Rights (admissibility decision), 25 September 1965, 1611/62, *X. v. The Federal Republic of Germany*; Decision of the European Commission of Human Rights (admissibility decision), 14 July 1977, 7289/75 and 7349/76, *X. and Y. v. Switzerland*. In the former case, the formula "*exercise of authority* over such persons or property" was employed by the Commission, which instead in the latter case defined jurisdiction as "actual authority *or* control"; emphasis added.

3.2 The effective overall control principle: *Loizidou v. Turkey*

Loizidou v. Turkey[242] represents a landmark case[243] of the ECtHR jurisprudence and a point of contact with what the EComHR had stated beforehand in matters of State jurisdiction and extraterritorial application of the ECHR. The individual applicant of this case, Mrs. Loizidou, was a Cypriot national who owned a number of plots of land in the district of Kyrenia, in Northern Cyprus. After the above-mentioned Turkish occupation of the region in 1974 and the establishment of the TRNC, Mrs. Loizidou filed an application with the ECtHR because, due to the Turkish confiscations, she had been and still was "prevented from returning to Kyrenia and 'peacefully enjoying' her property"[244]. She therefore accused Turkey of continuously violating Article 8 ECHR, guaranteeing the right to respect for private and family life, and Article 1 of the first Additional Protocol to the Convention, which codifies the protection of property[245].

Evidently, the central issue concerned whether Turkey, a High Contracting Party of the ECHR since 22 January 1990[246], was exercising its jurisdiction in the territory corresponding to the TRNC and, consequently, whether it was the State carrying out the alleged human rights violations denounced by Mrs. Loizidou. The line of objection of the Turkish government on the admissibility was based on the primary fact that the "mere presence of Turkish armed forces in [N]orthern Cyprus was not synonymous with 'jurisdiction'"[247] and that the TRNC was "far from being a 'puppet'"[248] of Turkey, but represented instead an independent and democratic State, despite not having been recognized by the international community except for Turkey itself. The Turkish objection continued suggesting that, being the TRNC an independent State, it was this latter which exercised jurisdiction over the territory of Northern Cyprus. However, not representing a High Contracting Party to the ECHR, the TRNC's conduct, in particular the confiscations of plots of land, could not constitute an illicit under the Convention.

On the contrary, in its examination of the issue, the Court stated:

> "In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, *the concept of 'jurisdiction' under this provision is not*

[242] Judgment of the European Court of Human Rights, 23 March 1995, 15318/89, *Loizidou v. Turkey* (preliminary objections).
[243] MILANOVIĆ (2008: 422); DUTTWILER (2012: 149).
[244] Judgment *Loizidou v. Turkey*, paragraph 11.
[245] *Ibid*, paragraph 38.
[246] Center for Interlegality Research of Scuola Superiore Sant'Anna, 2016, *Lozidou v. Turkey: Summary*, in *Cases involving norms of different international and supranational regimes*.
[247] Judgment *Loizidou v. Turkey*, paragraph 56.
[248] *Ibid.*

> *restricted to the national territory of the High Contracting Parties*. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69 and 70, and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 103). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory […].
>
> *Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory*. 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*"[249].

Moreover, later on the merits of the case, the Court elaborated furtherly on the principle of effective overall control by adding:

> "It is *not necessary* to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey *actually exercises detailed control* over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (see paragraph 16 above) that her army *exercises effective overall control over that part of the island*. Such control, according to the relevant test and in the circumstances of the case, *entails her responsibility* for the policies and actions of the "TRNC" (see paragraph 52 above). *Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention* (art. 1). Her *obligation* to secure to the applicant the rights and freedoms set out in the Convention therefore *extends to the northern part of Cyprus*"[250].

Different important elements emerge in these two passages. First, in continuity with what the EComHR had already stated in its admissibility decision for *Cyprus v. Turkey*, the ECtHR refused to interpret the legal term 'jurisdiction' employed in Article 1 ECHR as strictly territorial. Instead, again by taking into consideration the object and purpose of the Convention according to the teleological approach, the Court introduced the fundamental effective overall control principle. According to this, "mere factual circumstances may determine jurisdiction"[251] or, in other words, only the fact itself of exercising overall, and not detailed, control over an area beyond national borders may be relevant for the establishment of

[249] *Ivi*, paragraph 62, emphasis added.
[250] Judgment *Loizidou v. Turkey*, paragraph 56, emphasis added.
[251] DUTTWILER (2012: 150).

jurisdiction. Hence, the lawfulness or unlawfulness under public international law of such exercise is not to be taken into consideration for jurisdiction to be established. Moreover, the overall effective control could be exercised directly or by other military or local administrative agents[252].

Bearing in mind the logical distinction among jurisdiction and attribution previously recalled, in *Loizidou v. Turkey* the ECtHR not only expressed itself on the essence of extraterritorial jurisdiction, but also presented the effective overall control principle as an important test of attribution[253]. Indeed, according to the line of reasoning of the Court, it was verified that by exercising effective overall control over the area, Turkey had jurisdiction over Northern Cyprus. As a second step, since Turkey represented a ECHR High Contracting Party, the Convention's obligations extended to the confiscation policies carried out formally by the TRNC, which were therefore to be considered illicit under the ECHR and thus entailed Turkey's responsibility. In other words, if jurisdiction and responsibility are not overlapping concepts, the effective overall control principle is an important point of contact. Moreover, inasmuch as attribution criterion, it is essential to link the *Loizidou* test with what emerges instead from the jurisprudence of the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia ('ICTY') concerning State responsibility[254]. In this regard, however, it is important to distinguish the *Loizidou* test of attribution from the ICJ and ICTY jurisprudence concerning attribution in terms of the subjects carrying out the illicit conduct. Indeed, the former refers to the control operated by the Turkish army itself, insofar as State actor, on a territory beyond the Turkish borders. The ICJ and ICTY jurisprudence taken into consideration refers instead to non-State actors, as it will be seen further.

3.2.1 The ICTY and the ICJ on attribution: between overall and effective control

The effective overall control principle laid out in *Loizidou* by the ECtHR was taken up a few years later by the International Criminal Tribunal for the former Yugoslavia in the famous *Tadić* case[255]. Indeed, the Tribunal first attempted to assess whether the conflict in Bosnia and Herzegovina, which was *prima facie* internal, could represent an international conflict in the light of the conduct of forces on behalf of foreign powers[256]. This, in fact, was relevant for the application

[252] Judgment *Loizidou v. Turkey*, paragraph 62.
[253] MILANOVIĆ (2008: 436-437).
[254] MILANOVIĆ (2008: 437-441).
[255] Judgment of the International Criminal Tribunal for the former Yugoslavia, 15 July 1999, IT-94-1-A, *Prosecutor v. Dusko Tadić* (Appeal Judgement).
[256] *Ibid*, also cited in MILANOVIĆ (2008: 30).

of the rules of international humanitarian law or *jus in bello*. Therefore, in order to carry out this assessment, the ICTY stated that it was "nevertheless imperative to specify *what degree of authority or control* [had to] be wielded by a foreign State over armed forces fighting on its behalf"[257]. The issue at stake here was evidently the link between the Federal Republic of Yugoslavia (FRY) and the Bosnian Serb army. In carrying out this assessment, the Tribunal hence accepted as valid the *Loizidou* test of attribution based on overall control and proceeded to conclude that:

> "In the case at issue, given that the Bosnian Serb armed forces constituted a 'military organization', the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, *international rules do not require that such control should extend to the issuance of specific orders* or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law"[258].

Moreover, in this same judgment, the ICTY brought to light a potential "conflict of jurisprudence with the ICJ"[259]. Indeed, it affirmed that there are various tests of attribution in public international law and not all of them are reciprocally coherent. Among the others, the Tribunal recalled the one laid out by the International Court of Justice in the famous case *Nicaragua*[260], and then proceeded to reject it because not persuasive in light of the law of State responsibility and varying judicial and State practice[261]. Without entering furtherly into the evaluation of the ICTY, the ECtHR overall control principle and the ICJ effective control principle are evidently different.

In this regard, the *Nicaragua* concerned the alleged unlawful involvement of the United States in the activities of the rebel group of the Contras in Nicaragua[262]. In its judgment, the International Court of Justice affirmed that:

> "The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged,

[257] *Ivi*, paragraph 97, emphasis added.
[258] *Ibid*, paragraph 145, emphasis added.
[259] MILANOVIĆ (2008: 29).
[260] Judgment of the International Court of Justice, 27 June 1986, ICJ Rep 14, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*.
[261] Judgment *Tadić* (Appeal Judgment).
[262] Judgment *Nicaragua v. United States of America*, also cited in RONZITTI (2016: 392).

> violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua"[263].

Therefore, it proceeded to assess this degree of control and, in doing so, stated that:

> "All the forms of United States participation mentioned above, and *even the general control* by the respondent State over a force with a high degree of dependency on it, *would not in themselves mean*, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control* of the military or paramilitary operations in the course of which the alleged violations were committed"[264].

In other words, according to the Court, evidence of a foreign power exercising general or overall control over other actors would not be sufficient to attribute the illicit conduct of these actors to the foreign State. What is necessary, instead, is proof that the latter exercises effective control at the time when the unlawful conduct occurs. The ICJ elaborated further on the effective control principle in another landmark case, *Genocide*[265], where the Court explicitly rejected the overall control test and, instead, specified that:

> "[…] it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, *in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions* taken by the persons or groups of persons having committed the violations"[266].

To put in another way, in order for the unlawful act to be attributed to the foreign State or power exercising control over the actions of non-State actors, it is necessary to prove that this latter concerned each action entailing or causing the alleged illegalities. It could be argued that the main difference among effective control and overall control concerns the nature of such control, rather than its intensity[267]. Indeed, in practice, effective control would mean for the State to issue

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[263] *Ivi*, paragraph 113.
[264] *Ibid*, paragraph 115, emphasis added.
[265] Judgment of the International Court of Justice, 26 February 2007, ICJ Rep 595, *Case Concerning Application of the Convention on The Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina v. Serbia And Montenegro)*.
[266] *Ibid*, paragraph 400, emphasis added.
[267] CARRON (2016: 1025).

"instructions, command or particular instances"[268] concerning every illicit act committed by the relevant persons or groups of persons. On the other hand, the overall control test, put forward by the ECtHR and taken up by the ICTY, would consist more in a diffused and general control over the relevant persons, also in terms of financial or logistical support. In this regard, as highlighted by Álvarez Ortega, this test would in practice attribute to the State the responsibility for failing to prevent the illicit conduct of the group, in light of its influence on the relevant territory, but without having directed the acts of the group in any more specific way[269]. In conclusion, from the comparison of these very different tests of attribution, it is evident that they foresee either a narrower or a wider scope of application of the relevant international law provisions. This becomes even more significant when put specifically in relation to international human rights law.

3.3 Jurisdiction as "essentially territorial": *Banković and others v. Belgium and others*

A significant shift in the ECtHR's approach with respect to the subject of extraterritorial jurisdiction was marked by the *Banković* case. During the years 1998 and 1999, Serbia and the Albanian province of Kosovo engaged in a strenuous conflict against each other, within the general framework of the disintegration of the Federal Republic of Yugoslavia ('FRY'). In this context, as international diplomacy had failed to extinguish the conflict, NATO eventually intervened with air strikes to halt the escalation of the Serbian nationalism led by Slobodan Milošević[270]. During this military intervention, a radio and television station of Belgrade, the Radio Televizije Srbije ('RTS') was bombed on 23 April 1999, causing the death of sixteen people and other injuries[271]. Subsequently, six citizens of the Federal Republic of Yugoslavia who suffered a loss on this occasion put forward an application with the ECtHR to denounce the alleged violation by the NATO Member States of the following ECHR obligations: Article 2 ECHR safeguarding the right to life, Article 10 ECHR for the freedom of expression, and Article 13 ECHR stating the right to an effective remedy[272]. The central legal issue tackled by the Court in its admissibility decision concerned "whether the applicants and their deceased relatives came within the 'jurisdiction' of the respondent States within the meaning of Article 1 of the Convention"[273]. In

[268] ÁLVAREZ ORTEGA (2015: 11).
[269] ÁLVAREZ ORTEGA (2015: 30).
[270] ROGEL (2003: 174-180).
[271] Judgment *Banković and others v. Belgium and others*, paragraph 10; ROXSTROM, GIBNEY, EINARSEN (2005: 57).
[272] ROXSTROM, GIBNEY, EINARSEN (2005: 57).
[273] Judgment *Banković and others v. Belgium and others*, letter A.

this regard, the respondent Governments claimed that the victims did not come within their jurisdiction, as this latter needed to be understood according to the ordinary meaning recognized in public international law[274]. On the other hand, instead, the applicants referred in particular to the previous *Loizidou* case and the effective overall control principle[275].

In its assessment, the Court took a new stance on jurisdiction, which is evidently inconsistent[276] with its previous jurisprudence and represents, for some scholars, a real watershed between the pre-*Banković*[277] and post-*Banković* ECtHR case law. Indeed, with the aim of outlining the meaning of the expression "within their jurisdiction" of Article 1 ECHR, the Court stated:

> "As 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*. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, *defined and limited by the sovereign territorial rights of the other relevant States.* […]
>
> The Court is of the view, therefore, 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"[278].

In other words, the Court operated a complete change of course and clearly stated that the legal term 'jurisdiction' employed in Article 1 ECHR perfectly overlaps with the one used in public international law, which, as previously mentioned, serves the Westphalian purpose of delimiting the sovereignty spheres of States. This means that jurisdiction is to be understood as mainly territorial, while extraterritorial exercises of jurisdiction represent the exception to the rule. The Court justified this quite narrow interpretation of the legal term 'jurisdiction' as follows:

> "The Court finds *State practice* in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention

[274] Judgment *Banković and others v. Belgium and others*, paragraph 36.
[275] Judgment *Banković and others v. Belgium and others*, paragraph 46.
[276] ROXSTROM, GIBNEY, EINARSEN (2005: 77).
[277] MILANOVIĆ (2008: 13).
[278] Judgment *Banković and others v. Belgium and others*, paragraphs 59 and 61, emphasis added.

> (inter alia, in the Gulf, in Bosnia and Herzegovina and in the FRY), *no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention* by making a derogation pursuant to Article 15 of the Convention. […]
>
> Finally, *the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words 'all persons residing within their territories' with a reference to persons 'within their jurisdiction' with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States (§ 19 above)"[279].

It is interesting to highlight how, despite having beforehand clarified the interpretative framework and referred to the VCLT rules and, in particular, to the object and purpose of the Convention, the Court proceeded to defend this territorial understanding of jurisdiction by relying heavily "on supplementary means of interpretation (i.e., drafting history, random examples of state practice, and textual comparisons with other treaties)"[280]. Moreover, the Court then explained the evident discrepancy with the preceding case law, partially analyzed in this chapter, in the following way:

> "In keeping with the essentially territorial notion of jurisdiction, the Court has *accepted only in exceptional cases* that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. […]
>
> In sum, the case-law of the Court demonstrates that *its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional*: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government"[281].

Therefore, in opposition to what had been established for example in *Loizidou* or *Cyprus v. Turkey*, State jurisdiction would seem to be territorially limited, with its exercise beyond national borders being only exceptional. It is obvious that this would thus translate into a narrow application of the ECHR itself, and therefore a significantly limited human rights protection mechanism. Finally, at the end of its reasoning, "the Court proceeded to carve out from previous case law what it contended to be the type of 'exceptional circumstances' that justified holding a Contracting State responsible for extraterritorial acts"[282], with these being military

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[279] Judgment *Banković and others v. Belgium and others*, paragraphs 62 and 63, emphasis added.
[280] ROXSTROM, GIBNEY, EINARSEN (2005: 69).
[281] Judgment *Banković and others v. Belgium and others*, paragraphs 67 and 71, emphasis added.
[282] ROXSTROM, GIBNEY, EINARSEN (2005: 87-88).

occupations, *de jure* jurisdiction and the exercise linked to a special relationship jurisdiction[283]. The territorial reading of 'jurisdiction' put forward by the ECtHR in *Banković* is problematic also in the light of the following jurisprudence, in which the Court seems to have again widened its approach and taken into greater consideration the exceptions to the territorial rule, as it will be seen further. This inconsistency is obviously problematic in the perspective of a coherent application of the Convention.

3.4 Beyond *Banković*? Acknowledging the extraterritorial exceptionalism

Banković represented an important turn in the ECtHR case law concerning the essence of State jurisdiction, its more or less potential extraterritorial exercise and the impact of this latter on the scope of application of the ECHR. It is therefore necessary to analyze whether this narrow territorial definition underwent changes and modifications in the post-*Banković* jurisprudence, up until the Court's most recent judgments. In particular, four cases will be taken into consideration as they show a relatively wider approach of the Court towards the 'exceptional' exercise of extraterritorial jurisdiction.

3.4.1 Ilaşcu and Others v. Moldova and Russia

The Moldavian Republic of Transdniestria ('MRT') was a territory which originally belonged to the Republic Moldova, with this latter being itself a former Soviet Socialist Republic up until 27 August 1991. The MRT, with Tiraspol as main city, was proclaimed on 2 September 1990 and its declaration of independence was adopted one year later, on 25 August 1991, but it was not at the time of the facts and is not still to this day recognized as an independent State by the international community. After Moldova's declaration of independence, the USSR Fourteenth Army stayed in the region, which was subsequently affected by an internal conflict in the years 1991 and 1992. This saw on one side the Moldovan authorities and on the other a significant movement of Transdniestrian separatists, armed and supported by the USSR, later on Russian Federation[284]. Against this background, Mr. Ilaşcu and the other applicants were Moldavian citizens who, accused of anti-Soviet political activities[285], had later been arrested in June 1992 in Tiraspol by people with uniforms of the USSR Fourteenth Army[286], detained

[283] *Ivi.*
[284] Judgment of the European Court of Human Rights, 8 July 2004, 48787/99*, Ilaşcu and Others v. Moldova and Russia*, paragraphs 30 and 57.
[285] LAWSON (2004: 101).
[286] Factsheet of the European Court of Human Rights, July 2018, *Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*.

before the trial, with some of them being convicted to property confiscation and/or to death, like Mr. Ilaşcu himself. In particular, the applicants brought the matter before the ECtHR to denounce a number of human rights violations. Firstly, the lack of jurisdiction of the Transdniestrian court convicting them and therefore the breach of Article 6 ECHR, enshrining the right to a fair trial. Moreover, they argued that the confiscation of their possessions constituted a violation of Article 1 of Protocol No. 1, concerning the protection of property, and then further denounced their illicit detention under Article 5 ECHR, guaranteeing the right to liberty and security. In addition, they contended that their imprisonment conditions breached Articles 3 and 8 ECHR, stating respectively the prohibition of torture and the right to respect for private and family life, and that they also had been hindered from applying to the Court, in explicit violation of Article 34 ECHR. In addition, Mr. Ilaşcu, sentenced to death, denounced on his side the violation of Article 2 ECHR, establishing the fundamental right to life. The applicants finally argued that at the time of the illicit they came within the jurisdiction of both the Republic of Moldova, responsible of not stopping the human rights violations, and the Russian Federation as well, since it was exercising a *de facto* control on the Transdniestrian region, through the presence and support of its military forces[287].

Therefore, in its assessment, the Court had to address two issues: on the one hand, "whether the applicants [came] within the jurisdiction of the Republic of Moldova"[288] and, on the other, "whether the applicants [came] within the jurisdiction of the Russian Federation"[289]. In answering to the first question and defining once again the meaning of 'jurisdiction' within Article 1 of the Convention, the ECtHR stated:

> "The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention. The Court refers to its case-law to the effect that the concept of 'jurisdiction' for the purposes of Article 1 of the Convention *must be considered* to *reflect the term's meaning in public international law* […] [and] to mean that a State's jurisdictional competence is *primarily territorial* […], but also that jurisdiction is presumed to be exercised normally throughout the State's territory.
> This presumption may *be limited in exceptional circumstances*, particularly where a State is *prevented from exercising its authority in part of its territory*. That may be as a result of *military occupation* by the armed forces of another State which effectively controls the territory concerned […], acts of war or rebellion, or the acts

[287] Judgment *Ilaşcu and Others v. Moldova and Russia*, paragraph 3.
[288] *Ibid.*
[289] *Ibid.* The USSR had in fact dissolved, the Russian Federation had become a member of the Council of Europe on 28 February 1996 and had ratified the ECHR in 1998.

> of a foreign State supporting the installation of a separatist State within the territory of the State concerned"[290].

In other words, the Court initially defined 'jurisdiction' generally as the *condicio sine qua non* for obligations to arise under the ECHR, and then proceeded to refer to the *Banković* primarily territorial interpretation, in compliance with public international law. The ECtHR then added that the latter premise may have exceptions, like in the relevant case of a military occupation and the limitation of the exercise of jurisdiction of the occupied State over a part of its territory. In this regard, the Court continued stating that:

> "The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, *positive obligations to take appropriate steps* to ensure respect for those rights and freedoms within its territory […].
> Those obligations *remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take*"[291].

The significant integration made by the Court in this sense is affirming that, even in the case of the limited exercise of jurisdiction, the positive obligations to implement measures to guarantee the rights and freedoms of individuals remain in force. Subsequently, the ECtHR further elaborated in the following way:

> "Moreover, the Court observes that, *although in Banković and Others* (cited above, § 80) *it emphasised the preponderance of the territorial principle* in the application of the Convention, it has also acknowledged that the concept of "jurisdiction" within the meaning of Article 1 of the Convention is *not necessarily restricted to the national territory* of the High Contracting Parties […].
> The Court *has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention*"[292].

It is evident from this passage that, in *Ilaşcu*, the narrow and territorial interpretation inherited from *Banković*, despite being referred to at the beginning, started instead to give way to the acknowledgment by the Court of the extraterritorial exceptionalism in the exercise of State jurisdiction. Moreover, it is important to highlight that in this case "for the first time, the Court found that a State which does not have effective control over a part of its territory as a result of occupation […] still has some *positive* obligations deriving from its *de jure*

[290] *Ivi*, paragraphs 311-312, emphasis added.
[291] *Ibid*, paragraph 313, emphasis added.
[292] *Ibid*, paragraph 314, emphasis added.

jurisdiction"[293]. Indeed, in light of the above-mentioned reasoning, the ECtHR finally found that the applicants came within the jurisdiction of the Russian Federation[294] while, on the other hand, the Republic of Moldova, despite having somewhat lost the effective control over Transdniestria, still exercised a partial jurisdiction[295] and "had to take the diplomatic, economic, judicial or other measures that it [was] in its power to take and [were] in accordance with international law to secure to the applicants the rights guaranteed by the Convention"[296].

3.4.2 Issa and Others v. Turkey

Between 19 March 1995 and 16 April 1995, the Turkish forces carried out a military operation in the northern part of Iraq, during which they had allegedly arrested and killed some Iraqi shepherds in the province of Sarsang, near the Turkish border. According to this version, their respective daughters and wives decided to file a joint application to the ECtHR to denounce the breach of the following provisions: Articles 2, 3, 5, 8, 13, 14 and 18 ECHR[297]. Also on this occasion, the Court had to establish the admissibility of the complaints and, therefore, to pronounce itself on "whether the applicants' relatives came within the jurisdiction of Turkey"[298]. Hence, on the same line followed in *Ilaşcu and Others v. Moldova and Russia*, the ECtHR first proceeded to summarize the principles concerning State jurisdiction and thus mentioned the previous case law, the understanding of the legal concept 'jurisdiction' in public international law and the *Loizidou* test of effective overall control. Subsequently, it stated:

> "In the light of the above principles the Court must ascertain whether the applicants' relatives *were under the authority and/or effective control, and therefore within the jurisdiction*, of the respondent State as a result of the latter's extra-territorial acts. […]
>
> The Court does not exclude the possibility that, *as a consequence of this military action*, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a *sufficient factual basis* for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey […].

[293] YUDKIVSKA (2016: 138).
[294] Judgment *Ilaşcu and Others v. Moldova and Russia*, paragraph 394.
[295] DUTTWILER (2012: 150).
[296] Judgment *Ilaşcu and Others v. Moldova and Russia*, paragraph 331.
[297] Judgment of the European Court of Human Rights, 16 November 2004, 31821/96, *Issa and Others v. Turkey*, paragraphs 12, 24, 25 and 82.
[298] *Ibid.*

> However, notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq"[299].

Hence, also in this case the *Banković* territorial approach barely emerges, if not only in the ritual enumeration of the general principles concerning State jurisdiction within Article 1 ECHR. What is evident instead is, again, a return to the *Loizidou* effective overall control principle and the interpretation of jurisdiction as a factual, rather than geographical, concept, based on the tangible and evidence-supported exercise of authority and/or control over a territory, also in the form of military occupation of an area. As shown in the last segment of the passage, the application was finally considered inadmissible by the Court not because the Turkish occupation could not entail in principle the Turkish exercise of extraterritorial jurisdiction over the Iraqi province, but eventually due to the lack of evidence.

3.4.3 Al-Skeini and Others v. the United Kingdom

Another landmark case which offers new and interesting insights concerning the Court's evolving position on extraterritorial jurisdiction is *Al-Skeini*[300]. The applicants were the relatives of six Iraqi civilians, five of which had been allegedly killed by the British troops present in 2003 in Basra, in southern Iraq, while the sixth, Baha Mousa, had died after having been arrested by British army and having undergone severe mistreatment[301]. At the beginning, the applicants had turned to UK domestic judicial remedies denouncing violations carried out by the British forces under the Human Rights Act. In this regard, in 2004 the Secretary of State for Defence refused to conduct further "independent inquiries into the deaths; […] to accept liability for the deaths; and […] to pay just satisfaction"[302]. The applicants then applied for judicial review to the Divisional Court, which rejected the first four applications but received the sixth. This decision was later supported by the Court of Appeal and the House of Lords. Therefore, the applicants, pursuant to Article 34 ECHR, filed an application with the ECtHR, in which accused the United Kingdom of violating the right to life as established by Article 2 ECHR. Hence, the Court had to assess first and foremost whether the deceased Iraqi civilians came at the time of the facts within the jurisdiction of the United Kingdom, operating on a foreign soil, and therefore whether the ECHR could be applied extraterritorially in this particular case.

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[299] *Ivi*, paragraphs 72, 74 and 75, emphasis added.
[300] Judgment of the European Court of Human Rights, 7 July 2011, 55721/07, *Al-Skeini and Others v. The United Kingdom*.
[301] *Ibid*, paragraphs 33-71.
[302] *Ibid*, paragraph 72.

In this respect, the ECtHR first reaffirmed that

> "'Jurisdiction' under Article 1 is *a threshold criterion*. The exercise of jurisdiction is a *necessary condition for a Contracting State to be able to be held responsible* for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention"[303].

So, the Court stated what has been anticipated in the previous chapter, namely that the exercise of jurisdiction is a *condicio sine qua non* for the obligations and rights to arise under the Convention and that, therefore, the establishment of responsibility does not overlap perfectly but represents instead a subsequent step. Then the Court elaborated on the territorial principle as follows:

> "A State's jurisdictional competence under Article 1 is *primarily territorial* […] Jurisdiction is presumed to be exercised *normally throughout the State's territory* […] Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 *only in exceptional cases* […].
>
> To date, the Court in its case-law has recognised a number of *exceptional circumstances* capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the *particular facts*"[304].

As clearly shown in this passage, in *Al-Skeini* the Court explicitly took a step back towards the *Banković* territorial understanding of jurisdiction as employed in Article 1 ECHR and acknowledged its extraterritorial exercise as merely exceptional. This extraterritorial exceptionalism, as outlined in this judgment, would arise in the following cases: State agent authority and control, effective control over an area and the *espace juridique* of the Convention. As for the first element, the ECtHR affirmed:

> "The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to *acts of its authorities which produce effects outside its own territory* […].
>
> Firstly, it is clear that the acts of *diplomatic and consular agents*, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents *exert authority and control over others* […].

[303] *Ivi*, paragraph 130, emphasis added.
[304] *Ibid*, paragraphs 131 and 132, emphasis added.

> Secondly, the Court has recognised *the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government* […]. Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out *executive or judicial functions* on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State […]"[305].

Put differently, the State agent authority and control principle could translate first in two ways: the activities undertaken by diplomatic representatives of the relevant State on a foreign soil or, when the relevant State exercises the governmental functions of a foreign State in the presence of the latter's consent, request or non-protest. The Court then continued elaborating on the State agent authority and control principle, by affirming:

> In addition, the Court's case-law demonstrates that, in certain circumstances, the *use of force by a State's agents operating outside its territory may bring the individual* thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad […]. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is *the exercise of physical power and control over the person in question*.
>
> It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are *relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be '*divided and tailored*' (compare Banković and Others, cited above, § 75)"[306].

There are different significant elements to be highlighted in this passage of the Court's assessment. First, it is important to underline that here the ECtHR refers specifically to personal control. More simply, this translates into control, exercised directly over people by different State agents. Personal control represents for many scholars an independent, not to say increasingly recurring, "model of jurisdiction"[307], even though this does mean that personal and territorial jurisdiction are mutually exclusive, since in some cases they could be established concurrently[308]. It is therefore necessary to outline now what this personal control could consist of. Indeed, this latter, besides the alleged human rights violations

[305] *Ivi*, paragraphs 133-135, emphasis added.
[306] *Ibid*, paragraphs 133-137, emphasis added.
[307] BESSON (2012: 874).
[308] *Ibid.*

stemming from the specific conduct, could occur either lawfully or unlawfully under public international law. In the first case, as previously anticipated, it could be either through consular or diplomatic representatives of the foreign State, by consent or invitation of the 'host' State or "state agents, including the military, in official ships, aircraft or buildings"[309]. Instead, the unlawful manifestation of the exercise of extraterritorial jurisdiction would be linked specifically to the conduct of state agents, including the military on the ground or, also in this case, the military in aircrafts, infrastructures or ships. Moreover, even though the link with the *Banković* territorial principle is evident, in *Al-Skeini* the Court also marked a clear contrast with this previous case by affirming that the rights and freedoms of individuals put under the physical control of an extraterritorial power can in fact be "divided and tailored"[310] according to his specific situation and necessities.

In continuing to elaborate on the exceptional cases entailing the extraterritorial exercise of jurisdiction, the Court then proceeded to explain the effective control principle over a territory:

> "Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a *consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that 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 the Contracting State's own armed forces, or through a subordinate local administration* […]. Where the fact of such domination over the territory is established, it is *not necessary to determine whether the Contracting State exercises detailed control* over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights […]"[311].

This passage of the Court's assessment represents the point of contact between the *Banković* territorial principle and the *Loizidou* effective overall control principle, noting however that this latter is still considered only as an exception to the rule rather than the general standard for the establishment of jurisdiction.

Finally, the ECtHR defined the *espace juridique* principle by stating:

> "The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, *the occupying State should in principle be*

[309] BESSON (2012: 871).
[310] Judgment *Al-Skeini and Others v. The United Kingdom*, paragraph 137.
[311] *Ibid*, paragraphs 138-140, emphasis added.

> *held accountable under the Convention for breaches of human rights within the occupied territory*, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and *would result in a 'vacuum' of protection within the 'legal space of the Convention'* […]. However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction […]"[312].

In conclusion, once again the Court's stance on the extraterritorial exercise of jurisdiction does not seem perfectly aligned with the immediately preceding jurisprudence, despite presenting a more organic and organized vision of the extraterritorial 'exceptions'. In light of this particular case, in fact, the ECtHR, rather than making an evolution towards a wider understanding of State jurisdiction and extraterritoriality, seems to have operated an involution towards the narrow and territorial scope of the Convention stated some years before.

3.4.4 Hassan v. The United Kingdom

Another case which is relevant in order to have an exact understanding of the Court's evolving position on extraterritorial jurisdiction is that of *Hassan v. The United Kingdom*[313]. The applicant, Mr Khadim Resaan Hassan, filed an individual application against the United Kingdom, pursuant to Article 34 ECHR, on 5 June 2009. The background of the case concerns the activity of the British troops in the Iraqi region of Basra. Here, the applicant, a member of the Ba'ath Party and the Al-Quds Army, was hiding with his family, since the British forces were searching and arresting the generals of the Ba'ath party. However, instead of taking Mr. Khadim Resaan Hassan, the British army unit arrested his brother, Mr. Tarek Hassan, and moved him into the detention facility of Camp Bucca. He was released, according to the British records, but then disappeared and his body was found some months later in the countryside near Samara, a town north of Baghdad[314]. Thus, Mr. Khadim Resaan Hassan, after having exhausted the domestic judicial remedies, filed the application, accusing the United Kingdom of violating the following obligations under the ECHR: Article 2, the right to life, Article 3, the prohibition of torture, and Article 5, paragraphs 1, 2, 3 and 4, generally establishing the right to liberty and security. Therefore, the issue of extraterritoriality arose again and, in this case, the Court first referred to the *Al-Skeini* principles concerning the extraterritorial exercise of jurisdiction, namely

[312] *Ivi*, paragraph 142, emphasis added.
[313] Judgment of the European Court of Human Rights 16 September 2014, 29750/09, *Hassan v. The United Kingdom*.
[314] *Ibid*, paragraphs 10-29.

the territorial principle, State agent authority and control, effective control over an area and the *espace juridique*. However, within the comparison with the *Al-Skeini* case, the Court added:

> "The present case concerns an earlier period, before the United Kingdom and its coalition partners had declared that the active hostilities phase of the conflict had ended and that they were in occupation, and before the United Kingdom had assumed responsibility for the maintenance of security in the South East of the country […]. However, as in *Al-Skeini*, the Court does not find it necessary to decide whether the United Kingdom was in effective control of the area during the relevant period, because it finds that the United Kingdom exercised jurisdiction over Tarek Hassan on another ground"[315].

Therefore, the Court clarified that the facts of *Hassan v. The United Kingdom* referred to a context prior to the invasion of Iraq undertaken on 20 March 2003 by the military coalition led by the United States of America and comprising a significant British unit. For this reason, the United Kingdom's jurisdiction over Mr. Tarek Hassan could not be established on the ground of the State's effective control over the Iraqi south-eastern region of Basra. However, the ECtHR continued affirming that:

> "Following his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was *within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction under the principles outlined in paragraph 136 of Al-Skeini, set out above*"[316].

Put differently, even though the United Kingdom was not exercising its effective control over the area, the Court unanimously found that Mr. Tarek Hassan came under its jurisdiction, from his capture until his release, because British troops were exercising physical control over him, in light of the personal control principle laid out in *Al-Skeini*. In fact, the Court rejected the British government's counter-argument, according to which this should not apply in the context of an international armed conflict and, therefore, within the legal framework of international humanitarian law. The judges affirmed instead:

> "The Court is not persuaded by this argument. *Al-Skeini* was also concerned with a period when international humanitarian law was applicable […]. Moreover, to accept the Government's argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently […]. As the Court has observed on many occasions, *the Convention cannot be interpreted in a*

[315] *Ivi*, paragraph 75.
[316] *Ibid*, paragraph 76, emphasis added.

> *vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part* […]"[317].

Moreover, after having stated the possibility of concurrent application of international humanitarian law and international human rights law, in continuity with both the previous ECtHR jurisprudence and that of the ICJ, the Court also rejected the second argument put forward by the British government. According to this latter, Mr. Tarek Hassan did not come under the United Kingdom's jurisdiction but rather, under that of the United States of America, in charge of the operational command of Camp Bucca. In this regard, the Court in short stated that since Mr. Tarek Hassan had been listed as a prisoner for the United Kingdom, interrogated under the British supervision and ultimately released in compliance with a UK order, he clearly came under the British jurisdiction[318]. Finally, the ECtHR also rejected the last argument put forward by the British government, according to which Mr. Tarek Hassan was not under the jurisdiction of the United Kingdom after his release, by affirming that "it appear[ed] clear that Tarek Hassan remained in the custody of armed military personnel and under the authority and control of the United Kingdom until the moment he was let off the bus that took him from the Camp"[319].

To sum up, moving along the lines drawn in *Al-Skeini*, *Hassan v. The United Kingdom*, if compared to *Banković*, showed a wider approach of the Court towards the extraterritorial exercise of jurisdiction. However, in this case extraterritoriality still held a characterization of exceptionalism, therefore representing a more restrictive interpretation of jurisdiction than the ones put forward by the ECtHR in the previous cases of *Ilaşcu* and *Issa*. It is now important to understand whether this reverse trend has been supported also by the most recent ECtHR jurisprudence.

3.5 Recent developments in the ECtHR case law: *Hanan v. Germany*

One of the most relevant cases in the recent ECtHR case law on extraterritorial jurisdiction is *Hanan v. Germany*[320]. For what concerns the background to the case, this traces back to the deployment of German forces in Afghanistan within the Operation Enduring Freedom, led by the US and the UK and in response to the terrorist attacks of September 11, 2001. Alongside this operation, the

[317] *Ivi*, paragraph 77, emphasis added.
[318] DE KOKER (2015: 91).
[319] Judgment *Hassan v. The United Kingdom*, paragraph 79.
[320] Judgment of the European Court of Human Rights, 16 February 2021, 4871/16, *Hanan v. Germany*.

International Security Assistance Force ('ISAF') was established through a UN Security Council authorization in 2001 and later, in 2003, this passed under the NATO command. Also within this framework, German troops were deployed in Afghanistan under the Regional Command North, comprising in particular the Kunduz Provincial Reconstruction Team ('PRT'). Against this background and in an increasingly deteriorating situation in the Kunduz province, in September 2009 a German commander gave order for an air strike on fuel tanks which had been previously hijacked and blocked by insurrectionaries. The airstrike resulted in the destruction of the tankers and the killing of several people, among which over 90 civilians and, in particular, the two children of the applicant, Mr. Hanan[321]. This latter, before bringing the matter before the ECtHR, turned to German domestic judicial remedies. However, his complaints concerning the investigations and the breach of the right to be heard were dismissed by the Düsseldorf Court of Appeal and the Federal Constitutional Court, while the request for compensation was rejected by the Federal Court of Justice because ill-founded[322]. For this reason, Mr. Hanan filed an individual application with the European Court of Human Rights under Article 34 ECHR on 13 January 2016. First of all, the applicant claimed that Germany had breached the procedural limb on effective investigation foreseen by Article 2 ECHR, which guarantees the right to life. Moreover, by combining Article 2 ECHR with Article 13 ECHR, establishing the right to an effective remedy, Mr. Hanan contested the refusal of the German Federal Prosecutor General to carry out further criminal investigations on the air strike of 2009 in the Kunduz province[323].

In this context, the German government challenged the ECtHR's competence *ratione personae* but, more importantly, *ratione loci*, by affirming that Germany did not in fact exercise exceptional extraterritorial jurisdiction in the Kunduz province of Afghanistan[324]. Mr. Hanan, instead, claimed that a jurisdictional link was established through the criminal investigations carried out by German authorities. The applicant added that even in the absence of the criminal investigation, Germany's jurisdiction on the victims of the air strike would have been established anyway due to its capacity of affecting their relevant rights, in particular the right to life enshrined in Article 2 ECHR[325]. This latter argument was later conceptualized as the "effective control over rights doctrine"[326].

[321] *Ivi*, paragraphs 9-25.
[322] *Ibid*, paragraphs 51-70.
[323] *Ibid*, paragraphs 1-3.
[324] *Ibid*, paragraph 140.
[325] *Ibid*, paragraphs 115 and 120.
[326] ÇALI (2020: no pagination).

On the other hand, in its assessment the Court, by referring to the 'special features' doctrine[327] developed in the previous case *Güzelyurtlu and Others*[328], specified:

> "The principle that the *institution of a domestic criminal investigation or proceedings* concerning deaths which occurred outside the jurisdiction *ratione loci* of that State, not within the exercise of its extraterritorial jurisdiction, *is in itself sufficient to establish a jurisdictional link* between that State and the victim's relatives who bring proceedings before the Court […] *does not apply to the factual scenario at issue in the present case*.
>
> However, in *Güzelyurtlu and Others* the Court found that a *jurisdictional link had also been established in view of the 'special features' of that case*. It considered such special features, which it did not define *in abstracto*, could establish a jurisdictional link bringing the procedural obligation imposed by Article 2 into effect, *even in the absence of an investigation or proceedings* having been instituted in a Contracting State in respect of a death which occurred outside its jurisdiction […]. This also applies in respect of extraterritorial situations outside the legal space of the Convention […] as well as in respect of events occurring during the active hostilities phase of an armed conflict […]"[329].

In other words, the Court rejected the argument that Germany's jurisdictional link with the victims of the air strike could be established only due to the initiation of domestic investigations and proceedings. However, in light of the above-mentioned 'special features' theory, the existence of a jurisdictional link with the foreign State, in this case Germany, could be assessed by looking at other elements. In particular, the judges stated:

> "In the present case the Court considers, firstly, that Germany was *obliged under customary international humanitarian law* to investigate the air strike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime […]
> The Court considers, secondly, that *the Afghan authorities were prevented, for legal reasons, from themselves instituting a criminal investigation* […]
> Thirdly, the German prosecution authorities were *also obliged under domestic law* to institute a criminal investigation, as the Government confirmed. […]"[330].

Put differently, the obligation of investigation under customary international humanitarian law and German domestic law and the impossibility of Afghan authorities to carry out themselves an investigation on the air strike were found to

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[327] MILANOVIĆ (2021: no pagination).
[328] Judgment of the European Court of Human Rights, 29 January 2019, 36925/07, *Güzelyurtlu and Others v. Cyprus and Turkey*.
[329] Judgment *Hanan v. Germany*, paragraphs 135 and 136, emphasis added.
[330] *Ibid*, paragraphs 137-139, emphasis added.

be by the Court the 'special features' for the assessment of Germany's extraterritorial jurisdiction over the Afghan victims[331].

What is interesting to highlight here in relation to the ECtHR's case law on extraterritoriality is that the exercise of State jurisdiction beyond national borders is once again considered as something exceptional or which arises under special circumstances, which instead "will actually exist in the vast majority of situations involving the extraterritorial use of force"[332].

To sum up, the chronological analysis performed so far with respect to the EComHR and ECtHR's case law on extraterritorial jurisdiction would suggest that a brave impetus was demonstrated at the beginning, in particular in cases like *Cyprus v. Turkey* and *Loizidou,* as the two CoE bodies pushed to go beyond the territorial understanding of jurisdiction and, therefore, enlarge the scope of application of the ECHR to guarantee the effective protection of human rights. This trend was then reversed in *Banković*, where the Court affirmed the essentially territorial interpretation of jurisdiction as employed in Article 1 ECHR. From that moment on, the extraterritorial exercise of jurisdiction would have been considered as an exception to the rule, thus entailing a narrower scope of application of the Convention beyond the national borders of the High Contracting Parties. Moving beyond the jurisprudential take on extraterritoriality, since the EComHR and ECtHR case law offers different, sometimes opposite, insights on the subject of extraterritorial jurisdiction, this heterogeneity translated into various scholarly interpretations of 'jurisdiction', which will be addressed in the following chapter.

[331] STEIGER (2020: no pagination); MILANOVIĆ (2021: no pagination).
[332] *Ibid.*

Chapter IV. Jurisdiction and extraterritoriality in the doctrine

As previously stated, the heterogeneity, not to say inconsistency[333], of the ECtHR's case law on the extraterritorial application of the Convention has sparked a lively debate in the literature. The current academic landscape thus shows a variety of scholarly interpretations[334] of the legal concept of jurisdiction employed in Article 1 ECHR. The most significant among these will be analyzed hereinafter.

4.1 Different interpretations of jurisdiction

4.1.1 Jurisdiction as de facto *authority and control*

Among the different schools of thought concerning the essence of State jurisdiction with respect to human rights treaties and, in particular, the ECHR, the most well-established would be certainly the one interpreting jurisdiction as *de facto* exercise of authority and control. This viewpoint has been drawn on the lines traced by the ECommHR in the *Cyprus v. Turkey* cases and by the ECtHR initially in *Loizidou*. In these occasions, both bodies managed to get past the territorial understanding of jurisdiction and, instead, establish its essence on a factual basis, that is the exercise of authority and control over a territory or over persons.

One of the main representatives of this school of thought is Marko Milanović. In fact, the scholar rejected[335] the stand taken by the ECtHR in *Banković*, according to which, as previously addressed, the legal notion of 'jurisdiction' employed in Article 1 ECHR is to be understood mainly in a territorial way. In providing a justification for this particular interpretation, the Court stated that the 'jurisdiction' mentioned in the provision exactly aligns with the prescriptive and enforcement jurisdiction under public international law[336]. The political and legal choices behind this restrictive and cautious approach of the ECtHR are quite evident. If, in fact, on the one hand there was the risk of antagonizing powerful European States[337], on the other hand, there was an additional issue with which the Court was faced at the time, as clearly emerges from the report submitted to the ICTY Office of the Prosecutor ('OTP') by the Committee established to

[333] NUßBERGER (2012: 262).
[334] DUTTWILER (2012: 153).
[335] MILANOVIĆ (2008: 417-426).
[336] MILANOVIĆ (2008: 417-426); MILANOVIĆ, PAPIĆ (2018: 781).
[337] MILANOVIĆ (2008: 436).

investigate the NATO bombings[338]. In expressing itself on the aim of NATO's air strike on the Serbian radio and television station RTS, the Committee wrote that "[it] finds that if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law"[339]. Thus, the issue for the ECtHR concerned whether these legal questions within the framework of international humanitarian law or *jus in bello* could really fit with a human rights court's competence and jurisprudence[340]. Either way, moving beyond the relevance or accuracy of the political and legal reasons that moved the Court in developing this strictly territorial interpretation, Milanović explained why this particular understanding of State jurisdiction in human rights treaties would be erroneous and lead to absurd results in the application of the ECHR[341]. The interpretation of 'jurisdiction' in human rights treaties as primarily territorial, because coincident with its homonym under public international law, might be a descriptively correct premise, since, in theory, in most cases "everyone who is within a state's territory is *ipso facto* within its [prescriptive and enforcement] jurisdiction"[342]. However, in practice, the State might act also not under the premise of its legal prescriptive or enforcement capacity. In other terms, "the state may kill, maim or persecute people without any guise of legal authority"[343], and this might occur intra-territorially but even more extraterritorially.

In addition, the Court's territorial interpretation of 'jurisdiction' based on the State's sovereign title and legal competence is not even supported by an explicit wording of Article 1 ECHR, which does not mention the word 'territory', like other jurisdiction clauses of above-mentioned human rights treaties. Finally, Milanović not only highlighted the inherent "absurdity"[344] of the *Banković* reasoning but also its inconsistency as well as its loopholes compared to the previous[345] and even subsequent ECtHR case law. On the back of this rebuttal of the *Banković* doctrine, the scholar proceeded to provide an alternative interpretation of State jurisdiction. This latter would in fact constitute a specific or *sui generis* typology of jurisdiction[346], separate from the prescriptive and

[338] International Criminal Tribunal for the former Yugoslavia (ICTY), 8 June 2000, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available online. Cited by O'BOYLE (2004: 135).

[339] International Criminal Tribunal for the former Yugoslavia (ICTY), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, paragraph 76.

[340] O'BOYLE (2004: 135).

[341] MILANOVIĆ (2008: 422-426); MILANOVIĆ, PAPIĆ (2018: 781).

[342] MILANOVIĆ (2008: 425).

[343] MILANOVIĆ (2008: 425).

[344] MILANOVIĆ (2008: 422).

[345] MILANOVIĆ, PAPIĆ (2018: 795).

[346] MILANOVIĆ (2008: 426).

enforcement jurisdiction under public international law. This perspective, on which the distinction previously operated in Chapter II is also based, was shared by some ECtHR judges, who, in their dissenting opinion to the *Ilaşcu* judgment, referred to the "autonomous meaning"[347] of the term 'jurisdiction' in Article 1 ECHR. To put in another way, according to the judges, this legal concept thus did and does not hold the same general meaning under public international law. In Milanović's view, this *ad hoc* understanding of State jurisdiction relates mostly to the ECHR and human rights treaties, although not exclusively[348]. Moving therefore to the essence of such autonomous concept, according to the scholar, this latter would be the "power, authority or control over people or a territory, or […] [the] synonym for the territory within which such power is exercised"[349]. It would constitute thus something different from the legal authority to prescribe or enforce set out in public international law. At the same time, and not less importantly, it would represent a notion separate from that of State responsibility and attribution. Put differently, the establishment of jurisdiction is purely factual and practical, rather than being based on a legal competence designed under public international law for securing the sovereignty spheres of States. This has evidently significant implications for what concerns the extraterritorial exercise of jurisdiction and application of the ECHR itself. Indeed, if jurisdiction is established in light of the actual capacity of the State to exercise its control and authority over a territory or over persons, and, more importantly, the concrete implementation of such capacity, without any territorial or geographical limitation, the scope of application of the ECHR is obviously extended. Indeed, no matter if between or beyond national borders, if the State exercises its jurisdiction, this entails the arising of obligations under the ECHR on the State side and of enforceable rights for those coming under the jurisdiction of the relevant State, despite not being its nationals or living on its territory[350].

Another representative of this school of thought on the interpretation of jurisdiction in relation to the ECHR and human rights treaties is Judge Loukis Loucaides, who joined the European Court of Human Rights after having been a

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[347] Judgment of the European Court of Human Rights, 8 July 2004, 48787/99, *Ilaşcu and Others v. Moldova and Russia (Partly Dissenting Opinion of Judge Sir Nicolas Bratza Joined By Judges Rozakis, Hedigan, Thomassen and Panţîru)*, paragraph 8.

[348] MILANOVIĆ (2008: 434-435). Indeed, Milanović mentioned also the Slavery Convention, the Forced Labour Convention, the peace treaties, the Universal Declaration of Human Rights (UDHR), the Enforced Disappearances Convention, the Ottawa Convention on Landmines, the Chemical Weapons Convention, the Rio Declaration on the Environment and Development and the Environmental Modification Convention ('ENMOD') Convention, formally Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

[349] MILANOVIĆ (2008: 434).

[350] MILANOVIĆ (2008: 446-448); MILANOVIĆ, PAPIĆ (2018: 799-800).

member of the European Commission of Human Rights from 1989 to 1998[351]. In multiple occasions, Judge Loucaides expressed his disagreement with the territorial understanding of the legal notion 'jurisdiction' of Article 1 ECHR laid out by the Court in *Banković*. In this regard, with respect to his dissenting or separate opinions, it is essential to mention first the *Assanidze v. Georgia*[352] case. Tengiz Assanidze, the applicant, was previously the mayor of the Georgian city Batumi. After being charged with illegal financial activities, Mr. Assanidze was condemned to jail and the confiscation of his assets. His imprisonment in the short-term facility of the Adjarian Ministry of Security, sustained also by the Georgia Supreme Court in 1995, continued also after having received the presidential pardon in 1999. The case was referred to the European Court of Human Rights in 2001, while the applicant was still in jail. Mr. Assanidze accused Georgia of violating a number of obligations under the ECHR: Articles 5, 6, 10 and 13 of the Convention and Article 2 of the Protocol No. 4, establishing respectively the right to liberty and security, the right to a fair trial, freedom of expression, the right to an effective remedy and finally freedom of movement[353]. As for the merits of the case, the ECtHR in the end found that Georgia had in fact breached Article 5(1) and Article 6(1) of the Convention and instructed that, due to the peculiarity and the urgency of the case, the respondent State had to "secure the applicant's release at the earliest possible date"[354], besides granting him a compensation for the period of imprisonment. On the other hand, the ECtHR also elaborated on the admissibility of the case and the issue of the jurisdiction of the Adjarian Autonomous Republic, a former autonomous republic of the USSR which, following its dissolution, became part of the newly independent Georgia. Indeed, even though both parties to the dispute had raised no objection to the establishment of jurisdiction of the Adjarian Autonomous Republic, the ECtHR further clarified:

> "Article 1 of the Convention requires […] that the States Parties are answerable for any violation of the protected rights and freedoms of anyone within their 'jurisdiction' – or competence – at the time of the violation.
> *In certain exceptional cases, jurisdiction is assumed on the basis of non- territorial factors,* such as: acts of public authority performed abroad by diplomatic and consular representatives of the State; the criminal activities of individuals overseas against the interests of the State or its nationals; acts performed on board vessels flying the State flag or on aircraft or spacecraft registered there; and particularly serious international crimes (universal jurisdiction).

[351] TULKENS, KOVLER, SPIELMANN, CARIOLOU (2008: xv).
[352] Judgment of the European Court of Human Rights, 8 April 2004, 71503/01, *Assanidze v. Georgia*.
[353] *Ibid.*
[354] *Ibid*, paragraph 203.

> *However, as a general rule, the notion of 'jurisdiction' within the meaning of Article 1 of the Convention must be considered as reflecting the position under public international law* […].
>
> *In addition* to the State territory proper, territorial jurisdiction extends to any area which, at the time of the alleged violation, is under the '*overall control*' of the State concerned […]"[355].

In other terms, the Court once again adopted the primarily territorial approach inherited from *Banković*, stating that the legal term 'jurisdiction' employed in Article 1 ECHR aligns with its homonym under public international law and that it is mainly established on the basis of territorial factors. Other non-territorial examples of the exercise of State jurisdiction are still considered exceptional. Judge Loucaides expressed his viewpoint in response to this part of the Court's judgment in his concurring opinion, stating that:

> "[…] To my mind 'jurisdiction' means *actual authority*, that is to say the *possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Party or outside that territory*. Therefore, a High Contracting Party is accountable under the Convention to everyone *directly affected by any exercise of authority* by such Party in any part of the world. *Such authority may take different forms and may be legal or illegal*. The usual form is governmental authority within a High Contracting Party's own territory, but it may extend to authority in the form of overall control of another territory even though that control is illegal […], notably occupied territories […]. It may also extend to authority in the form of the exercise of domination or effective influence through political, financial, military or other substantial support of a government of another State. And it may, in my opinion, take the form of any kind of military or other State action on the part of the High Contracting Party concerned in any part of the world […]"[356].

Perfectly inscribed in the same reasoning as Milanović, in this opinion Judge Loucaides thus rejected the primarily territorial interpretation of the term 'jurisdiction' and affirmed, instead, that its essence is based on the exercise of authority and control, whether intra-territorially or extraterritorially and lawfully or unlawfully. Therefore, jurisdiction is not to be understood through the public international law lens, as the prescriptive and enforcement competence of a sovereign State to be exercised within its national borders. The judge then continued by stating that:

> "Any other interpretation excluding responsibility of a High Contracting Party for acts resulting from the exercise of its State authority *would lead to the absurd proposition* that the Convention lays down obligations to respect human rights only within the territory under the lawful or unlawful physical control of such Party and

[355] *Ivi*, paragraphs 137 and 138, emphasis added.
[356] Judgment of the European Court of Human Rights, 8 April 2004, 71503/01, *Assanidze v. Georgia*, Concurring Opinion of Judge Loucaides, emphasis added.

> that outside that context, leaving aside certain exceptional circumstances (the existence of which would be decided on a case-by-case basis), the State Party concerned may act with impunity contrary to the standards of behaviour set out in the Convention. […]"[357].

Therefore, as anticipated by Milanović, Judge Loucaides affirmed that interpreting 'jurisdiction', with respect to human rights treaties, with a territorial approach and in perfect alignment with public international law could lead to counterproductive and absurd results in the application of the ECHR. In other words, according to the judge, "what is decisive in finding whether a High Contracting Party has violated the Convention […] is the question whether such Party has exercised *de facto* or *de jure* actual authority, i.e. the power to impose its will, over the alleged victim"[358]. This viewpoint was reiterated by Judge Loucaides also in his dissenting opinion in the above-mentioned *Ilaşcu* case[359], where he also added that "a State may also be accountable under the Convention for failure to discharge its positive obligations in respect of any person if it was in a position to exercise its authority directly or even indirectly over that person or over the territory where that person is"[360]. In light of this further elaboration of the authority-based definition of 'jurisdiction', the judge agreed with the stand taken by the Court with respect to the Russian Federation's exercise of jurisdiction over Transdniestria and, therefore, the arising of its responsibility for the alleged human rights violation. Instead, Judge Loucaides did not agree with the Court's statement concerning the Republic of Moldova's responsibility for not implementing the appropriate measures to secure the rights and freedoms under the ECHR of the applicants, despite having lost control of part of the Transdniestrian territory. The judge, indeed, affirmed in his dissenting opinion that:

> "There [was] nothing to show that Moldova actually had any direct or indirect authority over the territory where the applicants were detained or over the applicants themselves. Moldova was in no way responsible for the illegal detention of the applicants or for the continuation of such detention.
>
> […] In any case, to conclude that there is 'jurisdiction' over certain persons for the purposes of the Convention simply because the government concerned has failed to take judicial, political, diplomatic and economic measures or any other of the measures cited by the majority, with the object of securing the Convention rights of the applicants even though actual authority over these persons on the part of the

[357] *Ivi*, emphasis added.
[358] LOUCAIDES (2007: 84).
[359] LOUCAIDES (2007: 89-91).
[360] Judgment of the European Court of Human Rights, 8 July 2004, 48787/99*, Ilaşcu and Others v. Moldova and Russia*, Partly Dissenting Opinion of Judge Loucaides.

> government was lacking, would be *stretching the concept of 'jurisdiction' to an unrealistic and absurd extent*"[361].

As shown in this passage, according to Judge Loucaides, the 'authority test', while representing an enlargement if compared to the *Banković* territorial principle, nevertheless does not justify an unnecessary widening of the notion of 'jurisdiction'. This as well, in fact, could lead to absurd results.

Another representative of this school of thought would be Françoise Hampson[362]. As a matter of fact, in the examination of the case law and the contributions of the ECtHR, the ICJ, the HRC and the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, some of which were also recalled in the previous chapter, the scholar first proceeded to define 'control' and 'jurisdiction' as follows: "control can exist in law or in fact but, in either case, it refers to an *ability to dominate or command*. Jurisdiction, on the other hand, refers *to the space within which an organ of the state exercises its functions*"[363]. These two notions, which would seem apparently separated, are instead linked by the third notion of 'effectiveness'. Hampson, indeed, clarified that jurisdiction, used interchangeably with 'authority', does not depend directly on control. However, its effective exercise, even extraterritorially, is instead linked to the concept of control. Subsequently, the scholar continued by proposing three different scenarios in which the effective exercise of jurisdiction might lead to the arising of obligations towards those individuals coming under the jurisdiction of the relevant State. The first one would be the military occupation of a territory, then the physical or personal control of individuals or, in other words, coercion and, finally, the case of state agents directly impacting the rights and freedoms of one or more individuals through their deliberate conduct. In light of this categorization, Hampson therefore added that "in the symbiotic relationship between rights and obligations, it is clear that control is relevant. *Control determines* how much an individual is affected by state action and therefore what rights are needed in relation to such control and therefore *what obligations attach to the state*"[364]. In other words, according to her, jurisdiction is the State's authority of exercising its functions and the space in which these are exercised. However, control establishes the effectiveness of such exercise of functions and, therefore, the ability to impact the rights and freedoms of individuals and the rising of obligations on the State's side towards the individuals coming under their effective jurisdiction. In light of this, one could thus suggest that Hampson does belong to the school of thought

[361] *Ivi*, emphasis added.
[362] HAMPSON (2010: 157-182).
[363] HAMPSON (2010: 166), emphasis added.
[364] HAMPSON (2010: 169), emphasis added.

according to which the legal term 'jurisdiction' should be interpreted as *de facto* authority and control, stressing in particular the conjunction between these two terms. As for extraterritoriality, the scholar, in rejecting, like Milanović and Judge Loucaides, the absurd consequences that the *Banković* doctrine would entail, finally clarified that

> "Where a state chooses to exercise executive jurisdiction in the territory of another state, *it is required to take account of the likely effect of its actions on individuals in that state.* […]
> […] the extra-territorial applicability of human rights law does or should depend on the relationship between an act for which a state is responsible and the (foreseeable) harm resulting from that act. That brings the victim of the harm within or subject to the exercise of jurisdiction. The exercise of jurisdiction means action taken by state agents or in the name of and with the authority of the state. *The extent of the obligation owed, but not the existence of the obligation, will be affected by the nature and degree of control exercised* over the territory. That applies particularly to the *range* of obligations owed rather than the *degree* to which any particular obligation is owed"[365].

Put differently, according to Hampson, as the arising of obligations for the State towards individuals is determined by its exercise of effective control and authority or, in other words, its effective authority and capacity of having an impact on them with its conduct, this is also true for when the latter situation occurs beyond the national borders of the State. Moreover, in explicit contrast with the *Banković* rejection of the 'divided and tailored' principle, Hampson affirmed instead that the obligations arisen in light of the extraterritorial exercise of State jurisdiction can in fact vary depending on the situation, not so much in terms of the strength with which the State has to comply, but instead in terms of the number of obligations *per se*.

Samantha Besson[366] is also sharing the same viewpoint of the above-mentioned scholars and experts. She underlined how the legal term 'jurisdiction' with respect to human rights treaties, and in particular Article 1 ECHR, is to be understood as State jurisdiction. This signifies the "threshold criterion"[367] for the application of the Convention, that is to say the *condicio sine qua non* for the arising of obligations for the contracting States and, on the other side, of enforceable rights for those coming under their jurisdiction. According to Besson, State jurisdiction is both "a normative threshold and a practical condition for human rights"[368], establishing a specific relationship between the State and the individuals. These are in fact identified as the right-holders, while the States represent the duty-

[365] HAMPSON (2010: 171), emphasis added.
[366] BESSON (2012: 862-868).
[367] BESSON (2012: 862).
[368] BESSON (2012: 863).

bearers[369]. Against this background, therefore, 'jurisdiction' is the legal or normative trigger for the safeguarding of human rights, but at the same time is the practical condition of the States, in their position of authority, of being able to secure human rights. Moving beyond its legal and functional significance, the essence of State jurisdiction with respect to human rights treaties according to Besson is to be found in the political theory perspective and consists of the "*de facto* political and legal authority, that is to say, practical political and legal authority that is not yet legitimate or justified, but claims to be or, at least, is held to be legitimate by its subjects"[370]. As anticipated by the other scholars previously referred to, 'jurisdiction' is once again understood as something factual and practical. In this regard, indeed, Besson explicitly affirmed that "the criterion for the ECHR to apply is not territorial at all, but functional […]. When territorial jurisdiction is mentioned, it should not therefore be understood to mean that jurisdiction is territorial in nature, but only that territory is used as shorthand for the function of jurisdiction"[371]. She subsequently added also that "the proposed understanding of jurisdiction corresponds to the one that applies both domestically and extraterritorially"[372]. Put in another way, 'jurisdiction' always amounts to the factual exercise of authority and control by the State, either within or outside its national borders. For this reason, it represents the criterion for the arising of obligations under the ECHR both intra-territorially and extraterritorially with respect to its High Contracting Parties. Besson indeed stated that "when territorial jurisdiction is mentioned, it should not therefore be understood to mean that jurisdiction is territorial in nature, but only that territory is used as shorthand for the function of jurisdiction"[373]. As for the relationship between the legal notion of 'jurisdiction' in human rights treaties and its homonym under public international law, the scholar seems to have endorsed the same approach of Milanović and Judge Loucaides, when affirming that "the function of jurisdiction under international law is very different from that of jurisdiction qua threshold criterion for the applicability of international human rights law"[374]. The latter has indeed the normative and practical function of triggering the application of the ECHR. State jurisdiction under public international law, as previously anticipated, instead "protects a division of labour between territorial states and their respective jurisdiction […] and organizes their coexistence when their jurisdiction exceptionally overlaps in extraterritorial circumstances by authorizing it in certain cases"[375].

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[369] *Ivi.*
[370] BESSON (2012: 864-865).
[371] BESSON (2012: 863).
[372] BESSON (2012: 866).
[373] BESSON (2012: 863).
[374] BESSON (2012: 869).
[375] *Ibid.*

Finally, another scholar who embraced this factual approach, and even partially enlarged it, is Pasquale De Sena[376]. Indeed, he as well first operated an autonomous analysis of the wording of Article 1 ECHR, also in light of the *travaux préparatoires* of the Convention, but not deriving any relevant clarifications from it concerning the essence of State jurisdiction, also with respect to the ICCPR, then turned to the examination of the doctrine and the ECtHR case law, part of which is also previously referred to[377]. In light of this analysis, De Sena finally proposed his own interpretation of jurisdiction with respect to the extraterritorial application of the ECHR. He therefore stated that:

> "In line with what has just been said and notwithstanding the *contrary indications obtainable in this regard from the Banković judgment* itself [...] it seems legitimate to affirm that the notion of jurisdiction elaborated in the course of the investigation is also apt to encompass *state activities which, while not identifying themselves as true governmental activities in relation to a foreign territory, prove equally apt to stably affect the enjoyment of rights enshrined*"[378].

In other words, De Sena, in explicit contrast with what was established by the Court in *Banković*, did not agree with the perfect alignment among the notion of 'jurisdiction' employed in human rights treaties and its definition under public international law, as the governmental competence to prescribe and enforce. On the contrary, the scholar clearly affirmed that jurisdiction for human rights treaties is also established when the State carries out activities which are not linked to its sovereign powers, usually exercised on the national territory. Instead, the necessary requirement is that these activities have the effective or factual ability to impact the rights of individuals protected by the relevant human rights treaty. Put differently, jurisdiction is established when the State conduct, also extraterritorially, entails a control of such State over the people's enjoyment and access to rights and freedoms. This represents even a step further than the *de facto* authority and control approach. Indeed, De Sena not only went beyond the public international law perspective and, rather, built his understanding of 'jurisdiction' on a rather factual basis, but also suggested that this particular form of control exercised by the State is not only physical but concerns even the individuals' enjoyment of rights. De Sena's understanding would entail an even wider scope of application of the ECHR and, interestingly enough, recalls the recent 'control over rights' doctrine, which will be explored in more detail in the next paragraphs.

To sum up, the most well-established school of thought, in which the above-mentioned scholars and experts can be included, defines State jurisdiction in Article 1 ECHR as the factual exercise of authority and control. This, in

[376] DE SENA (2002: 203-241).
[377] DE SENA (2002: 13-99).
[378] DE SENA (2002: 231), translation by the author, emphasis added.

conformity with some part of the ECtHR jurisprudence, like *Cyprus v. Turkey*, *Loizidou* and *Issa*, does not foresee any kind of geographical limitation or territorial restriction, rejects the *Banković* doctrine and the overlapping with prescriptive and enforcement jurisdiction under public international law. According to this part of the doctrine, thus, the scope of the application of the ECHR could be less narrow than expected.

4.1.2 Jurisdiction as ultimately territorial

Another viewpoint emerging from the scholarly publications is the one according to which State jurisdiction is ultimately territorial. In this regard, it is important to point out Sarah Miller's work[379]. The scholar, indeed, first highlighted the controversial nature of the academic debate on jurisdiction but, more importantly, the inconsistency of the recent ECtHR jurisprudence on the matter. On this last aspect, Miller first discussed the narrow territorial interpretation proposed by the Court in *Banković* and then the discrepancy with such approach showed in the following jurisprudence, in particular in the cases *Issa*, also covered in the previous chapter, and *Öcalan v. Turkey*. In this latter case, the application was filed by the Turkish national, Mr. Öcalan, leader of the PKK, the Kurdish Workers' Party. The applicant had moved to Kenya after his expulsion from Syria, but the Kenyan Minister for Foreign Affair also ordered Mr. Öcalan's removal from the country. He was therefore arrested at the Nairobi airport by Turkish officials and transferred to the detention facility of the Imrali Island, in Turkey. Bringing the matter before the ECtHR, the applicant accused Turkey of violating a consistent number of obligations under the Convention, among which the right to life, the prohibition of ill-treatment and the right to liberty and security[380]. These alleged violations were not substantiated in the end, but, as for whether Mr. Öcalan came under Turkey's jurisdiction from the moment of his arrest, the Court affirmed:

> "It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, *even though in this instance Turkey exercised its authority outside its territory*"[381].

[379] MILLER (2009: 1223-1246).
[380] Judgment of the European Court of Human Rights, 12 May 2005, 46221/99, *Öcalan v. Turkey*, paragraphs 1-3 and 14-24.
[381] *Ibid*, paragraph 91, emphasis added.

In other words, also in this case, as pointed out by Miller[382], the Court broadened again its approach towards the extraterritorial exercise of jurisdiction, in explicit discontinuity with the *Banković* doctrine. This jurisprudential inconsistency, according to the scholar, risks two major consequences. The first one would have to do with the institutional credibility of the European Court of Human Rights, inasmuch as the "recognized […] authoritative interpreter of the Convention's jurisdiction"[383]. The second consequence would concern, instead, the conduct of the Contracting States and, in particular, their inability to "accurately […] include Convention obligations as part of their decisional calculus when assessing the desirability of various extraterritorial undertakings"[384]. Put differently, in light of this uncertainty, States could even underestimate the scope of application of the Convention and therefore engage more easily in unlawful conduct beyond their national borders. This jurisprudential inconsistency on the ECtHR side is associated with a significant disharmony in the scholarly interpretations, which Miller categorizes in a two-fold way. On the one side, there is the interpretation of 'jurisdiction', employed in Article 1 ECHR, as compliant to public international law. On the other side, Miller refers to the first school of thought recalled in this chapter, that is to say the one stating that the essence of jurisdiction is the *de facto* exercise of control. The scholar then proceeded to elaborate a critique of both viewpoints. As for the public international law perspective, Miller partially took up Milanović's line of reasoning and stated that aligning the legal term 'jurisdiction' employed in the ECHR and, generally, in human rights treaties with its homonym under public international law is unsustainable. This is justified not only by the fact that the two notions serve two different purposes, namely protecting and delimiting States' sovereignty for what concerns public international law, while, on the other side, triggering the protection of human rights. In other words, the ECtHR "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"[385]. In light of this, Miller thus proposed an alternative reading of *Banković*, according to which the Court identified 'jurisdiction' in Article 1 ECHR as compliant to public international law, therefore as the State's prescriptive and enforcement competence, in order to have a general jurisprudential guideline. However, the extraterritorial exceptionalism first laid out in *Banković*, and then better elaborated in *Al-Skeini*, does not follow the same pattern. In other words, the extraterritorial exceptions to the *Banković* territorial interpretation of State jurisdiction are not to be inserted within the same legal framework of public

[382] MILLER (2009: 1229).
[383] *Ibid.*
[384] MILLER (2009: 1230).
[385] MILLER (2009: 1232).

international law. This would mean that for the Court the exceptional bases for the extraterritorial exercise of jurisdiction are not rooted in the principles foreseen under public international law, like the passive personality, nationality or protective principles, but are built instead on special justifications arising in particular circumstances. Thus, in Miller's own words:

> "*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"[386].

The scholar subsequently moved to the critique of the second doctrinal approach towards State jurisdiction, defined as the "control entails responsibility approach"[387] and based on the understanding of jurisdiction as factual exercise of authority and control. In this regard, Miller clarified that this approach is inconsistent with the ECtHR jurisprudence, as it would suggest a too expansive reading of jurisdiction and blur the boundaries between this latter notion and that of State responsibility. Besides these conceptual counter-arguments, some more practical critiques were put forward, like the resource objection, according to which the approach based on control would "[set] the threshold for jurisdiction at such a low level that it would […] strain the Court's already stretched resources to breaking point"[388]. In light of this doctrinal and jurisprudential ambiguities, Miller therefore proposed an alternative approach towards extraterritorial jurisdiction under the ECHR. Following this, even the exceptional cases of extraterritorial exercise of jurisdiction foreseen by the ECtHR would be explicable in light of the territorial principle. In other words, the 'exceptions to the rule' set out in *Banković* and rearranged in *Al-Skeini*, like the effective control or personal control through State agents, "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"[389]. In short, according to Miller, the territorial *fil rouge* which can be traced in the ECtHR case law and linked also to extraterritorial jurisdiction is justified in light of the sovereignty-based nature of powers exercised by the State, even beyond national borders.

[386] MILLER (2009: 1233).
[387] MILLER (2009: 1234).
[388] MILLER (2009: 1235).
[389] MILLER (2009: 1236).

4.1.3 Jurisdiction as causal link between State action and violation of rights

The last school of thought proposing an alternative interpretation of State jurisdiction with respect to the ECHR, as recalled by Duttwiler[390], is the one understanding this notion as the causal link between the activities carried out by the State and the human rights violations stemming from these activities. One of the representatives of such viewpoint is Lawson[391]. The scholar, indeed, identified State jurisdiction as the "direct and immediate link between the extraterritorial State act and the alleged human rights violations"[392]. This causal understanding of the exercise of State jurisdiction with respect to the ECHR, and human rights treaties in general, somewhat reflects a part of the ECtHR jurisprudence. For example, this is the case of the Court's judgment for *Andreou v. Turkey*[393]. The applicant, Mrs. Georgia Andreou, was among some Greek-Cypriot protestants demonstrating against the Turkish invasion of Northern Cyrprus, and some of them ended up being shot and badly wounded by the Turkish forces, who had opened fire on them[394]. Mrs. Andreou therefore filed an application before the ECtHR against Turkey, denouncing the violation of the following ECHR provisions: Articles 2, 3 and 8, establishing respectively the right to life, the prohibition of torture and the right to respect for private and family life[395]. In this context, the Court had to respond to the Turkish government's objection about its lack of jurisdiction over Mrs. Andreou. In this respect, the ECtHR stated:

> "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was *the direct and immediate cause of those injuries*, was such that the *applicant must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1* and that the responsibility of the respondent State under the Convention is in consequence engaged"[396].

Put in another way, the Court established that the applicant came under Turkey's jurisdiction not even in the light of the exercise of an effective control over the person, but due to the causal link between the shooting initiated by the Turkish forces and the wounds of Mrs. Andreou resulting from this shooting. A similar approach was followed by the Court in *Solomou v. Turkey*[397]. This case concerned as well a protestant demonstrating against the Turkish presence in the north of

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[390] DUTTWILER (2012: 153).
[391] LAWSON (2004: 83-123).
[392] LAWSON (2004: 104), as quoted in DUTTWILER (2012: 153).
[393] Judgment of the European Court of Human Rights, 3 June 2008, 45653/99, *Andreou v. Turkey*.
[394] *Ibid*, paragraphs 1-2.
[395] *Ibid.*
[396] *Ibid*, emphasis added.
[397] Judgment of the European Court of Human Rights, 24 June 2008, 36832/97, *Solomou and Others v. Turkey*.

Cyprus. Solomos Solomou was shot while climbing up a flagpole in the attempt of taking down the Turkish flag on its top. Also on this occasion, the ECtHR established Turkey's jurisdiction on the basis of the victim's wounds, caused by the Turkish-Cypriot's shooting[398].

As it is evident from this case, this 'cause-effect' interpretation of State jurisdiction employed in Article 1 ECHR would represent an even more extensive approach than the one based on the *de facto* authority and control, however with no few issues. Indeed, as "harm may be caused directly, but accidentally"[399] and the conduct causing the human rights violation may not even fit in the exercise of jurisdiction.

[398] *Ivi*, also quoted in DUTTWILER (2012: 148).
[399] DUTTWILER (2012: 154).

Conclusion

The purpose of this thesis was to approach in an analytical way the still debated issue of extraterritoriality in relation to the European Convention on Human Rights, and, in this regard, demonstrating why and in which way different interpretations of the notion of jurisdiction in Article 1 ECHR can translate either into a narrower or broader scope of application of the Convention. In order to do so, the analysis has been structured in the following way.

Chapter I was dedicated to explaining briefly and in general terms the functioning of the Council of Europe, its historical evolution, its structure and activity, with the aim of having an exhaustive understanding of the institutional framework within which this study would have been carried out. Subsequently, the study focused on the European Convention on Human Rights itself, to capture its significance and scope in terms of human rights protection. Finally, the last part of the chapter was dedicated to the judicial organ of the CoE, as well as the principal body enforcing and interpreting the ECHR, that is to say the European Court of Human Rights. What emerged from this first chapter was the historical and legal significance of this regional system of human rights protection, probably the most advanced and effective to date in light of the judiciary structure underpinning it.

Chapter II introduced the notions of jurisdiction and extraterritoriality within the European Convention on Human Rights, without relying yet on the jurisprudential or scholarly takes on these concepts. This meant starting from the textual basis of the Convention, contextualised within a specific interpretative framework. The jurisdiction clause of the ECHR was then presented, compared to other jurisdiction clauses and then analysed. This analysis was carried out, as anticipated, employing different interpretative norms and criteria, from the wording itself to the *travaux préparatoires*, to the object and purpose of the Convention. The study of the provision was done, without yet referring to the jurisprudential or doctrinal interpretations, in order to examine whether a territorial characterization of the term 'jurisdiction' could be isolated from the provision or not. With the aim of providing an even more exhaustive understanding of the notion of jurisdiction, this was also distinguished from other legal concepts like the ECtHR's judicial jurisdiction, admissibility, attribution, and jurisdiction under public international law. Finally, the last part was dedicated to the examination of the concept of extraterritoriality. Chapter II therefore showed that Article 1 ECHR represents an essential but significant jurisdiction clause, not territorially limited according to its wording. In light of this provision, jurisdiction in relation to the ECHR thus consists of an autonomous legal notion

and the *condicio sine qua non* for the arising of obligations and, conversely, enforceable individual rights under the Convention.

Chapter III is the one dedicated to the jurisprudential elaboration on jurisdiction and extraterritoriality carried out by the European Court of Human Rights. First, the initial case law of the European Commission of Human Rights was taken into consideration, with the *Cyprus v. Turkey* cases. On this occasion, the Commission had proposed a wider and non-territorial understanding of State jurisdiction in light of Article 1 ECHR. Later on, in the landmark case *Loizidou v. Turkey*, the Court elaborated along the same lines the 'effective overall control principle', therefore rejecting any kind of territorial limitation to the notion of jurisdiction and to the scope of application of the Convention. This viewpoint was overturned, instead, in *Banković and others v. Belgium and others*, a watershed in the ECtHR case law. Indeed, in this judgment the Court proposed the primarily territorial interpretation of jurisdiction, establishing that this latter is aligned with its homonym under public international law, and accepted the extraterritorial exercise of jurisdiction only in exceptional cases. The post-*Banković* case law of the Court showed even more explicitly its inconsistency and ambiguity. If, indeed, the ECtHR in *Ilaşcu and Others v. Moldova and Russia* and *Issa and Others v. Turkey* seemed to have taken back a wider understanding of State jurisdiction, enlarging again the scope of application of the Convention, in *Al-Skeini and Others v. the United Kingdom* extraterritoriality was again acknowledged as an exception to the rule. The *Al-Skeini* categorisation of the extraterritorial exceptions was then taken up in *Hassan v. the United Kingdom*, even if in this case the Court's approach appeared to be slightly more inclusive and towards a more extensive application of the Convention extraterritorially. What results from this key chapter is that the ECtHR approach towards extraterritoriality has never been consistent or coherent, but it has oscillated from a narrow and territorial conceptualisation to a wider one. In other terms, the Court has proposed on some occasions the interpretation of 'jurisdiction' as the factual exercise of control and authority over persons or a territory, without referring to the general meaning of the term under public international law. Other times, instead, the ECtHR has understood jurisdiction as being primarily territorial, explaining that this notion amounts to the prescriptive and enforcement competence that States exercise within their national borders. According to this alternative jurisprudence, in fact, extraterritoriality is essentially exceptional. This of course has translated in a different application of the Convention, or diversified degrees of protection of human rights, not to mention the ambiguity mirrored in the doctrinal debate.

Chapter IV finally tackled the diversity among the different scholarly interpretations of jurisdiction under the ECHR and extraterritoriality. The first one, the most well-established, is the *de facto* authority and control, which

establishes the essence of jurisdiction on a purely factual element. This approach was supported by scholars and experts like Marko Milanović, Judge Loucaides, Samantha Besson, Françoise Hampson and Pasquale De Sena. Instead, according to the second school of thought, jurisdiction is always ultimately territorial. Miller affirmed, indeed, that even the extraterritorial jurisdiction is in fact the different expression of the same territorial jurisdiction, or competence, exercised by the State as sovereign entity. Finally, the third interpretation, put forward by Lawson, considers that jurisdiction can be established on the basis of the existence of a cause-effect link among the State conduct and the human rights violations.

In light of this analysis, to answer to the research question, it could be concluded that the notion of State jurisdiction mentioned in Article 1 ECHR is essential for the arising of obligations for the Contracting States and, on the other hand, of enforceable rights for individuals. In short, the exercise and establishment jurisdiction is crucial for the application of the Convention and, in more general terms, for the protection of human rights. However, the essence of the notion of State jurisdiction has changed as the case law has changed. Depending on whether the Court proposed a narrower and territorial interpretation or a wider one instead, the scope of application of the ECHR underwent a shrinking or, on the contrary, an expansion. This is significant because it meant, and still means, that in practice the safeguarding of human rights was not and is not always effective or evenly guaranteed. Moreover, this still seems to be the case in light of the stand taken by the Court in the most recent case *Hanan v. Germany*.

Interestingly enough, in response to this, different instances and impulses for a more extensive approach towards the extraterritoriality and the application of human rights safeguards were advanced on more than one front. This is the case of the so-called 'control over rights' doctrine[400], which can be traced back even to the work of the Italian scholar Pasquale De Sena[401], as referred to in Chapter IV, and to the objections of the applicant in the recent *Hanan v. Germany* case, discussed in Chapter III. According to this, Mr. Hanan:

> "[…] submitted that, even in the absence of a criminal investigation, a jurisdictional link for the purposes of Article 1 would be established. The facts underlying the present application fell within Germany's extraterritorial jurisdiction because Germany had exercised. […] he argued that *it was decisive that Germany was able to affect the relevant rights – in the present case the right to life – of the applicant's sons*, who were killed by the air strike"[402].

[400] ÇALI (2020: no pagination).
[401] DE SENA (2002: 231).
[402] Judgement *Hanan v. Germany*, paragraph 120, emphasis added.

In other words, according to this approach, jurisdiction is established in light of the fact that the relevant State exercises its control, and therefore is able to have an impact, over the rights of individuals. As highlighted by Çali[403], the 'control over rights doctrine' for the extraterritorial application of human rights treaties was embraced also by the UN Human Rights Committee. This latter, in its General Comment No. 36, concerning Article 6 ICCPR on the right to life, stated that:

> "In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who *are within its territory and all persons subject to its jurisdiction*, that is, *all persons over whose enjoyment of the right to life it exercises power or effective control*. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner"[404].

As shown in the passage, jurisdiction is not reduced to the territorial aspect. On the contrary, it is established not even in the light of the exercise of physical control over the persons, but on the basis of the power or effective control exercised by the State over the enjoyment of rights of individuals.

This recent 'control over rights' doctrine could therefore represent a significant impulse for the evolution of the general approach towards extraterritorial application of human rights treaties and, in this particular case, of the ECHR. In any case, the future case law of the ECtHR will suggest to us whether the Court will move still towards a restrictive approach or, instead, an expansive one and how either of these orientations will influence the conventional scope of States' obligations and, consequently, the extent of protection afforded to individuals.

[403] ÇALI (2020: no pagination).
[404] UN Human Rights Committee (HRC), 3 September 2019, CCPR/C/GC/36, *General comment No. 36: Article 6: right to life*, paragraph 63, emphasis added.

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Abstract

La protezione e la tutela dei diritti umani costituiscono tuttora una missione, per non dire una sfida, fondamentale per la società moderna, soprattutto alla luce delle gravi e continue violazioni che hanno luogo ancora oggi. I singoli Stati rappresentano degli attori importanti nella salvaguardia dei diritti umani, ma anche le organizzazioni internazionali hanno implementato il loro ruolo in questo campo, sia a livello universale che regionale, attraverso attività di tipo normativo, di sensibilizzazione e di monitoraggio ed esecuzione. A questo proposito, a livello universale è fondamentale citare il lavoro delle Nazioni Unite, e in particolare l'adozione della Dichiarazione universale dei diritti umani, insieme al Patto internazionale sui diritti civili e politici e al Patto internazionale sui diritti economici, sociali e culturali. Oltre all'impegno normativo nel campo dei diritti umani, le attività di monitoraggio e applicazione possono essere svolte, da un lato, da istituzioni giuridicamente radicate nello Statuto dell'organizzazione, come il Consiglio dei diritti umani, organo sussidiario dell'Assemblea generale. Dall'altro lato, vi è l'attività di organi la cui base giuridica è da ritrovare nelle convenzioni giuridicamente vincolanti in materia di diritti umani, come nel caso del Comitato per i diritti umani, che si occupa dell'implementazione del Patto internazionale sui diritti civili e politici. A livello regionale, è necessario fare riferimento al lavoro dell'Organizzazione degli Stati Americani, dell'Unione Africana e, per quanto riguarda il continente europeo, alle attività dell'Unione Europea ma, soprattutto, del Consiglio d'Europa. Quest'ultimo rappresenta il quadro istituzionale di riferimento di questa tesi, il cui focus principale è la nozione di giurisdizione in relazione alla questione dell'extraterritorialità nella Convenzione europea dei diritti dell'uomo e nella giurisprudenza del suo rispettivo organo giudiziario, la Corte europea dei diritti dell'uomo, detta anche Corte di Strasburgo. In questo contesto, la principale domanda di ricerca del presente studio è in che misura un'interpretazione più o meno territoriale della nozione di giurisdizione rispetto alla CEDU e al suo Articolo 1 comporterebbe una sfera di applicazione più ristretta o più ampia della Convenzione stessa e, quindi, un sistema di protezione dei diritti umani più limitato o più esteso.

Il Consiglio d'Europa è il risultato storico della necessità condivisa nello scenario politico europeo di prevenire futuri attacchi alla democrazia e ai diritti umani sulla scia delle atrocità della Seconda Guerra Mondiale. Tuttavia, nonostante questa comunità di intenti, il percorso verso la creazione di un'organizzazione come il Consiglio d'Europa non è stato chiaramente definito né agevole fin dall'inizio. A partire dall'Unione franco-britannica del 1940, passando per le proposte dei movimenti di resistenza nel 1944 che parlavano di un'unione federale, il suggerimento di Spaak di un'associazione di Paesi dell'Europa occidentale o le

parole di Churchill che prefiguravano, già nel 1942, un “consiglio d'Europa" e gli "Stati Uniti d'Europa”, il dibattito politico è stato sempre popolato da una pluralità di idee, a volte anche divergenti per quanto riguardava la struttura e il funzionamento della nuova organizzazione. In particolare, c'erano da un lato i cosiddetti ‘unionisti’ o ‘intergovernamentalisti’, che sostenevano una forma più blanda di cooperazione interstatale, senza alcun trasferimento di poteri sovrani. Dall'altro lato, invece, i "federalisti" sostenevano un'organizzazione pienamente integrata di natura sovranazionale, pur mostrando sfumature diverse al loro interno. Questa frammentazione ideologica si ripresentò anche in occasione del noto Congresso dell'Aia del 1948, durante il quale lo stesso Churchill rinnovò la sua proposta di un'organizzazione europea, e che si concluse con la creazione del Movimento Europeo nell'ottobre 1948. Fu proprio quest’ultimo a innescare il processo di costituzione del Consiglio d'Europa, i cui primi protagonisti furono i Paesi dell'Unione Occidentale - Belgio, Francia, Lussemburgo, Paesi Bassi e Regno Unito -, creata dopo la firma del Trattato di Bruxelles nel 1948. Queste cinque potenze del Trattato di Bruxelles si accordarono infine a Londra sulla creazione di un Consiglio d'Europa intergovernativo con due organi principali e il coinvolgimento di altre nazioni europee. Non molto tempo dopo, il 5 maggio 1949, lo Statuto del Consiglio d'Europa fu firmato a Londra da dieci Stati fondatori: le nazioni del Trattato di Bruxelles, l'Irlanda, l'Italia, la Danimarca, la Svezia e la Norvegia. Oggi il Consiglio d'Europa conta quarantasei Stati membri, dopo la recente espulsione della Federazione Russa il 15 marzo 2022. Tutti gli Stati membri sono appartenenti alla stessa area regionale: in questo senso, il Consiglio potrebbe essere considerato come un'organizzazione internazionale con ‘membership limitata’ su base geografica. Le uniche eccezioni in questo senso sono il Kosovo e la Bielorussia, che non fanno parte del Consiglio a causa delle rispettive carenze nella protezione dei diritti umani. Allo stesso tempo, però, alcuni Paesi non europei godono dello status di osservatori: Giappone, Canada, Stati Uniti d'America, Israele - solo per quanto riguarda l’Assemblea Parlamentare –, la Santa Sede e il Messico. Lo Statuto del Consiglio d’Europa prevede tre organi principali: il Comitato dei Ministri, l'Assemblea parlamentare e il Segretariato. Tuttavia, il Comitato dei Ministri è apparso fin dall'inizio come il vero nucleo politico dell'organizzazione. Come si può intuire dalla sua denominazione, il Comitato dei Ministri è composto ufficialmente dai Ministri degli Affari Esteri, uno per ogni Stato membro e dotato di un voto. Essendo il principale organo decisionale ed esecutivo del Consiglio, il Comitato dei Ministri adotta raccomandazioni e convenzioni per promuovere lo scopo e la missione dell'organizzazione. Inoltre, prende decisioni relative all'adesione, elabora protocolli interni, gestisce il bilancio e svolge anche un'attività di monitoraggio. L'Assemblea parlamentare del Consiglio d'Europa ha rappresentato al momento della sua istituzione una vera e propria innovazione, adottata da molte altre organizzazioni internazionali. Essendo l'unico elemento sovranazionale di

un'organizzazione generalmente intergovernativa, all'inizio il ruolo dell'Assemblea era più limitato. La crescita dell'autorità e del potere dell'Assemblea nell'equilibrio istituzionale del Consiglio è stata rappresentata simbolicamente dal cambiamento della sua denominazione nel 1974, da Assemblea consultiva ad Assemblea parlamentare. Ad oggi, è composta da 324 membri eletti dai parlamenti nazionali degli Stati membri del Consiglio, in base alle dimensioni e ai principali partiti politici di ciascuno Stato. Per quanto riguarda le sue attribuzioni, l'Assemblea parlamentare presenta raccomandazioni al Comitato dei ministri che riflettono le conclusioni dei suoi dibattiti interni, prende decisioni su questioni che non richiedono il coinvolgimento del Comitato e nomina, tra i tanti, il Segretario generale del Consiglio, i giudici della Corte europea dei diritti dell'uomo e il Commissario per i diritti umani. Quest'ultimo, insieme al Segretariato, completa la struttura istituzionale del Consiglio d'Europa. Se il Segretariato, da un lato, rappresenta il pilastro amministrativo dell'organizzazione, il Commissario per i diritti umani è uno strumento innovativo e aggiuntivo a disposizione del Consiglio, che ben integra il complesso apparato per la salvaguardia dei diritti e delle libertà individuali istituito dalla Convenzione europea dei diritti dell'uomo. Quest'ultima, ufficialmente intitolata Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, fu firmata a Roma il 4 novembre 1950 da tutti gli Stati membri del Consiglio d'Europea. Dopo la ratifica da parte di dieci Stati, la Convenzione è entrata in vigore il 3 settembre 1953. La ratifica della CEDU è tuttora una condizione di adesione al Consiglio d'Europa. Dal novembre 1950, la Convenzione europea dei diritti dell'uomo si è rivelata uno strumento dinamico e 'vivo', da inserire nella missione del Consiglio d'Europa di salvaguardare i diritti e le libertà individuali attraverso la sua attività normativa e di monitoraggio ed esecuzione. Il testo principale della Convenzione contiene oggi tre sezioni, di cui la prima una serie di obblighi positivi e negativi, che potrebbero essere classificati in base alla sfera di attività e interesse a cui si riferiscono. In primo luogo, vi sono le disposizioni relative all'integrità fisica e alla libertà personale dell'individuo, in seguito quelle riguardanti la tutela della vita privata e pubblica dell'individuo, con inclusi anche le disposizioni relative all'attività politica. Un'altra categoria potrebbe essere quella delle norme riguardanti i procedimenti giudiziari, mentre le disposizioni alla fine di questa prima sezione concernono più da vicino l'applicazione della Convenzione in sé. La sezione II regolamenta poi il meccanismo di controllo e di applicazione delle norme della CEDU e, quindi, l'organizzazione della Corte europea dei diritti dell'uomo, come si vedrà più avanti. Infine, la Sezione III contiene disposizioni varie riguardanti il Segretario Generale e il Comitato dei Ministri e il rapporto giuridico tra gli Stati firmatari e la Convenzione in termini di applicazione territoriale, riserve, firma e ratifica. Come già anticipato, questo scheletro essenziale della Convenzione europea dei diritti dell'uomo è stato poi ampliato, sia in termini di obblighi che di procedure, da diversi protocolli aggiuntivi e

modificativi. Anche altre convenzioni sono state concluse nel quadro giuridico del Consiglio d'Europa, anche se la Convenzione europea dei diritti dell'uomo rappresenta ancora oggi uno degli strumenti più efficaci per la salvaguardia dei diritti umani a livello regionale, soprattutto grazie alla progressiva costruzione e consolidamento di una vera e propria struttura giudiziaria, la Corte europea dei diritti dell'uomo. La Corte europea dei diritti dell'uomo, informalmente nota anche come Corte di Strasburgo per la sua sede, è l'organo giudiziario dell'apparato istituzionale del Consiglio d'Europa, istituito dalla Convenzione europea dei diritti dell'uomo. Come inizialmente anticipato, la Corte europea dei diritti dell'uomo non è sempre esistita come la conosciamo oggi, poiché all'inizio la supervisione della corretta applicazione della CEDU da parte degli Stati membri del Consiglio era affidata a tre istituzioni: la Commissione europea dei diritti dell'uomo, la Corte e il Comitato dei ministri. Tra questi, la prima può essere considerata il vero e proprio predecessore della Corte europea dei diritti dell'uomo, poiché svolgeva le funzioni che oggi spettano esclusivamente alla Corte di Strasburgo. Ad oggi, sia il funzionamento e la struttura della Corte che le procedure contenziose e consultive sono regolate dalla Sezione II della CEDU, dai relativi protocolli aggiuntivi e dal Regolamento della Corte. La Corte europea dei diritti dell'uomo è composta da un numero di giudici pari a quello degli Stati, e questi devono soddisfare specifici criteri di età e professionalità. I giudici sono eletti dall'Assemblea parlamentare del Consiglio e ricoprono, in quanto indipendenti, un mandato unico e a tempo pieno di nove anni, incompatibile con altre attività esterne. Le disposizioni interne dei giudici della Corte europea dei diritti dell'uomo possono cambiare in base alle diverse formazioni giudiziarie che posseggo competenze diverse. Queste corrispondono ai giudici unici, che si pronunciano sull'irricevibilità di un ricorso individuale. D'altro canto, i comitati si pronunciano sull'ammissibilità e anche sul merito quando il caso si riferisce a una solida giurisprudenza della Corte. In alternativa, le Camere possono decidere sull'ammissibilità e sul merito dei casi non trattati nell'ambito delle procedure sopra menzionate, mentre la Grande Camera riceve i casi deferiti dalle Camere, soprattutto quando riguardano una grave questione di interpretazione o di coerenza giurisprudenziale. La Corte europea dei diritti dell'uomo ha una giurisdizione contenziosa e consultiva. Per quanto riguarda il primo aspetto, può quindi decidere sulle controversie riguardanti la potenziale violazione degli obblighi CEDU da parte di un'Alta Parte contraente. La Corte non può decidere d'ufficio, ma su richiesta di una parte. Quest'ultima può essere un altro Stato o un individuo per quanto riguarda i ricorsi individuali. Tutti i casi presentati e ricevuti dalla Corte europea dei diritti dell'uomo devono soddisfare i criteri di ammissibilità. Si tratta innanzitutto dell'esaurimento di tutte le vie di ricorso interne e di un limite di quattro mesi dalla decisione giudiziaria interna definitiva. Inoltre, in particolare, i ricorsi individuali sono inammissibili se anonimi, irrilevanti - non presentano elementi nuovi rispetto a un caso già deciso o in fase

di indagine -, incompatibili con le disposizioni della CEDU, infondati o derivanti da un abuso del diritto di ricorso individuale e, infine, se non riguardano uno "svantaggio significativo" subito dal singolo richiedente. Per quanto riguarda l'aspetto dell'incompatibilità, questo può presentare diverse sfumature: *ratione temporis, ratione loci, ratione personae* e *ratione materiae*.

Avendo dunque definito il quadro istituzionale di riferimento, per comprendere correttamente il concetto di giurisdizione statale sancito dalla Convenzione europea dei diritti dell'uomo, è essenziale individuarne il quadro interpretativo rilevante. Poiché la CEDU costituisce innanzitutto un trattato internazionale, le norme per la sua interpretazione si trovano principalmente nella Convenzione di Vienna sul diritto dei trattati, in particolare negli articoli 31-33. L'Articolo 31 della Convenzione di Vienna costituisce una regola generale di interpretazione, secondo la quale un trattato deve essere interpretato alla luce del significato ordinario dei termini della disposizione, del contesto e dell'oggetto e scopo dell'accordo. Questa regola generale combina quindi il metodo testuale con quello teleologico, mentre gli altri paragrafi della disposizione e le due successive ampliano ulteriormente il quadro interpretativo. Infatti, l'Articolo 31, paragrafo 2, della Convenzione di Vienna definisce il contesto del trattato, mentre il paragrafo 3 approfondisce ulteriormente affermando che, oltre al contesto, altri elementi devono essere presi in considerazione per l'interpretazione di un trattato, ovvero qualsiasi prassi o accordo successivi tra le parti riguardante l'applicazione del trattato, nonché qualsiasi norma pertinente di diritto internazionale. In aggiunta, l'Articolo 32 della Convenzione si riferisce ai mezzi di interpretazione supplementari, come i lavori preparatori del trattato. Inoltre, è essenziale delineare la relazione tra le suddette norme della Convenzione di Vienna sull'interpretazione dei trattati e i trattati sui diritti umani. Infatti, alcuni studiosi hanno sottolineato alcune caratteristiche peculiari di questi trattati, con sfumature sia formali, per la loro natura 'costituzionale', che sostanziali, dato il loro significativo valore normativo. In altre parole, la CEDU, come ogni trattato sui diritti umani, mostra una certa peculiarità, pur non rappresentando di per sé un regime autonomo. Ciò comporta che il quadro interpretativo della CEDU si basa in larga misura sulle regole generali sancite dalla Convenzione di Vienna sul diritto dei trattati. Tuttavia, a causa delle suddette caratteristiche speciali, le disposizioni della CEDU devono essere interpretate anche in base a una serie di criteri aggiuntivi stabiliti dalla Corte europea dei diritti dell'uomo. Tra questi sono da evidenziare l'approccio teleologico sostenuto dalla Corte, strettamente legato al principio di effettività e all'interpretazione evolutiva della CEDU, nonché il principio di proporzionalità e il concetto di margine di apprezzamento. La delineazione di questo quadro interpretativo è fondamentale per comprendere l'Articolo 1 della CEDU, che introduce la nozione giuridica di giurisdizione. La disposizione, nella sua essenzialità, stabilisce l'obbligo per gli Stati contraenti di riconoscere a ogni

persona sottoposta alla loro giurisdizione i diritti e le libertà enunciati nella Convenzione. Nel suo minimalismo, questa disposizione costituisce un vero e proprio 'prototipo di clausola di giurisdizione', poiché è stata successivamente evocata e ampliata in altri trattati sui diritti umani. È stata anche una delle prime ad essere elaborata, insieme a quella codificata nel Patto internazionale sui diritti civili e politici. Nelle altre clausole di giurisdizione, il criterio territoriale è più o meno esplicitamente evidenziato. Nello stesso Patto internazionale sui diritti civili e politici, il requisito territoriale è integrato nella formulazione dell'Articolo 2, paragrafo 1, che tuttavia richiederebbe un'interpretazione più ampia e non specificamente territoriale secondo quanto affermato nei commenti e nella giurisprudenza del Comitato per i diritti umani e della Corte internazionale di giustizia. Ritornando alla disposizione di interesse per il presente lavoro di analisi, l'Articolo 1 della CEDU deve essere quindi interpretato in conformità con il quadro sopra delineato, e quindi seguendo un approccio evolutivo e teleologico, basato sull'oggetto e sullo scopo della CEDU. Questi ultimi possono essere rintracciati principalmente nel Preambolo e corrispondono al riconoscimento e alla tutela universale ed effettiva dei diritti definiti nella Convenzione e, più in generale, al raggiungimento di una maggiore unità tra i suoi membri. Questo è stato ampiamente confermato dalla giurisprudenza della Corte europea dei diritti dell'uomo. Per quanto riguarda la formulazione dell'Articolo 1 CEDU, è generalmente noto che la giurisdizione statale è una *condicio sine qua non* affinché la Convenzione possa produrre effetti giuridici. Tuttavia, il significato ordinario di 'giurisdizione', insieme alla sua potenziale caratterizzazione territoriale, rappresenta ancora un tema dibattuto sia all'interno della giurisprudenza della Corte europea dei diritti dell'uomo sia in dottrina. Tuttavia, nel tentativo di fare chiarezza sul suo significato, sarebbe opportuno affiancare all'approccio teleologico quello basato sull''intenzione delle parti' e quindi fare riferimento ai lavori preparatori della Convenzione. Infatti, la formulazione del progetto di clausola di giurisdizione, così come era stata presentata per la prima volta dal Movimento europeo nel luglio 1949, presentava una caratterizzazione territoriale. Questo punto è stato ulteriormente precisato dal Comitato per le questioni giuridiche e amministrative dell'Assemblea consultiva del Consiglio d'Europa nell'agosto 1949. Successivamente, però, in seguito al voto del Comitato di esperti intergovernativi, il riferimento territoriale è stato modificato nell'attuale e più ampia formulazione 'sottoposta alla loro giurisdizione'. Questa modifica testuale rispondeva infatti alla necessità di avere un'applicazione non troppo restrittiva dei diritti e degli obblighi stabiliti dalla CEDU. Questa analisi interpretativa circoscritta dell'Articolo 1 della CEDU, basata sui lavori preparatori e sull'oggetto e lo scopo generale della Convenzione, suggerirebbe quindi che la clausola di giurisdizione della CEDU non deve essere interpretata da un punto di vista territoriale ristretto. Tuttavia, è essenziale distinguere il concetto di giurisdizione contenuto nell'Articolo 1 CEDU da altre nozioni giuridiche, nonché

analizzare anche la giurisprudenza della Corte europea dei diritti dell'uomo e il dibattito dottrinale relativo agli argomenti di giurisdizione ed extraterritorialità per avere un quadro completo ed esaustivo. La prima distinzione da operare è quella tra giurisdizione statale e giurisdizione della Corte europea dei diritti dell'uomo, ammissibilità e imputazione. Già osservando la formulazione dell'Articolo 1 della Convenzione europea dei diritti dell'uomo, è evidente che l'uso del termine giuridico ‘giurisdizione’ si riferisce alle "Alte Parti Contraenti" e, pertanto, deve essere inteso come giurisdizione statale. Quest'ultima deve essere distinta dalla giurisdizione della Corte, menzionata in altre parti della stessa Convenzione ma riferita appunto alla Corte europea dei diritti dell'uomo. La distinzione tra giurisdizione statale e giurisdizione della Corte nella CEDU è fondamentale innanzitutto per una questione terminologica e concettuale, dato che la prima si riferisce agli Stati parti della Convenzione, i soggetti che hanno assunto volontariamente l'obbligo di garantire i diritti e le libertà fondamentali degli individui sottoposti alla loro giurisdizione. Il secondo, invece, si riferisce all'organo giudiziario incaricato di far rispettare la CEDU, in un certo senso nel ruolo di ‘supervisore’ dei suddetti Stati parti della Convenzione. Tuttavia, questi due diversi usi di ‘giurisdizione’ riflettono anche due fasi procedurali distinte. Infatti, la giurisdizione degli Stati ai sensi della CEDU è in qualche modo ontologicamente precedente alla giurisdizione della Corte europea dei diritti dell'uomo. In effetti, la prima è il criterio fondamentale affinché siano posti in essere gli obblighi e i diritti previsti dalla CEDU. Una volta che la Convenzione produce tali effetti giuridici e in caso di presunta violazione di questi obblighi, la Corte europea dei diritti dell'uomo è in grado di esercitare la propria giurisdizione. In altre parole, la giurisdizione della Corte è conseguente alla giurisdizione dello Stato così come impiegata e intesa nell'Articolo 1 della CEDU. Infine, altre due nozioni non coincidono e non devono essere associate a quella di giurisdizione statale, così come codificata nella CEDU e nei trattati sui diritti umani in generale. La prima, in continuità con il discorso sulla giurisdizione giudiziaria, è quella di ammissibilità. In altre parole, l'esistenza o meno della giurisdizione statale non ha lo stesso valore di un criterio di ammissibilità non soddisfatto. Infatti, l'inesistenza del primo inciderebbe di per sé sui diritti sostanziali degli individui. Nel secondo caso, invece, verrebbe compromessa solo la possibilità di far valere tali diritti. Per quanto riguarda l'attribuzione di un atto illecito o di una violazione delle disposizioni della CEDU, questa, come nel caso della giurisdizione della Corte, rappresenta qualcosa di consequenziale alla giurisdizione dello Stato. In altre parole, gli obblighi e i diritti protetti e garantiti dalla Convenzione possono logicamente essere violati solo che la Convenzione è in grado di produrre effetti giuridici. In secondo luogo, la nozione di giurisdizione dell’Articolo 1 CEDU è da distinguere da quella impiegata nel diritto internazionale generale. Quest’ultima corrisponde nella pratica alla competenza normativa, esecutiva e giudiziaria di uno Stato, da esercitare all’interno dei propri confini nazionali.

Come evidenziato da Milanović, questa nozione di giurisdizione nel diritto internazionale generale non è perfettamente equivalente a quella utilizzata nei trattati sui diritti umani e, nello specifico, a quella menzionata nell'Articolo 1 della CEDU. Infatti, anche se, come verrà discusso in seguito, parte della giurisprudenza della Corte europea dei diritti dell'uomo si discosta da questa analisi, i due usi del termine giurisdizione servono innanzitutto a due scopi diversi. Da un lato, la giurisdizione nel diritto internazionale generale deve essere intesa come uno spartiacque tra le sfere di influenza e di sovranità degli Stati. Invece, la giurisdizione statale della CEDU attribuisce agli Stati parte della Convenzione il ruolo di portatori di doveri nei confronti degli individui, che rappresentano i titolari dei diritti sanciti nella Convenzione. Inoltre, è evidente che le gravi violazioni extraterritoriali dei diritti umani non possono, e di solito non avvengono, sotto la premessa di un legittimo esercizio della giurisdizione prescrittiva o esecutiva. In altre parole, sempre più frequentemente le violazioni dei diritti umani sono compiute da uno Stato in modo ufficioso o non ufficiale. Pertanto, poiché la nozione di giurisdizione statale della CEDU sembrerebbe costituire un concetto autonomo, è essenziale ripercorrerne il significato essenziale prima nella giurisprudenza della Corte europea dei diritti dell'uomo e poi nella dottrina. Prima di procedere in tal senso, è necessario chiarire anche il concetto di ‘extraterritorialità’. La nozione di extraterritorialità ricorre spesso in relazione all'applicazione dei trattati sui diritti umani. Questa comporterebbe in pratica l'insorgere di obblighi derivanti dal trattato, in particolare in questo caso dalla CEDU, per gli Stati contraenti anche al di fuori dei loro confini nazionali, laddove esercitino la loro giurisdizione. Questo, infatti, rimane ancora il criterio ‘soglia’. Dall'altro lato, l'extraterritorialità, o l'applicazione extraterritoriale del trattato, comporterebbe reciprocamente l'insorgere di diritti esigibili per gli individui che vivono oltre i confini nazionali degli Stati contraenti. Per quanto riguarda la CEDU, i criteri che ne regolerebbero l'applicazione extraterritoriale sono diventati sempre più rilevanti e necessari a causa delle crescenti attività transfrontaliere svolte dagli Stati contraenti. Tuttavia, l'applicazione extraterritoriale della CEDU rimane ancora una questione complessa per una serie di ragioni, come le discrepanze, sia nella giurisprudenza che nella dottrina, riguardo all'essenza della giurisdizione statale. Alla luce di questa complessità e incertezza, è fondamentale quindi analizzare prima la giurisprudenza della Corte europea dei diritti dell'uomo e poi il dibattito dottrinale, al fine di comprendere meglio il tema dell'applicabilità extraterritoriale della CEDU.

Il quadro che emerge dalla giurisprudenza della Commissione europea dei diritti dell'uomo e della Corte europea dei diritti dell'uomo in merito all'essenza della giurisdizione statale e all'applicazione extraterritoriale della CEDU non appare omogeneo né lineare. Per questo motivo, è necessario effettuare un'approfondita analisi cronologica delle principali decisioni, rispettivamente report o sentenze,

emesse dalla Commissione e, successivamente, dalla Corte. Una delle prime occasioni in cui il predecessore della Corte europea dei diritti dell'uomo, la Commissione europea dei diritti dell'uomo, si è espressa apertamente sulla questione della giurisdizione statale è il caso *Cyprus v. Turkey*. Tra il luglio e l'agosto del 1974, la Turchia aveva invaso la regione settentrionale di Cipro e istituito la Repubblica Turca di Cipro del Nord. Di conseguenza, Cipro aveva presentato ricorso interstatale contro la Turchia alla Commissione, ai sensi dell'ex Articolo 24 della Convenzione, ora Articolo 33 della CEDU. In queste denunce, il governo cipriota aveva accusato la Turchia e le sue forze armate di aver perpetrato diverse violazioni dei diritti umani nel territorio occupato. A questo proposito, il governo turco aveva contestato la giurisdizione *ratione loci* della Commissione. Quest'ultima, nel pronunciarsi, ha alla fine respinto la lettura strettamente territoriale del termine giuridico 'giurisdizione' avanzata dalla Turchia e proposto, invece, un'interpretazione alternativa, combinando l'approccio interpretativo testuale con quello teleologico. Infatti, facendo riferimento in particolare alla formulazione francese della disposizione e all'oggetto e allo scopo dell'Articolo 1 CEDU e della Convenzione in generale, la Commissione ha affermato che la 'giurisdizione' non può essere ridotta ai territori degli Stati parte della Convenzione, ma può andare anche oltre i confini nazionali. La logica di questa affermazione va ricercata nella successiva definizione della Commissione di giurisdizione come esercizio effettivo di autorità. Ciò sarebbe fortemente supportato dall'esplicita omissione di qualsiasi tipo di limitazione territoriale nella formulazione dell'Articolo 1 della CEDU. Anche se una definizione più precisa del concetto di autorità in sé non compare nei report adottati successivamente dalla Commissione, quest'ultima aveva continuato a elaborarlo affiancandolo al concetto aggiuntivo di 'controllo'. L'interrelazione tra giurisdizione, autorità e controllo, introdotta per la prima volta nella causa *Cyprus v. Turkey*, è stata ripresa e ulteriormente chiarita anche nella successiva giurisprudenza della Commissione europea dei diritti dell'uomo e della Corte europea dei diritti dell'uomo. Alcuni esempi sono i casi riguardanti le violazioni dei diritti umani perpetrate dalle ambasciate all'estero, e soprattutto il caso *Loizidou v. Turkey*. Quest'ultimo rappresenta un caso emblematico della giurisprudenza della Corte europea dei diritti dell'uomo e un punto di contatto con quanto affermato in precedenza dalla Commissione europea dei diritti dell'uomo in materia di giurisdizione statale e applicazione extraterritoriale della CEDU. La questione centrale riguardava se la Turchia, Alta Parte Contraente della CEDU dal 22 gennaio 1990, avesse esercitato e stesse ancora esercitando la propria giurisdizione nel territorio corrispondente alla Repubblica Turca di Cipro del Nord e, di conseguenza, fosse lo Stato che stava compiendo le presunte violazioni dei diritti umani denunciate dalla signora Loizidou. Nella sentenza della Corte, emergono diversi elementi importanti. In primo luogo la Corte europea dei diritti dell'uomo aveva rifiutato di interpretare il termine giuridico 'giurisdizione'

utilizzato nell'Articolo 1 della CEDU come strettamente territoriale. Invece, sempre prendendo in considerazione l'oggetto e lo scopo della Convenzione secondo l'approccio teleologico, la Corte aveva introdotto il principio fondamentale del controllo globale effettivo. Secondo questo principio il fatto stesso di esercitare un controllo globale, e non dettagliato, su un'area al di là dei confini nazionali può essere rilevante per stabilire la giurisdizione. Pertanto, la legittimità o l'illegittimità di tale esercizio ai sensi del diritto internazionale generale non deve essere presa in considerazione per stabilire la giurisdizione. Inoltre, il controllo globale potrebbe essere esercitato direttamente o da altri agenti militari o amministrativi locali. Tenendo presente la distinzione logica tra giurisdizione e attribuzione precedentemente ricordata, nella causa *Loizidou* la Corte europea dei diritti dell'uomo non solo si è espressa sull'essenza della giurisdizione extraterritoriale, ma ha anche presentato il principio del controllo globale come un importante test di attribuzione, da collegare anche con quanto emerge invece dalla giurisprudenza della Corte internazionale di giustizia e del Tribunale penale internazionale per l'ex Jugoslavia in materia di responsabilità dello Stato. A questo proposito, tuttavia, è importante distinguere il test di attribuzione di Loizidou dalla giurisprudenza della Corte internazionale di giustizia e del Tribunale penale internazionale per l'ex Jugoslavia in materia di attribuzione in termini di soggetti. Infatti, la prima si riferisce al controllo operato dallo stesso esercito turco, in quanto attore statale, su un territorio al di fuori dei confini turchi. La giurisprudenza del Tribunale penale e della Corte internazionale di giustizia presa in considerazione, rispettivamente il caso *Tadić* e i casi *Nicaragua* e *Genocide*, si riferisce invece ad attori non statali. Un cambiamento significativo nell'approccio della Corte europea dei diritti dell'uomo al tema della giurisdizione extraterritoriale è stato segnato dal caso *Banković*. Nel contesto del conflitto degli anni 1998 e 1999 tra la Serbia e il Kosovo, la NATO era intervenuta con attacchi aerei per fermare l'escalation del nazionalismo serbo guidato da Slobodan Milošević e, durante questo intervento militare, una stazione radiotelevisiva di Belgrado, la Radio Televizije Srbije, era stata bombardata il 23 aprile 1999, causando la morte di sedici persone e altri feriti. In questo contesto, la questione giuridica centrale affrontata dalla Corte nella sua decisione di ammissibilità riguardava se le vittime rientrassero nella giurisdizione degli Stati coinvolti. A tal proposito, la Corte ha operato un completo cambio di rotta e ha chiaramente affermato che il termine giuridico ‘giurisdizione’ utilizzato nell'Articolo 1 della CEDU si sovrappone perfettamente a quello utilizzato nel diritto internazionale generale, che, come già detto, ha lo scopo di delimitare le sfere di sovranità degli Stati. Ciò significa che la giurisdizione deve essere intesa come principalmente territoriale, mentre l'esercizio extraterritoriale della giurisdizione rappresenta l'eccezione alla regola. Il caso *Banković* ha rappresentato una svolta importante nella giurisprudenza della Corte europea dei diritti dell'uomo riguardo all'essenza della giurisdizione statale, al suo più o meno

potenziale esercizio extraterritoriale e all'impatto di quest'ultimo sull'ambito di applicazione della CEDU. È quindi necessario analizzare se questa definizione territoriale ristretta abbia subito cambiamenti e modifiche nella giurisprudenza post-*Banković*, fino alle più recenti sentenze della Corte. In particolare, ci si riferisce qui a quattro casi che mostrano un approccio relativamente più ampio della Corte nei confronti dell'esercizio 'eccezionale' della giurisdizione extraterritoriale. Nel caso *Ilaşcu and Others v. Moldova and Russia*, la Corte ha inizialmente definito la 'giurisdizione' in generale come *condicio sine qua non* per l'insorgere di obblighi ai sensi della CEDU, per poi fare riferimento all'interpretazione principalmente territoriale di *Banković*, in conformità al diritto internazionale pubblico. La Corte europea dei diritti dell'uomo ha poi aggiunto che quest'ultima premessa può avere delle eccezioni, come nel caso rilevante di un'occupazione militare e della limitazione dell'esercizio della giurisdizione dello Stato occupato su una parte del suo territorio, aggiungendo però in modo innovativo che anche in caso di esercizio limitato della giurisdizione, rimangono in vigore per lo Stato gli obblighi positivi di attuare misure per garantire i diritti e le libertà degli individui. Anche nella sentenza della Corte per il caso *Issa and Others v. Turkey*, l'approccio territoriale di *Banković* emerge appena, se non solo nella rituale enumerazione dei principi generali relativi alla giurisdizione statale all'interno dell'Articolo 1 della CEDU. Ciò che emerge è invece, ancora una volta, il ritorno al principio del controllo globale di *Loizidou* e l'interpretazione della giurisdizione come concetto fattuale, piuttosto che geografico, basato sull'esercizio tangibile e supportato da prove dell'autorità e/o del controllo su un territorio, anche sotto forma di occupazione militare di un'area. L'approccio della Corte sembra diventare di nuovo territoriale e ristretto in *Al-Skeini and Others v. the United Kingdom*, dove la Corte ha classificato le eccezioni riguardanti l'esercizio extraterritoriale della giurisdizione e ha quindi elencato le seguenti condizioni: il controllo personale esercitato da agenti posti sotto il controllo e l'autorità dello Stato, il controllo territoriale effettivo e il criterio de *l'éspace juridique* della Convenzione. In conclusione, alla luce di questo particolare caso giuridico, ancora una volta la posizione della Corte sull'esercizio extraterritoriale della giurisdizione non sembra perfettamente allineata con la giurisprudenza immediatamente precedente, pur presentando una visione più organica e organizzata delle 'eccezioni' extraterritoriali. Alla luce di questo caso particolare, infatti, la Corte europea dei diritti dell'uomo, più che compiere un'evoluzione verso una comprensione più ampia della giurisdizione statale e dell'extraterritorialità, sembra aver operato un'involuzione verso l'ambito ristretto e territoriale della Convenzione affermato qualche anno prima. Altro due casi di particolare rilevanza per comprendere esattamente l'evoluzione della posizione della Corte in materia di giurisdizione extraterritoriale sono quelli di *Hassan v. The United Kingdom*, in cui la Corte muovendosi lungo le linee tracciate in *Al-Skeini*, ha mostrato un approccio più ampio verso l'esercizio extraterritoriale della

giurisdizione, conservando però la sua caratterizzazione di eccezionalità. Quest'ultima linea di ragionamento è stata seguita dalla Corte anche nel più recente caso di *Hanan v. Germany*, preferendo ancora quindi un approccio più restrittivo verso l'esercizio extraterritoriale della giurisdizione e, conseguentemente, verso l'applicazione stessa della Convenzione.

Al di là dell'approccio giurisprudenziale all'extraterritorialità, poiché la giurisprudenza della Commissione europea dei diritti dell'uomo e della Corte europea dei diritti dell'uomo offre spunti diversi, a volte opposti, sul tema della giurisdizione extraterritoriale, questa eterogeneità si è tradotta in varie interpretazioni accademiche del concetto di 'giurisdizione'. Tra le diverse scuole di pensiero riguardanti l'essenza della giurisdizione dello Stato rispetto ai trattati sui diritti umani e, in particolare, la CEDU, la più consolidata sarebbe certamente quella che interpreta la giurisdizione come esercizio di fatto di autorità e controllo. Questo punto di vista è stato tracciato sulle linee dell'iniziale giurisprudenza della Commissione europea in *Cyprus v. Turkey* e dalla Corte europea dei diritti dell'uomo in *Loizidou*. Questa scuola di pensiero conta studiosi ed esperti come Marko Milanović, il giudice Loukis Loucaides, Françoise Hampson, Samantha Besson e Pasquale De Sena. Secondo questo approccio condiviso, la nozione di giurisdizione rispetto ai trattati sui diritti umani non prevede alcun tipo di limitazione geografica o di restrizione territoriale, respinge la dottrina *Banković* e la sovrapposizione con la giurisdizione prescrittiva ed esecutiva alla luce del diritto internazionale generale. Secondo questa parte della dottrina, quindi, il campo di applicazione della CEDU potrebbe essere meno ristretto del previsto. Un altro punto di vista che emerge dalle pubblicazioni accademiche è quello secondo cui la giurisdizione dello Stato è comunque in ultima analisi territoriale. A questo proposito, è importante sottolineare il lavoro di Sarah Miller. In breve, secondo Miller, il *fil rouge* territoriale che può essere rintracciato nella giurisprudenza della Corte europea dei diritti dell'uomo e legato anche alla giurisdizione extraterritoriale è comunque giustificato alla luce della natura sovrana dei poteri esercitati dallo Stato, anche al di là dei confini nazionali. L'ultima scuola di pensiero che propone un'interpretazione alternativa della giurisdizione dello Stato rispetto alla CEDU, come ricordato da Duttwiler, è quella che interpreta questa nozione semplicemente come il nesso causale tra la condotta dello Stato e le violazioni dei diritti umani derivanti da questa condotta. Uno dei rappresentanti di tale punto di vista è Lawson, e una tale interpretazione si può rintracciare in parte della giurisprudenza della Corte, in casi come *Andreou v. Turkey* e *Solomou v. Turkey*.

Alla luce dell'analisi qui svolta, per rispondere alla domanda di ricerca, si potrebbe concludere che la nozione di giurisdizione dello Stato di cui all'Articolo 1 della CEDU è essenziale per il sorgere di obblighi per gli Stati contraenti e,

d'altra parte, di diritti per i singoli. In breve, l'esercizio e l'istituzione della giurisdizione sono cruciali per l'applicazione della Convenzione e, in termini più generali, per la protezione dei diritti umani. Tuttavia, l'essenza della nozione di giurisdizione dello Stato è cambiata con l'evolversi della giurisprudenza. A seconda che la Corte abbia proposto un'interpretazione più ristretta e territoriale o una più ampia, l'ambito di applicazione della CEDU è stato ridotto o, al contrario, ampliato. Questo è importante perché significava, e significa ancora, che nella pratica la salvaguardia dei diritti umani non era e non è sempre efficace o garantita in modo uniforme. Inoltre, questo sembra essere ancora il caso alla luce della posizione assunta dalla Corte nella sentenza più recente per *Hanan v. Germany*. È interessante notare che, in risposta a ciò, sono state avanzate diverse istanze e impulsi per un approccio più ampio verso l'extraterritorialità e l'applicazione delle salvaguardie dei diritti umani su più fronti. È il caso del cosiddetto approccio del 'controllo sui diritti', che può essere ricondotto anche allo studioso italiano Pasquale De Sena e alle obiezioni presentate dal ricorrente nella recente causa *Hanan v. Germany*. In altre parole, secondo questo approccio, la giurisdizione è stabilita alla luce del fatto che lo Stato in questione esercita in modo più astratto il suo controllo, e quindi è in grado di avere un impatto, sui diritti dei singoli. Come evidenziato da Çali, il controllo sulla dottrina dei diritti per l'applicazione extraterritoriale dei trattati sui diritti umani è stato adottato anche dal Comitato per i diritti umani delle Nazioni Unite. Questo recente principio del 'controllo sui diritti' potrebbe quindi rappresentare un impulso significativo per l'evoluzione dell'approccio generale verso l'applicazione extraterritoriale dei trattati sui diritti umani e, in questo caso particolare, della CEDU. In ogni caso, la futura giurisprudenza della Corte europea dei diritti dell'uomo ci suggerirà se la Corte procederà ancora verso un approccio restrittivo o, invece, un approccio espansivo e in che modo uno di questi orientamenti influenzerà la portata convenzionale degli obblighi degli Stati e di conseguenza, l'estensione della protezione accordata agli individui.