The ECHR System and International Law

THE NOTION OF "JURISDICTION" IN ARTICLE 1: FUTURE SCENARIOS FOR THE EXTRA-TERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

RAFFAELLA NIGRO*

1. INTRODUCTION

Under Article 1 of the European Convention on Human Rights (ECHR) "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention". The interpretation of the term "jurisdiction" is one of the most controversial and debated issues, not only in the case law of the European Court of Human Rights (ECtHR), but also in literature, within the larger debate on the universality of human rights and on the extra-territorial reach of human rights obligations.[1] The interpretation of Article 1 of the Strasbourg Court was recently at the core of the reasoning adopted by the Inter-American Commission on Human Rights (IAComHR) in the 2010 Report on the exercise of extra-territorial jurisdiction (pursuant to Article 1(1) of the American Convention on Human Rights) by Colombia during a military operation led by Colombian military forces in the territory of Ecuador (an 11-hour operation, which lasted from midnight to 11 am, on 1 March 2008).[2] The report of the IAComHR is particularly indicative of the importance of the rulings of the ECtHR in terms of the effects and consequences that the interpretation of the term "jurisdiction" is likely to produce not only in the *legal space* of the ECHR but also, more broadly, in other contexts, particularly in those cases involving human rights violations committed against individuals in parts of the world far from those in the reach of the ECtHR.

The following analysis will focus on the specific issue of extra-territorial application of the ECHR. This aspect is relevant in relation to two different contexts. First, with regard to cases in which the judges are called upon to determine the extent to which the ECHR can be applied to alleged violations committed by States Parties in the territory of third States. In this vein it is worth mentioning the *Al-Skeini v. The United Kingdom* case concerning the alleged violations committed by the United Kingdom in Iraq after the Anglo-American intervention in 2003. As is well-known, the House of Lords ruled out that the victims deceased outside the British prison in southern Iraq fell under the jurisdiction of the United Kingdom

* Research Fellow of International Law, University of Perugia.

[1] Cf. DE SCHUTTER, "Globalization and Jurisdiction: Lessons from the European Convention on Human Rights", Baltic Yearbook of International Law, 2006, pp. 185-247.

[2] IAComHR, Report No. 112/10 of 21 October 2010, available at: <http://www.cidh.oas.org/casos/10.eng.htm>.

pursuant to Article 1 of the Convention.[3] In this case, the Grand Chamber of the ECtHR has recently recognized the exercise of jurisdiction by the United Kingdom under Article 1 of the ECHR with respect to all the applicants, even those who were killed outside the prison.[4]

Secondly, the extra-territorial application of the ECHR is relevant in relation to new potential applications that the Strasbourg Court is likely to be called upon to address in the near future, considering for example the dimension that immigration has recently taken not only for Italy but also for all European countries. One can also considers some recent pronouncements of domestic courts, which, by interpreting the term "jurisdiction" under Article 1, have rejected the application of the ECHR in situations where alleged violations were committed by States Parties to the Convention within the territory of third States. In particular, in the *Smith* case, the Supreme Court of the United Kingdom stated that British soldiers operating in Iraq, because of their *status*, i.e. simply because they are members of a State Party's military troops, do not fall within its "jurisdiction" under Article 1 of the ECHR.[5]

It is worth mentioning a specific context in which the ECtHR shifted the focus from the question of "jurisdiction" under Article 1 to the relationship between the ECHR and the UN Charter. This occurred for example in the *Behrami and Saramati* case.[6] As far as "jurisdiction" was concerned, the Court pointed out that "the FRY did not 'control' Kosovo (within the meaning of the word in the […] jurisprudence of the Court concerning northern Cyprus)",[7] and that to the contrary "Kosovo was under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY",[8] suggesting that an international force is able to exercise the same powers as a State. However, in the following paragraph, the Court stressed that

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[3] House of Lords, *Al-Skeini and Others v. Secretary of State for Defence*, 13 June 2007, available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>.

[4] *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011.

[5] House of Lords, *R (on the application of Smith) v. Secretary of State for Defence and another*, 30 June 2010, available at: <http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0103_Judgment.pdf>. Cf. MILANOVIĆ, "UK Supreme Court Decides *R (Smith) v SSD*", available at: <http://www.ejiltalk.org/uk-supreme-court-decides-r-smith-v-ssd>.

[6] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Application Nos. 71412/01 and 78166/01, Decision of 2 May 2007. In literature cf., among others, BREITEGGER, "Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*", International Community Law Review, 2009, pp. 155-183; KRIEGER, "A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights", Journal of International Peacekeeping, 2009, pp. 159-180.

[7] *Ibid.*, para. 69.

[8] *Ibid*., para. 70.

> "the question raised by the present case is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo".[9]

More specifically the Strasbourg judges pointed out that "since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security…the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions…to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including…with the effective conduct of its operations"[10]. Interestingly, in the *Al-Jedda* case, the Grand Chamber delivered a judgment which appears to go beyond what was stated in the *Behrami* case. In this respect, the Strasbourg judges clearly affirmed the possibility of scrutinizing acts and omissions of Contracting Parties which are covered by UNSC Resolutions. They considered that, in interpreting the UNSC Resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights.[11]

This is a very important and complex issue that deserves a separate discussion and for this reason it will not be addressed in this article.

Instead, our analysis will focus specifically on the circumstances in which the interpretation of the term "jurisdiction" is decisive for the purposes of the extra-territorial application of the ECHR. In particular, we will focus on some possible scenarios in which the interpretation of the term "jurisdiction" is likely to rise again in the near future before the Strasbourg Court. Before discussing these new scenarios and suggesting possible solutions, it is appropriate to review the current interpretation of the term "jurisdiction" in the Strasbourg case law, in the light of the exercise of extra-territorial jurisdiction as well as the views expressed in the literature on the matter.

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[9] *Ibid*., para. 71.

[10] *Ibid*., para. 149.

[11] Application No. 27021/08, *Al-Jedda v. The United Kingdom*, Judgment of 7 July 2011, para. 102. First, the Grand Chamber concluded that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention (see para. 86). Secondly, the judges considered that there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5, para. 1, of the ECHR (see para. 109). Finally, they concluded that the applicant's detention constituted a violation of Article 5, para. 1 (see para. 110).

2. The Interpretation of the Notion of "Jurisdiction" in the ECtHR Case Law

It is well-known that, on several occasions, the Strasbourg judges have stressed that Article 1 of the ECHR must be considered to reflect the ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring a special justification in the particular circumstances of each case.[12] It is also widely known that, pursuant to Article 1, the case law of the ECtHR has identified some cases of exercise of extra-territorial jurisdiction of States Parties to the ECHR, in particular with respect to: a) acts of diplomatic agents or consuls abroad; b) acts committed on board of aircrafts or vessels registered in the State Party or flying its flag; and c) acts committed by a State Party within the territory of another State in which the first exercises effective control. Particular attention was drawn to this third hypothesis, both by the literature and the case law, especially when national courts were called upon to rule on issues concerning the extra-territorial application of the ECHR.

The main question on the exercise of extra-territorial jurisdiction is essentially twofold. First, it concerns the geographic scope (i.e. the *legal space*) of the ECHR, in particular, the possibility that violations committed by States Parties to the Convention in the territory of third States, outside the European region, may fall within the jurisdiction of the former under Article 1. In the *Al-Skeini* case, considering the ECtHR decision in *Banković* as the leading case on jurisdiction, the House of Lords held that the ECHR does not apply to alleged violations committed in the territory of States that are not party to the Convention.[13] Actually, the ECtHR appears to have contradicted the conclusions of the House of Lords, particularly in the *Pad v. Turkey* case, in which it admitted that "a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State *which does not necessarily fall within the legal space of the Contracting States*, but who are found to be under the former State's authority and

[12] *Banković and Others v. Belgium and 16 Other Contracting States*, Application No. 52207/99, Decision of 12 December 2001, para. 61.

[13] According to the British judges, the cases in which the ECtHR held that the activities carried out by a State party in the territory of States not party to the Convention fall within its jurisdiction, under Article 1, were mainly of a diplomatic or consular nature or concerned other hypothesis, however limited. On the *Issa* case decided by the ECtHR, the British judges held that the statements of the ECtHR do not correspond to its settled case law but on the contrary, are incompatible with the principles stated in the *Banković* case. They stressed that "it may well be that there is more than one school of thought at Strasbourg; and that there is an understandable concern that modern events in Iraq should not be put entirely beyond the scope of the Convention: but at present we would see the dominant school as that reflected in the judgement in *Banković* and that it is to that school that we think we owe a duty under section 2(1)" (see para. 265).

control",[14] emphasizing that in this case the Iranian citizens killed by Turkish soldiers during an operation against suspected terrorists in the Iranian territory, about 500 metres from the Turkish border, fell within the jurisdiction of Turkey. Recently, in the *Al-Skeini* case the Grand Chamber confirmed this principle by stating that "[t]he importance of establishing the occupying State's jurisdiction…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".[15]

Secondly, it concerns the criterion of effective control. Once more, in the *Al-Skeini* case, the House of Lords, although excluding that the ECHR applied in the territory of a third State, held that in any case the United Kingdom did not pursue a "high degree of control" in southern Iraq such as to presume an exercise of its jurisdiction under Article 1 of the Convention. In this sense, the British judges seem to suggest that, apart from a possible "extra-regional" implementation of the ECHR, there is a certain level of effective control over a territory under which the exercise of jurisdiction cannot be considered to exist under Article 1.

In fact, in the jurisprudence of the ECtHR, as we shall see shortly, it is possible to note that when a State Party is accused of violations of the ECHR *outside* of its territory, the interpretation of the term "jurisdiction" is not strictly related to the criterion of effective control over the geographic area in which the alleged violation was committed. Effective control, on the contrary, is only *one possible criterion*. In fact, it cannot be ruled out that a State Party might exercise its jurisdiction under Article 1, through the exercise of authority and control over *an individual* who claims to be the victim of a violation, even in the absence of effective control over the territory. Moreover, even when a State Party is accused of violations of the ECHR perpetrated *within* its territory, the criterion of effective control, according to the jurisprudence of the ECtHR, is not believed to be crucial in determining the exercise of jurisdiction under Article 1.

The analysis of the ECtHR case law highlights three different interpretations of the criterion of effective control in establishing the existence of "jurisdiction" under Article 1. The first one concerns *effective control over a geographic area, with the presumption of State involvement*. In some cases the ECtHR held the existence of jurisdiction under Article 1 by applying a rather loose criterion of effective control. For example, the Court held that the large number of military forces of a State Party in the territory of another State is evidence of its "overall" control and consequently of its exercise of jurisdiction under Article 1. This principle was affirmed in the *Loizidou* case, with regard to the control exercised by Turkey over the geographic area of Northern Cyprus,[16] and in the *Ilaşcu* case, with regard to the

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[14] *Pad and Others v. Turkey*, Application No. 60167/00, Decision of 28 June 2007, para. 53.

[15] *Al-Skeini*, *cit. supra* note 4, para. 142.

[16] *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 18 December 1996. The Court held that, in principle "a State's responsibility may be engaged where, as a consequence of mili-

control exercised by the Russian Federation over the geographic area within which the Transnistrian separatist forces operated.[17] These cases concerned the effective control exercised by a State Party to the ECHR in the territory of *another State Party*.

The second interpretation concerns *effective control over individuals, with evidence of State involvement "beyond a reasonable doubt" or at least based on concrete evidence*. In some cases, the ECtHR held the existence of jurisdiction under Article 1, on the assumption that the State Party exercised authority and control over individuals who claimed to be victims of a violation of the ECHR, even in the absence of effective control over the territory where the alleged violation occurred. In these cases the alleged violations were committed in the territory of States *not parties* to the Convention.

This principle was pronounced, for example, in the *Issa v. Turkey* case.[18] The application concerned the alleged violation of the ECHR by Turkey during a military operation that took place in Northern Iraq. The ECtHR, while accepting in principle that during the military operation in Iraq, Turkey was *de facto* temporarily exercising effective control and that therefore that part of the territory fell within its jurisdiction, ruled out the "jurisdiction" under Article 1 since there was no sufficient evidence that the alleged violations attributed to Turkey were perpetrated by the Turkish military.[19]

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tary action – whether lawful or unlawful – it in practice exercises effective control of an area situated outside its national territory" and that "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 forced, or through a subordinate local administration" (cf. para. 52). Moreover, the Court added that sometimes there is no need for proof of a "detailed control" of the acts of the authorities in the area situated outside its national territory, since "even *overall control* of the area may engage the responsibility of the Contracting Party concerned" (cf. para. 56). The overall control criterion was taken by the European Commission in a subsequent decision, of 28 June 1996, on an interstate application submitted by Cyprus against Turkey when Cyprus complained about violations of the ECHR originating in the Turkish military occupation of 1974 .

[17] *Ilaşcu and Others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004. The Grand Chamber considered the financial support and the supply of weapons by the Russian Federation to be of great importance, stating that the Transnistrian separatist forces "vested with organs of power and its own administration, remains under the effective authority, or at least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation" (cf. para. 392).

[18] *Issa and Others v. Turkey*, Application No. 31821/96, Judgment of 16 November of 2004,

[19] Cf. MOLE, "Issa v Turkey: Delineating the Extraterritorial Effect of the European Convention on Human Rights?", European Human Rights Law Review, 2005, pp. 86-91; MILTNER, "Broadening the Scope of Extraterritorial Application of the European Convention on Human Rights?", European Human Rights Law Review, 2007, pp. 172-182.

In the more recent *Isaak v. Turkey* case, the applicants were relatives of Cypriot nationals who were killed during a demonstration organized in Cyprus and aimed at protesting against the Turkish occupation of the northern part of Cyprus.[20] The acts complained of took place in the neutral UN buffer zone. But even so the Court considered that the deceased was under the authority and/or effective control of the respondent State through its agents. In particular, despite the presence of the Turkish armed forces nothing was done to prevent or stop the attack or to help the victim. After stating that "a State's responsibility may be engaged where, as a consequence of military action, whether lawful or unlawful, that State exercises *effective control of an area* situated outside its national territory",[21] the Court added that

> "moreover, a State may also be held accountable for a violation of the Convention rights and freedoms of *persons who are in the territory of another State but who are found to be under the former State's authority and control* through its agents operating – whether lawfully or unlawfully – in the latter State".[22]

Finally, in the *Al-Skeini* case, the Grand Chamber clearly affirmed the principle according to which in some cases, what is decisive for the purposes of Article 1 of the ECHR is the "[e]xercise of physical power and control over the person in question".[23]

It should be noted that in cases where the existence of jurisdiction under Article 1 was determined for the alleged violations committed in the territory of a third State and on the basis of the criterion of authority and control over the victims of the alleged violations, the ECtHR has effectively required a more stringent test of State involvement in the alleged violation. For example in the *Issa* case, the Court held that the applicants had not provided sufficient evidence in order to prove that the Turkish military were involved in the killing of Iraqi civilians "beyond a reasonable doubt".[24] It is worth noting that the ECtHR has concluded, contrary to what was stated in the *Loizidou* case, that despite the high number of Turkish military deployed in military operations, there was no evidence of actual control in northern Iraq since "the essential question to be examined […] is whether at the relevant time Turkish troops conducted operations in the area where the killings

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[20] *Isaak v. Turkey*, Application No. 44587/98, Decision of 28 September 2006.

[21] *Ibid*., p. 19.

[22] *Ibid*., emphasis added.

[23] *Al-Skeini*, *cit. supra* note 4, para. 136.

[24] *Issa*, cit. *supra* note 18, para. 76. The Court affirmed that this standard of proof is habitually employed when ascertaining whether there is a basis in fact for an allegation of unlawful killing. In particular, according to the Court, "such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".

took place".[25] To this effect, it could be assumed that it was precisely because the alleged violations occurred in the territory of a third State, that the Court has required more concrete evidence of the involvement of the State Party. Similarly, in the *Isaak* case, the ECtHR has examined various concrete factors as evidence of the alleged violations, for instance, written statements from independent eye-witnesses describing the alleged course of events and also reports of the UNFICYP and the UN Secretary-General concerning the demonstration and the video recording and photographs submitted by the applicants.[26]

The ECtHR decision in the *Saddam Hussein* case should be mentioned in support of the need to provide adequate evidence of the involvement of a State Party in the alleged violations committed in the territory of a third State.[27] The applicant complained about his arrest, detention and transfer to the Iraqi authorities and about his ongoing trial and its outcome. He maintained that he fell within the jurisdiction of all the respondent States because they were the occupying powers in Iraq and because he was under their authority and control. The Court considered these jurisdiction arguments to be based on submissions which were not substantiated. In the opinion of the Court the applicant did not address each respondent State's role and responsibilities or the labour/power between them and the US. He did not detail the relevant command structures between the US and non-US forces. The Court considered that the applicant did not establish that he fell within the jurisdiction of the respondent States and that he did not demonstrate that those States had jurisdiction on the basis of their control of the territory where the alleged violations took place. According to the ECtHR there was no basis in the Convention's jurisprudence according to which the applicant fell within the respondent State's jurisdiction on the sole basis that those States formed part of a coalition at varying unspecified levels. To this effect, the ECtHR considered a more stringent test of the States Parties involvement to the alleged violation to be necessary, even though it occurred in the territory of a third State.

Also in the *Öcalan v. Turkey* case,[28] the Grand Chamber ascertained "jurisdiction" because "directly after being handed over to Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within '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".[29] The *Öcalan* case therefore supports the approach according to which even when a State

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[25] *Ibid*.

[26] *Isaak*, *cit. supra* note 20, p. 21.

[27] *Hussein v. The United Kingdom*, Application No. 23276/04, Decision of 14 March 2006.

[28] *Öcalan v. Turkey*, Application No. 46221/99, Judgment of 12 May 2005.

[29] *Ibid*., para. 91. After expulsion from Syria in 1998, Öcalan fled to Kenya where Greek diplomats initially gave him safe harbour at the Greek embassy. The Kenyan government then ordered Öcalan to be removed from the country and Kenyan officials facilitated Öcalan's capture by Turkish security officers at Nairobi airport. Turkish officers arrested Öcalan and flew him to Turkey where he was tried and convicted. Öcalan then filed an application with the ECtHR claiming that Turkey's highly irregular extradition process amounted to kidnapping, and that his treat-

Party does not exercise effective control in the territory of a third State, it may nevertheless be held accountable for violations of the ECHR by virtue of the authority and control it exercised over an individual who claims to be victim of such violations.

Finally, the ECtHR has ascertained the existence of "jurisdiction" under Article 1 inside a State Party prison situated in the territory of a third State. In the *Al-Saadoon and Mufdhi* case, on the compatibility with the ECHR of the transfer to the Iraqi Special Tribunal of some members of the Iraqi Baath Party detained in a British prison in Iraq, the ECtHR held that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction" stating that "this conclusion is, moreover, consistent with the dicta of the House of Lords in Al-Skeini and the position adopted by the Government in that case before the Court of Appeal and House of Lords".[30] In this case, the ECtHR has thus upheld the interpretation of the House of Lords in *Al-Skeini*, i.e. that prisons of a State Party in the territory of a third State shall be treated for the purposes of Article 1 of the ECHR like embassies or consulates abroad or even like vessels flying the flag of a State Party. Again, it was crucial in the reasoning of the Court that the British authorities exercised *de facto* control and authority over individuals within the prison, regardless of the exercise of effective control over the territory of Iraq.

The third interpretation provided by the ECtHR concerns the hypothesis of a *legitimate government temporarily deprived of effective control, with proof of the power to affect the enjoyment of Convention rights*. This is a specific case in which the ECtHR has not considered the criterion of effective control to be crucial for the purposes of jurisdiction under Article 1.

In the *Ilaşcu* case, referring to Moldova, the Court clearly established that the absence of effective control over the territory in which the Transnistrian separatist forces operated, could not by itself exclude the exercise of jurisdiction by Moldova under Article 1. In general terms, the Court held that

> "where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not

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ment at the hands of Turkish security officials on the aeroplane flight back to Turkey amounted to cruel, inhuman, and degrading treatment.

[30] *Al-Saadoon and Mufdhi v. The United Kingdom*, Application No. 61498, Decision of 30 June 2009, para. 88. On the decision see JANIK and KLEINLEIN, "When Soering Went to Iraq…: Problems of Jurisdiction, Extraterritorial Effect and Norms of Conflicts in Light of the European Court of Human Rights' *Al-Saadoon* Case", Goettingen Journal of International Law, 2009, pp. 459-518.

> thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State".[31]

Furthermore, the Court stated that "nevertheless such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory".[32] However, also in this instance, an objective and concrete element appeared to be crucial to the Court, namely that the initial measures taken by Moldova had concretely affected the enjoyment of the rights enshrined in the ECHR.[33]

From the above examined case law, some principles can be inferred which seem to inspire the ECtHR in deciding whether, in certain particular circumstances, the applicants fall within the jurisdiction of the States Parties to the ECHR. First of all, it is worth noting the tendency of the Court to extend the possibility of finding violations of the ECHR when committed in the territory of States Parties. This is demonstrated by a broad interpretation of the criterion of effective control when it is exercised in the territory of a State Party on the one hand, as demonstrated by the *Loizidou* case in reference to Turkey, and by the *Ilaşcu* case referring to the Russian Federation, and on the other, by the possibility of establishing jurisdiction under Article 1 when a State Party does not have effective control over part of its territory in which violations of the ECHR are committed, as demonstrated once again by the *Ilaşcu* case, in reference to Moldova.

However, when the alleged violation is committed by a State Party to the ECHR in the territory of a third State, the ECtHR seems to require a more stringent test of the exercise of jurisdiction under Article 1, in particular, the involvement of the State Party in the alleged violation beyond a reasonable doubt, as in the *Issa* case, or at least objective and concrete evidence of such an involvement as shown by the *Isaak* case. Moreover, the decision in the *Banković* case could be interpreted to the same effect.[34] One could, for example, interpret the reasoning of the ECtHR in the sense that the mere bombing of the RTS perpetrated by States Parties to the ECHR

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[31] *Ilaşcu*, *cit. supra* note 17, para. 333.

[32] *Ibid*.

[33] On the violation of positive obligations under the ECHR cf. Conforti, "Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights", IYIL, 2003, pp. 3-10.

[34] On the *Banković* case, cf. among others Loukaidēs, "Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case", European Human Rights Law Review, 2006, pp. 391-407; Roxstrom, Gibney and Einarsen, "The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection", Boston University International Law Journal, 2005, pp. 55-136; Ress, "Problems of Extraterritorial Human Rights Violations. The Jurisdiction of the European Court of Human Rights: The *Banković* Case", IYIL, 2002, pp. 51-68.

during NATO's military operations in Kosovo in 1999 could not be considered sufficient, *without further evidence*, to establish that the relatives of the applicants fell within the jurisdiction of the respondent States. Since this case too deals with alleged violations committed in the territory of a State not party to the Convention, it could be assumed that the ECtHR does not rule out the possibility of establishing the existence of jurisdiction under Article 1, however it requires a more stringent proof of the involvement of the State Party. The issue is not that the air bombing itself cannot be equated with effective control of the territory, as stated in literature,[35] but rather that the air bombing itself, i.e. without further evidence of State involvement in the alleged violation, is not sufficient for the purposes of jurisdiction under Article 1. Such a principle can be found in the *Pad v. Turkey* decision of 2007.[36] In this case the ECtHR considered that it was not required to determine the exact location of the impugned events (i.e. the alleged killing of seven Iranian men by Turkish soldiers in 1999 in north-west Iran) given that the (Turkish) Government had already admitted that the *fire discharged from the helicopters* had caused the killing of the applicant's relatives, who had been suspected of being terrorists. The Strasbourg judges, therefore, did not rule out that the applicants were within the jurisdiction of Turkey under Article 1 although the violations occurred during an air strike as in *Banković*. However, unlike what happened in *Banković*, the Court found that "in the instant case, it was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey".[37]

3. Theories in Literature

As far as the interpretation of Article 1 of the Convention is concerned, and in particular on the interpretation of the term "jurisdiction" thereof, several theories

[35] According to some theories, the reasoning of the ECtHR decision in *Banković* could be interpreted as a clarification of the criterion of effective control. In particular there would be effective control during military operations in the territory of a State but not during air strike. Since the facts in the *Banković* case can be distinguished from the facts in the Cyprus cases it cannot be said that this decision is not in compliance with previous case law because the Court reached a different conclusion with different principles of interpretation. Cf. Peschardt Pedersen, "Territorial Jurisdiction in Article 1 of the European Convention on Human Rights", Nordic Journal of International Law, 2004, pp. 279-305. According to this interpretation, some authors argued that the House of Lords in the *Al-Skeini* case should have considered the jurisdiction of the United Kingdom under Article 1 because of the military operations carried out in the Iraqi *territory*; cf. Williams, "Al Skeini: A Flawed Interpretation of Bankovic", Wisconsin International Law Journal, 2005, pp. 687-729. Cf. also Abdel-Monem, Kennedy and Apostolova, "R (On the Application of Al Skeini) v. Secretary of Defence: A Look at the United Kingdom's Extraterritorial Obligations in Iraq and Beyond", Florida Journal of International Law, 2005, pp. 345-364.

[36] *Cit. supra* note 14.

[37] *Ibid*., para. 54.

have been formulated in literature to explain the extra-territorial application of the ECHR.[38]

According to some scholars the term "jurisdiction" is to be broadly interpreted with reference to all forms of manifestation of State power relevant to international law,[39] or consistently with the imputability regime of an unlawful act under international law. Since this regime operates independently of where the violation is committed, it would explain the practice of the ECtHR to declare the extra-territorial application of the ECHR.[40] Other scholars have argued that the interpretation of "jurisdiction" under Article 1 is closely linked to the system of the ECHR. According to this approach the term "jurisdiction" it to be interpreted on the assumption of the peculiar nature of the ECHR and of its purpose, i.e. to protect the rights and fundamental freedoms of individuals. To this effect, a "functional" interpretation of the term jurisdiction was adopted, which takes into account the ability of the State power to affect the enjoyment of the rights enshrined in the ECHR.[41]

A compromise solution was put forward by those scholars holding that "existing categories of extra-territorial jurisdiction can best be understood as limited exceptions to the rule of the territorial jurisdiction because they all require some significant connection between a signatory state's physical territory and the individuals whose rights are implicated".[42] Thus extra-territorial jurisdiction under the ECHR is and should be limited to such situations to maintain a workable balance between the Convention's regional identity and its universalist aspirations.

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[38] In fact, there is no shortage of opinions in the literature stressing the importance of respecting the will of the States and of not extending the scope of the ECHR in order to avoid discouraging the participation of States in peacekeeping operations, see to this effect DENNIS, "Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, or Just Right? Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?", ILSA Journal of International & Comparative Law, 2006, pp. 459-480; KAVALDJIEVA, "Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?: Can, and Should, an Iraqi Victim of Human Rights Abuses Inflicted by U.K. Troops Have a Remedy in U.K. Courts Under the European Convention on Human Rights?", Georgetown Journal of International Law, 2006, pp. 508-539.

[39] Cf. DECAUX, "Le territoire des droits de l'homme", in *Liber Amicorum Marc-André Eissen*, Bruxelles, 1995, pp. 65-78.

[40] For a reconstruction and deepening of doctrine theories, cf. DE SENA, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Torino, 2002, p. 113 ff.

[41] *Ibid.*, p. 125 ff.

[42] Cf. MILLER, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", EJIL, 2009, pp. 1223-1246. According to this theory, the ECtHR has identified four primary bases for extra-territorial jurisdiction: cases where a State party exercises 'effective overall control' over another territory; cases where either State authorities act abroad or their actions produce extra-territorial effects; extradition or expulsion cases involving the risk that an individual's right will be violated once he leaves the territory of the State party; and diplomatic, consular, and flag jurisdiction cases.

Indeed, a balanced solution is necessary in order to avoid an excessively broad interpretation of the term jurisdiction. However, in our opinion, the conflicting requirements the ECtHR is called to take into account are, on the one hand, the need to avoid an indefinite number of applications that could paralyze the work of the Court and, on the other, the need for consistency in its decisions in order to prevent manifestly unreasonable results because of its regional nature.[43] To this effect, in our opinion two main principles can be drawn from the ECtHR case law, which, if confirmed, would allow it to strike a balance between these conflicting demands.

First, there is the possibility of extending the notion of "jurisdiction" when the alleged violations of the ECHR are committed within the European sphere. In this regard, reference to the meaning of the term jurisdiction established in international law, to which the ECtHR often refers for interpretation, does not seem to exclude, because of the geographic scope in which it is applied, the possibility of sometimes taking broader interpretation criteria than those established by other international tribunals, as with the criterion of effective and/or overall control.[44] In fact, the ECtHR has limited itself to findings of effective and/or overall control in the territory of States Parties to the Convention on the indeed general assumption of economic, military and political support of a State to organized military groups or even on the mere presence of a large number of soldiers of that State in the territory of another.[45] To this effect, the Court seems to have given such a criterion an independent meaning different from that outlined in international case law in order to ascertain State responsibility.[46] This might be explained by the need to allow for

[43] On this point see *infra* para. 6. Suffice it to mention the conclusions reached by the Supreme Court in the *Smith* case of 2010, according to which the UK is not responsible for any violations of the ECHR committed against its military abroad when the alleged violations were committed outside the military base.

[44] A similar approach was taken by the House of Lords in the *Al-Skeini* judgment, whereas the judges held that "the significance of that regional scope, of the European public order, of the legal space or *espace juridique*, could now be seen to have both an exclusive and an inclusive dimension. It was exclusive in the sense that it demonstrated that the Convention is a legal order for Europe where a common heritage was enjoyed, not for the world […] It was inclusive, however, in that within the European sphere there was need of particular care to ensure that the Convention standards were preserved […]" (*Al-Skeini*, *cit. supra* note 3, para. 259). Meaning that there is an established trend of defining 'jurisdiction' in Article 1 in a way that is different from the concept of State jurisdiction in international law, cf. ORAKHELASHVILI, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", EJIL, 2003, pp. 529-568, p. 541.

[45] The effective and/or overall control criterion adopted in the jurisprudence of the ECtHR has raised some concerns even within the same Court. In particular, in the *Loizidou* case, some judges in their dissenting opinions, stressed that the mere presence of the Turkish military was not in itself sufficient to provide evidence of overall control of Turkey over Northern Cyprus and hence of its responsibilities in this area. Cf., for example, the dissenting opinion of Judge Bernhardt, also shared by Judge Lopes Rocha.

[46] See the ICJ Judgment of 27 June 1986 in the *Nicaragua v. United States* case (ICJ Reports, 1986, p. 14) and the judgments of the ICTY Trial Chamber and of the Appeals Chamber, of 7

a greater protection of the human rights enshrined in the ECHR. In other words, given the special role of the Convention, to protect fundamental rights and freedoms in the regional European sphere, the ECtHR could expand the criteria under which it establishes its jurisdiction as much as possible to ensure compliance with the Convention by States Parties.

As far as the alleged violations committed by States Parties in the territory of third States are concerned, the ECtHR, while not ruling out the possibility of deciding on such violations, seems to require however that the involvement of the State Party be demonstrated through more stringent tests than those required when the alleged violation takes place within the European regional sphere. This could result in the request for a test of effective control more stringent than the one required when such control is exercised by a State Party in the territory of another State which is also party to the ECHR. If such proof is not found, the Court may still determine the existence of jurisdiction under Article 1 by virtue of any authority and control that the State Party has exercised over individuals who claim to be victims of a violation. As we shall see shortly, such an interpretation, if upheld by the Court in its case law, would not only make the decisions of the ECtHR on the interpretation of Article 1 consistent, but it would also help in addressing new potential applications on which in the near future the Strasbourg judges are likely to be called to provide, once again, an interpretation of the term "jurisdiction" with regards to the extra-territorial application of the ECHR. This applies in particular to two future scenarios involving, first, the phenomenon of immigration and, secondly, the possibility that States Parties might have to ensure respect of the rights enshrined in the ECHR to their troops operating abroad.

4. Future Scenarios: Immigration

The first scenario concerns the possibility of considering that, in particular circumstances, migrants, even when they have not yet reached the territory of a State Party, may nevertheless fall within its jurisdiction under Article 1 of the Convention.[47] There are several reasons for looking into this issue. First, because

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May 1997 and 15 July 1999 respectively, in the *Tadić* case (Case No. IT-94-1-T) and, most recently, the clarifications of the ICJ in its Judgment of 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, concerning the different criterion of effective control adopted by the ICTY.

[47] Until now, the ECtHR has addressed only the issue of violation of rights enshrined in the Convention against illegal immigrants who had managed to reach the territory of a State party. For example, in the judgment issued on 19 January 2010 in the *Hussun et autres c. Italie* case (Application Nos. 10171/05, 10601/05, 11593/05 and 17165/05), the ECtHR addressed the problem of illegal immigrants landing on the Italian coast. The applicants were initially housed in temporary shelters in Lampedusa and then subjected to expulsion. They claimed violations of

of its relevance for Italy, and the European Union as well, in a period when following the events that are affecting North Africa, there has been a sharp increase in migrant landings in Italy or at least in attempts to reach the Italian territory. Secondly, the issue of violations against migrants under the ECHR will soon be addressed by the Grand Chamber of the ECtHR, to which, on March 2011, the *Hirsi v. Italy* case was referred, a case concerning the rejection by Italian authorities of individuals of various nationalities aboard boats arriving from Libya, which took place 35 miles off the Italian coast on 6 May 2009.[48] Last but not least, the question of the significant increase in requests for provisional measures, submitted to the ECtHR by immigrants against the decision of some States Parties to extradite or expel them, has been the subject of a declaration of Jean-Paul Costa, President of the Court, rendered in February 2011, in which concern was expressed for an "already overburdened Court" and a close cooperation of States Parties based on the "Court's proper but limited role in immigration and asylum matters" was demanded.[49]

In the framework of immigration, there is another scenario that could foreshadow new applications before the ECtHR, taking into account the fact that more and more States, also those party to the ECHR, enter into bilateral agreements with which they are entitled to control the border areas or parts of the territory of other States to address the problem of immigration. For example, in the borderland between Ukraine and Russia there are some immigration offices of other European as well as North American States. As far as the States Parties to the ECHR are concerned, the United Kingdom, on the basis of bilateral agreements with France, controls some areas of the ports of Calais, Dunkerque and Boulogne. It should be noted that with the Immigration Asylum and Nationality Act of 2006, the United Kingdom has provided for the possibility of allowing individuals to carry out this type of control functions, i.e. to intercept ships, aircrafts and vehicles carrying migrants whose situation should be examined by an immigration officer.[50] In consideration of the above, a problem of interpretation of "jurisdiction" could arise when these private citizens "authorized" by the United Kingdom commit violations of the Convention in the territory of another State in which they exercise their immigration control functions. In particular, the ECtHR might be called to establish

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Articles 2 and 3 of the Convention as, if deported, they would run the risk of death or inhuman and degrading treatment. Obviously, such a case presents no problems in terms of "jurisdiction" pursuant to Article 1, since the illegal immigrants were within the Italian territory and therefore fell within its "jurisdiction" under Article 1.

[48] Application No. 27765/09.

[49] Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011, available at: <http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf>.

[50] Immigration Asylum and Nationality Act of 2006, para. 40, available at: <http://www.legislation.gov.uk/ukpga/2006/13/pdfs/ukpga_20060013_en.pdf>.

whether those individuals who suffer human rights violations at the hand of private citizens acting on behalf of the State Party fall within the extra-territorial "jurisdiction" of the United Kingdom.

5. The Application of the ECHR to the Military of States Parties Operating Abroad: The *Smith* Case before the Supreme Court of the United Kingdom

The second scenario is inspired by a recent ruling of the United Kingdom Supreme Court, handed down on 30 June 2010 in the *Smith* case in which the Court addressed the possibility that the military forces operating abroad on behalf of a State Party may fall within its jurisdiction under Article 1.[51]

In the *Smith* case, a British soldier died of hyperthermia, or heat stroke in a British military base in Iraq where he was mobilised for service. His mother relied on Article 2 of the ECHR, in particular, on the alleged obligation of the United Kingdom to carry out a full investigation into the death of her son. The majority of the Supreme Court (Lady Hale, Lord Mance and Lord Kerr *dissenting*) stated that mere membership in the armed forces is insufficient to establish a jurisdictional link for the purposes of Article 1 of ECHR. In the opinion of the judges *the only event* in which the UK can be said to have an obligation under Article 1 to grant protection of human rights to the troops serving abroad is when the alleged violations occur on an army base. In this case, the Supreme Court allowed the appeal on the jurisdiction issue, stating that Private Smith fell within the jurisdiction of the United Kingdom under Article 1 of the Convention, *only because* his death had occurred on the UK army base in Iraq, a place where the UK exercised effective control. The British judges have ultimately taken, *mutatis mutandis*, the criterion reaffirmed by the House of Lords in the *Al-Skeini* case, i.e. only the Iraqi civilian who died in the British prison in Iraq could be considered within the jurisdiction of the United Kingdom under Article 1, but not the others who were killed outside the prison, because outside the prison there was no effective control of the United Kingdom over the Iraqi territory.

Taking the principles set out in the *Smith* case as a starting point, according to which soldiers operating abroad fall outside the jurisdiction of States Parties under Article 1 – except for events occurring on the premises of a military base – one could envisage Strasbourg judges dealing with another different issue. What happens when a soldier of a State Party is accused of committing violations of the ECHR in the territory of another State outside the army base? While in the *Smith* case, the alleged violation is attributed to the State Party *against a member of its own military* when the soldier is not on the army base, in the second instance

[51] *Smith, cit. supra* note 5.

the alleged violation would be attributed to the State Party *through the conduct of a member of its own military*. The question could be addressed as follows: do military troops operating abroad, even outside the army base, who have committed a violation of the rights enshrined in the ECHR, fall within the jurisdiction of States Parties under Article 1? In other words, can the State Party answer, under the Convention, for actions perpetrated abroad by their military forces, for example, for not complying with the procedural requirements of the ECHR with regard to the alleged violations?

6. Outlined Scenarios: Possible Solutions

In these scenarios too, we believe that there are two conflicting requirements the Strasbourg judges are called to take into account: first, to avoid an indefinite number of actions that could paralyse the work of the Court; second, to prevent violations of the ECHR from going unpunished for reasons that are unjustified and in fact could lead to unreasonable results. It should be noted that according to the interpretation of Article 1 provided by the British case law, the distinction between what happens on a military base abroad (such as in the *Smith* case) (or even in a prison, such as in the *Al-Skeini* case) and what happens outside of these premises may lead to unreasonable conclusions. For example, the decision of the House of Lords in the *Al-Skeini* case appears to lead to an unreasonable result, insofar as it should be assumed that if an Iraqi civilian is tortured in a British prison in Iraq, there is an obligation of the United Kingdom to comply with Article 3 of the ECHR, but if the British military torture him outside the prison, such obligation does not exist. According to the *Smith* judgment it follows, again unreasonably, that if the British soldier had died outside the British base even a few meters from it, the United Kingdom would not have had the obligation to carry out any investigation into the causes of his death, under Article 2 of the Convention.

As far as immigration is concerned, if a distinction were to be made, for the purposes of the exercise of jurisdiction under Article 1, between cases in which migrants are intercepted by and transferred on board the vessels of a State Party, from those in which the migrants are left on board the intercepted vessel instead, the envisaged scenario would be one whereby the State Party is under an obligation to comply with the ECHR only as far as the migrants transferred onto its vessels are concerned, but no obligation would exist towards the same migrants, even if in extreme life-threatening conditions. Clearly the envisaged circumstances, i.e. the territory outside a military base and the marine space outside the ship, are quite different but we feel that there is an underlying common factor: individuals invoking a breach of the Convention are *de facto* within the sphere of action of a State Party. In legal terms, this means that the State Party has the power, which of course must be proven with objective and concrete evidence, to affect the protection of

human rights enshrined in the ECHR, for example by leading an investigation into the death of a soldier occurring outside a military base or by adopting the measures within its power to save the lives of migrants found on board a ship while trying to reach its territory in order to escape serious violations of human rights by their State of origin.

How should the issue of jurisdiction be settled in these cases? In our opinion, the ECtHR itself has, through its case law, provided the necessary legal means to limit the circumstances in which the exercise of extra-territorial jurisdiction of States Parties may be invoked in the above scenarios.

As far as the interpretation of "jurisdiction" linked to the immigration phenomenon is concerned, the *Hirsi v. Italy* case before the Grand Chamber does not give rise to particular problems according to the established case law. This is because in this case the Italian vessels intercepted the ships coming from Libya and the migrants were transferred onto the Italian military vessels that returned them to Libya. Consequently, the Italian exercise of jurisdiction under Article 1 of the Convention may be assumed under an established principle, repeatedly reaffirmed by the ECtHR, according to which there is extra-territorial jurisdiction of a State Party for acts committed on board a ship flying its flag.

It may be more difficult, on the other hand, to determine whether the jurisdiction under Article 1 exists when ships of a State Party intercept another vessel on the high seas forcing it to return to port and escorting it under the threat of force, without transferring the people onto the ships of the State Party. On this instance it is worth mentioning the Grand Chamber Judgment in the *Medvedyev v. France* case. In this case the Strasbourg judges recognised the jurisdiction of France over the crew, made up of Ukrainian, Romanian, Greek and Chilean nationals, held on board the *Winner*, a Cambodian ship escorted to France by the French Navy, stating that the French authorities "kept the crew members under their exclusive guard and confined them to their cabins during the journey to France".[52] Moreover the Court stated that

> "as this was a case of France having exercised full and exclusive control over the Winner and its crew, *at least de facto, from the time of its interception,* in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention".[53]

[52] *Medvedyev and Others v. France*, Application No. 3394/03, Judgment of 29 March 2010, para. 66.

[53] *Ibid.*, para. 67 (emphasis added).

The Court seems to assume that from the moment the ship was intercepted, the *Winner* and its crew fell within France's *de facto* jurisdiction because of the authority and control exercised over the victims of the alleged violation.[54]

By applying these principles to the above scenarios, some possible solutions for the ECtHR can be drawn. With regard to the hypotheses put forward in the context of immigration: if a State Party, with its ships intercepts another vessel carrying migrants and forces it to return to port *without transferring the migrants on board its own vessels*, as well as in cases where a State Party carries out functions of immigration control in the territory of other States, possibly through private individuals authorized for this purpose, the ECtHR could ascertain the exercise of jurisdiction under Article 1 by applying the criterion of authority and control over private individuals, providing they can prove the State Party involvement in the alleged violation beyond a reasonable doubt, or at least when applicants are able to provide concrete evidence of the State involvement in the alleged violation.

In a hypothetical *Smith* case, supposing that outside the military base (or outside the prison, as in the *Al-Skeini* case) it is not possible to establish the effective control of the United Kingdom over the geographic area of southern Iraq, the ECtHR could still find that the UK has jurisdiction under Article 1 by virtue of the authority and control it exercises over *individuals* outside the military base, provided that there is concrete evidence of the involvement of the State Party to the alleged violation.

7. Concluding Remarks

The ECtHR case law shows that the Strasbourg judges have elaborated some principles that, if consolidated over time, could allow for an extension, although limited, of the scope of the ECHR beyond the European *legal space*. In the Report adopted on 21 October 2010, on the *Ecuador v. Colombia* case, the IAComHR af-

[54] It is worth mentioning the report of the European Committee for the Prevention of Torture published on 28 April 2010, concerning the push-back operations of the Italian authorities carried out on the high seas from 27 to 31 July 2009 (see CPT/Inf (2010) 14, available at: <http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.pdf>). The report, on Italy's jurisdiction under Article 1 of the Convention, argues that "Italy's responsibilities under Article 3 of the ECHR, including the principle of *non-refoulement*, are likely, in the CPT's view, to be engaged in the context of the push-back operations. Extraterritorial jurisdiction may, indeed, be established through Italy's exercise of authority or effective control over the migrants pushed back, which included their deprivation of liberty and transfer on Italian vessels" (para. 29). The Committee pointed out that "as a result of the principle of *non-refoulement*, States are obliged to screen intercepted migrants with a view to identifying persons in need of protection, assessing those needs and taking appropriate action" (para. 30). Therefore, although it relates to cases of transfer of migrants onto Italian vessels, the Committee does not seem to exclude an obligation to take "appropriate action" in order to safeguard intercepted migrants even when they are not transferred onto Italian vessels.

firmed the principle that "human rights are inherent in all human beings and are not based on their citizenship or location".[55] This statement is certainly too vague, not least from the point of view of positive law, but the legal question remains: who is liable for these violations? With regard to the ECtHR, we believe that it can ensure compliance with the ECHR even when States Parties operate in the territory of States not parties to the Convention, without thereby extending the notion of jurisdiction which would pave the way for an excessive number of applications. In fact, this article argues that it is only when there is evidence of effective control over a geographic area that the jurisdiction of a State Party may be assumed, whether it is exercised in another State Party or even within the territory of a State not party to the Convention. In other instances such as those of control and authority exercised over individuals, even in the absence of effective control over a geographic area, the exercise of jurisdiction under Article 1 cannot be assumed but rather it can only be ascertained if the involvement of the State Party in the alleged violation can be demonstrated beyond a reasonable doubt, or based on concrete evidence.

[55] *Cit. supra* note 2, para. 91.