The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should Be Read as Game Changers

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Abstract: This article argues that *Jaloud v Netherlands* and *Pisari v Moldova and Russia* should be interpreted as changing the approach to the extraterritorial application of the European Convention of Human Rights. It advances three key arguments. First, it suggests a reading of these cases pointing to the fact that the European Court of Human Rights is no longer relying on the separation of the different models of extraterritorial jurisdiction. Second, it advances a model of jurisdiction based on power understood as a potential for control and the application of rules to the concerned individuals. Third, it argues that this model is preferable to the previous ones because it explains hard cases just as well or better and in addition captures a distinct understanding of the function of human rights recognized in the Convention.

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Introduction

When do states parties to the European Convention on Human Rights (ECHR or Convention) owe human rights obligations to individuals outside their territory? When we are talking about the extraterritoriality of the ECHR, we are trying to answer this question. The ECHR in Article 1 provides that states parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Following this wording, the European Court of Human Rights (ECtHR or Court) considers the question of extraterritoriality under the category of jurisdiction. It is now generally accepted by the Court and scholarship that the ECHR may – and sometimes does – apply extraterritorially, but the question of when is still controversial and the answer is unclear.

In developing its jurisprudence on extraterritoriality, the ECtHR has followed a somewhat confusing path, frequently oscillating between various models and sometimes contradicting itself. Much of the relevant case law has been criticised to that effect.[1] In any event, it is not always what one would call coherent and every new judgment seems to either add another layer of confusion or line of case law different from the rest. The recent cases of *Jaloud v Netherlands*[2] and *Pisari v Republic of Moldova and Russia*[3] concerning the jurisdiction over military checkpoints are at first glance no exception. However, there might be a potential for clarity if these cases are taken as opportunities to gain a more principled understanding of the case law on

[1] See generally M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011).

[2] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29.

[3] *Pisari v Moldova and Russia* (App. No. 42139/12), judgment of October 19, 2015.

extraterritorial jurisdiction as a whole rather than conceiving of them as yet another, different cluster of cases. In this light, I will argue for an interpretation that both marks *Jaloud* and *Pisari* as a departure from past case law and explains why the latter has been so confusing.

Decided in November 2014, *Jaloud* has so far been discussed primarily in terms of its ramifications for the application of the ECHR in armed conflicts and their aftermath.[4] Some comments mention the issue of jurisdiction but focus on specific problems regarding the differences between jurisdiction and attribution of conduct.[5] Now that the dust has settled, the time seems ripe to consider a few deeper implications of *Jaloud*, especially in conjunction with its confirmation in *Pisari* in October 2015. These implications are easily overlooked as the judgments are interesting not because of what the Court says but because of what it does not say.

Facts of *Jaloud* and *Pisari*

Jaloud concerned the death of Azhar Sabah Jaloud following a shooting at a checkpoint in occupied Iraq, manned by Dutch troops and members of the Iraqi Civil Defence Force (ICDF), on 21 April 2004. The applicant alleged that the investigation

[4] A. Sari, *Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations*, 24 November 2014 <http://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>, accessed February 16, 2016; S. Borelli, 'Jaloud v Netherlands and Hassan v United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad' (2015) 16 Questions of International Law 25.

[5] M. Milanovic, *Jurisdiction, Attribution and Responsibility in Jaloud*, December 11, 2014 <http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/>, accessed February 16, 2016; A. Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?' (2014) 53 Military Law and the Law of War Review 287.

into the incident was insufficient under the procedural requirement of the right life enshrined in article 2 of the ECHR. After an initial exchange of fire with a car, the Iraqi soldiers called a Dutch patrol to the checkpoint. After they arrived, another car hit several barrels and the Dutch troops opened fire. Azhar Sabah Jaloud was hit and died shortly after. All of these events took place in an area where the UK was an occupying power and Dutch operations were carried out under the command of an officer of the British armed forces.

The ECtHR had to determine if the Dutch armed forces failed to carry out their obligation to investigate under Article 2 of the ECHR. Before it could do so, it had to ascertain whether the Netherlands had jurisdiction. It found that the Netherlands did, that the Convention was thus applicable, and that the shortcomings of the investigation indeed violated Article 2.

Pisari is in many ways similar to *Jaloud*. Vadim Pisari was killed by a Russian soldier at a peacekeeping checkpoint in the security zone created in the aftermath of the Transdniestrian conflict. In the morning of 1 January 2012, Vadim Pisari passed the checkpoint in a borrowed car and failed to comply with an order to stop the vehicle. After a warning, the sergeant in command fired three shots, allegedly to damage the car's tyres. Pisari was hit and died a few hours later after he had been hospitalized. At the time of the shooting, the checkpoint was manned by eight soldiers of the peacekeeping forces. Four were Russian, among them the sergeant in command who shot Pisari, two Moldovan and two Transdniestrian. The security zone in which the checkpoint was located had been created by a peace agreement and was under the control of a Joint Control Commission consisting of representatives of all three parties.

As in *Jaloud*, the applicants in *Pisari* alleged that the Russian authorities failed to investigate the incident pursuant to Article 2 ECHR.[6] To that effect, the Court had to determine if Russia had jurisdiction, even though the security zone was not Russian territory. It held that it did and further found a violation of Article 2 of the Convention.

Legal Principles

Currently, the Court operates with two principles of extraterritorial jurisdiction, personal and spatial, which are framed as exceptions because the assumption is still that jurisdiction is primarily exercised on national territory.[7] The principles as they stand today were first outlined in *Al-Skeini v United Kingdom*[8] and the Court quoted them extensively in *Jaloud* (but not in *Pisari*).[9] According to the personal model, a state has jurisdiction when state agents exercise physical power or control over an individual abroad and their actions are attributable to the sending state rather than the territorial one.[10] The paradigmatic example here is the situation of a person who is arrested or detained by foreign agents, be it in times of peace with the cooperation of

[6] While the original application was against both Russia and Moldova, the applicants later took the position that they no longer wished to pursue their application regarding Moldova. *Pisari v Moldova and Russia* (App. No. 42139/12), judgment of October 19, 2015 at [34] – [35].

[7] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [132]; L. Garlicki, 'New Tendencies on State Responsibility in the Case Law of the European Court of Human Rights' in J. Iliopoulos-Strangas, S. Biernat and M. Potacs (eds), *Responsibility, Accountability and Control of the Constitutional State and the European Union in Changing Times* (Baden-Baden: Nomos 2014).

[8] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [133] –[139].

[9] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [139].

[10] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [133] –[136].

local agents as in *Öcalan v Turkey*[11], or during belligerent occupation as in *Hassan v United Kingdom*[12].

The spatial principle, on the other hand, describes jurisdiction as the exercise of control over an area.[13] In the words of the Court it

> occurs when, as a consequence from lawful or unlawful military action, a Contracting State 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 the Contracting State's own armed forces, or through a subordinate local administration.[14]

The paradigmatic backdrop against which the geographical model was developed is belligerent occupation as is the case in *Al-Skeini* or *Loizidou v Turkey*[15].

In *Al-Skeini* the ECtHR further specified that a state, which exercises some or all public powers normally to be exercised by an inviting government in accordance with custom or agreement, the state exercising those powers also has jurisdiction.[16] It did so under the heading of the personal model, even though it is not entirely obvious that the exercise of public powers should not also be relevant in the context of the

[11] *Öcalan v Turkey* (2005) 41 E.H.R.R. 45.

[12] *Hassan v United Kingdom* (App. No. 29750/09), judgment of September16, 2014.

[13] On the development of the geographical model see R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel Law Review 503.

[14] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [138].

[15] *Loizidou v Turkey* (1995) 20 E.H.R.R. 99.

[16] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [132].

spatial one. Only further on, while applying the principles to the facts, the Court clarified why it found this notion of public powers important. It seems the idea was to add a specification to the personal model that would preserve its role as a delimiting criterion of extraterritoriality.[17] As the ECtHR gave no further reasons let alone an actual justification, this is one of the more puzzling aspects of the case law. Against the background of the two different models and the fact that the Court keeps distinguishing them, this criterion seems to be neither here nor there. We will come back to this point below.

Application and Interpretation

In *Jaloud*, the ECtHR takes care to meticulously outline these two exceptions to the principle that a state's jurisdiction is primarily exercised on its national territory.[18] The same cannot be said for their application. The Court oscillates between the application of the personal and the geographical model. At the outset, the ECtHR determines the relationship of Dutch troops with UK armed forces because the UK was the formal occupying power in the region.[19] While an explicit reference to the spatial model is missing in these passages, it seems nevertheless clear that the Court was trying to establish that whether or not a state has control over an area does not

[17] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [149]. See also M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121, p. 130. He sees the notion of public powers as a limiting factor, in the absence of which the personal model would not be a threshold criterion at all because it would amount to endorsing the notion of jurisdiction as "cause and effect".

[18] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [139], citing *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [130] –[139].

[19] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [141] – [149].

depend on its status as an occupying power.[20] The reason for this assertion can only be that the Netherlands was in fact not the occupying power in South-Eastern Iraq at the time but was still perceived as having jurisdiction by the ECtHR. However, when it comes to the actual pronouncement of jurisdiction the Court uses the phrase "authority and control over persons passing through a checkpoint"[21], which is reminiscent of the personal model.[22] In brief, the Court simply does not specify which model it applies or how the two models relate.

Pisari is different from *Jaloud* in the sense that the Russian government did not object to the allegation that it exercised jurisdiction.[23] Accordingly, the Court proceeds to only outline the principles and their application very briefly. However, the ECtHR does not mention explicitly whether it is assessing Russia's jurisdiction according to the personal or the spatial model. The Court only mentions one of the numerous formulations of principles it first laid down in *Al-Skeini*: namely, the exercise of "public powers", such as judicial or executive functions, in accordance with treaty or custom.[24] Recall that this is precisely the criterion, which the Court first brought up in relation with the personal model but that is not very obviously connected to either the personal or the spatial model of extraterritoriality. In sum, the Court in *Pisari* turns to the part of the personal model that is least clear in order to

[20] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [142].

[21] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [152].

[22] For a similar critique see F. Haijer and C. Ryngaert, 'Reflections on Jaloud V. The Netherlands' 19 Journal of International Peacekeeping 174, pp. 179-180.

[23] *Pisari v Moldova and Russia* (App. No. 42139/12), judgment of October 19, 2015 at [33].

[24] *Pisari v Moldova and Russia* (App. No. 42139/12), judgment of October 19, 2015 at [33] citing *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [135] and [149].

confirm *Jaloud* on account of the personal model even tough the latter judgment does not actually specify what model it was decided on.

It seems the ECtHR in *Jaloud* is struggling to separate the personal model and the geographical one because the Dutch troops asserted authority over a very small and unsteady area in the form of a checkpoint but still had the power to determine what was happening to people who passed through it. *Pisari* could have removed doubts created by *Jaloud* in this respect, but did not. This calls for some clarification. I suggest that the switching back and forth between the two models could be read in two ways. Either the Court is implicitly confirming that the models are increasingly failing to clarify cases because they ultimately collapse into each other, or the models were never meaningfully separate in the first place.

On the first reading, the ECtHR confirms a valid criticism, which consists of two claims. On one hand, the geographical model collapses into the personal one when it is applied to smaller and smaller areas or even objects.[25] This is nicely illustrated by the factual circumstances of both *Jaloud* and *Pisari*. After all a checkpoint is not only (usually) too small of an area to count as a form of territory but it can also quite easily be moved around.[26] The Court was – at least on this account – right not to decide either of the cases on the spatial model because it would have been artificial to do so. That leaves the ECtHR with the possibility to assess cases regarding checkpoints on the personal model, which it seemingly did in *Pisari* but by invoking the very criterion that is least obviously necessary for the personal model

[25] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011), p. 171.

[26] F. Haijer and C. Ryngaert, 'Reflections on Jaloud V. The Netherlands' 19 Journal of International Peacekeeping 174, p. 181.

and instead bears more resemblance to the geographical one. It is at least possible that the Court chooses this option because it recognizes that following through on the personal model consistently would make jurisdiction a meaningless criterion because it would follow that any extraterritorial conduct that potentially violates individuals' rights under the Convention constitutes jurisdiction.[27] But again, the Court says nothing to confirm this.

Accordingly, the interpretation of *Jaloud* that reveals two weaknesses of the personal and spatial model as well as a fundamental flaw in their relationship would mean that cases involving military checkpoints have turned into a "checkpoint" for the ECtHR itself. We could assume that the Court might be aware that the case law reached a point where the models it operates with can no longer clarify hard cases. This would explain the ECtHR's silence on which model it was applying in *Jaloud* as well as the odd choice of criterion in *Pisari*. However, it also paints a bleak picture for the future and provides us with little perspective to make sense of this line of case law.

The second reading suggests that the models were never separate to begin with. This would confirm the view that jurisdiction always denotes control over persons and that control over territory merely functions as shorthand in this context.[28] In other words, what is relevant is control over people in a given area, not control over the

[27] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011), p. 207; M. Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in a Digital Age' (2015) 56 Harvard International Law Journal 81, 114-118. See also fn. 17 above.

[28] S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 Leiden Journal of International Law 857, pp. 874-876.

area as such. Given that human rights are claims of individuals against a state such a reading makes sense. It also implies that *Jaloud* – even in combination with *Pisari* – is actually not as confusing as it seems at first glance. Indeed, if we look at the models of extraterritoriality as complementing each other, a different picture emerges that allows us to see the checkpoint cases as a radical departure from the previous case law. In order to do this, however, it is necessary to take a step back to clarify two issues. First, the concept of power must be elaborated on. It is the common theme in both models and also creeps up in the ominous criterion of "public powers". Second, to define what kind of power we are worried about here, we need to ask ourselves why we care about the application of international human rights law in the first place and what jurisdiction captures in this regard.

Power as an Unobservable Concept

In the context of Article 1 of the ECHR jurisdiction is a concept defined by factual power.[29] This is exemplified by the Court's definition of the personal model, the general, unspecified version of which reads "physical power or control" over a person.[30] However, some form of power is clearly also relevant for the spatial model. The problem with power as a concept is that it is dispositional. It is, in other words, a

[29] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011), ch. 2.

[30] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [136]. The ECtHR emphasizes that the question whether or not a state exercises effective control over an area is a question of fact; see *Al-Skeini* at [139]. I read this to mean (and agree) that it is irrelevant whether any kind of power or control outside a state's territory is lawful or coincides with title under international law, rather than being a statement on the quality or meaning of power as such. On this issue see R. Wilde, 'Legal Black Hole – Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004) 26 Michigan Journal of International Law 739.

potential or capacity and as such not observable.[31] This makes it unsuitable as a tool to delineate functions and responsibilities in legal, administrative, and military practice.

The Court uses power interchangeably with control[32] and thus conflates power with its exercise, the potential with its manifestation. Morriss and Lukes refer to this as the exercise-fallacy.[33] It is a fallacy because power can be had without ever being exercised. Again, the ECtHR's choice of words could be read in different ways. We could say that the Court is simply not aware of the distinction when it should be. On a more charitable analysis, it is possible to say the following. The Court may not be actively aware that this conflation is unhelpful but it is aware of the problem of power as a dispositional concept. That is, its reference to the exercise of power as opposed to power as a potential is a way of dealing with the general difficulty of power as such not being observable.

This solution is only partially satisfactory, however. The most pressing problem here is that the conflation of power with its manifestation makes it difficult to distinguish between the presence of jurisdiction and the violation of a human

[31] On power as a philosophical concept see, e.g., P. Morriss, *Power: A Philosophical Analisys*, 2nd edn (Manchester: Manchester University Press, 2002); S. Lukes, *Power: A Radical View* 2nd edn (Palgrave Macmillan, 2005).

[32] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [136]. That the Court does not actively distinguish between power and its exercise is also illustrated by the fact that it normally refers to a state as "exercising jurisdiction" rather than having it.

[33] P. Morriss, *Power: A Philosophical Analisys*, 2nd edn (Manchester: Manchester University Press, 2002), ch. 3, in particular pp. 15-17; S. Lukes, *Power: A Radical View* 2nd edn (Palgrave Macmillan, 2005), p. 109.

right.[34] This in turn is problematic because jurisdiction is said to be a necessary condition for the ECHR to be applicable and consequently for a state to have human rights obligations in the first place.[35] Looking at the issue this way explains why the Court (and some of the literature) is right to reject a "cause and effect" definition of jurisdiction,[36] which would mean that any violation of a right proves that jurisdiction was present. The reason for this is not so much political expediency but the logic of the matter: saying that one can create obligations under the Convention by violating them is simply absurd.

[34] This is not the same as saying "treating the very act of shooting an individual as bringing them within the scope of article 1 [ECHR]" necessarily collapses the distinction between establishing jurisdiction and the breach of an obligation as discussed and dismissed by Leggatt J in *R (Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin) at [108]-[109]. Distinguishing power as a potential form its exercise does, however, explain why the same set of facts (such as a shooting) should be considered under two sets of criteria: once as establishing jurisdiction and thus based on the right kind of power and once as a potential breach of an obligation where it needs to be determined whether an act was justified.

[35] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [130].

[36] *Banković v Belgium* (App. No. 52207/99) decision of December12, 2001 at [75]; H. King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 Human Rights Law Review 521, p. 538; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011), pp. 173-75, 208; A. Sari, *Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations*, 24 November 2014 <http://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>, accessed February 16, 2016. But see Y. Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 The Law & Ethics of Human Rights 47, pp. 65-66, who endorses a form of a "cause and effect" view but can do so more convincingly precisely because he distinguishes power as capacity and its exercise.

If power needs to be distinguished from its exercise in this regard, this still leaves us with the problem that power – correctly understood – is not observable. What is needed then are proxies, which allow the relevant institutions to assess who has the right kind of power in the situation in question. To this end, it is necessary to know what *kind* of power that would be and to then search for the *right* proxies.

The Relevant Kind of Power and the Search for Proxies

The suggestion is that *Jaloud* and *Pisari* reveal what has been the common thread in the case law of the ECtHR all along: identifying which state has (as opposed to exercises) the *relevant kind* of power over an area of human activity. Before looking at what the Court notes in this regard and how it could be read, it is helpful to take a step back and ask why we care about the application of international human rights law and what this means for the nature and function of human rights.

Human rights as embodied in the ECHR depend on public institutions in order to be guaranteed but also tackle a specific worry about them: they constrain and channel the power of these institutions if and when the necessary institutions are themselves a threat to the individuals they are supposed to protect.[37] In addition, the function of international legal human rights when they are – as is the case with the ECHR – judicially protected is closely connected to their legality as they depend on at

[37] For a defence of a version of such an understanding of human rights and their international legal dimension see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), ch. 1. See also S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 Leiden Journal of International Law 857.

least a very thin system of rules being applied.[38] This reliance on public institutions and the rules that govern if and when they have and exercise power begins to shed light on the relevant kind of power that we are seeking to define here. This power, I suggest should be understood to reflect these two features of human rights: the connection with public institutions and their reliance on rules. The two criteria that come closest are the presence of a potential for either harm or control and the fact that rules are being applied to direct said potential. As we will see, this is a possible reading of the ECtHR's definition as well.

It is further useful to note why a reflection of first principles such as the function of the ECHR has not been as problematic in cases concerning events on national territory. Because human rights are so intimately connected with public institutions and the rules they apply they exhibit a clear focus on the state. It should thus not come as a surprise that the most prominent proxy for the unobservable power of these institutions is national territory.[39] That is, instead of focusing on the nature and function of human rights to identify the duty-bearing state, we (and the Court) have been relying on territorial considerations to do this work for us. This explains why extraterritoriality is riddled with so much confusion. The most readily observable proxy is no longer available and conceptual uncertainties are brought to the fore.

For the Court, the relevant kind of power is associated with the potential for physical control or harm coupled with whose rules are being applied to the right-

[38] See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), ch. 1, for a similar approach albeit with an emphasis on coercion rather than power as such.

[39] S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 Leiden Journal of International Law 857, 863.

holding individuals in a way that directs said potential for control. One without the other is not enough. This would explain why an aerial bombing abroad does not bring the victims of such an attack within a state's jurisdiction[40] but a shooting at a vehicle checkpoint (as in *Jaloud*) does; even given the fact that neither of the concerned states controlled the relevant territory abroad.

In the case of the airstrike (as in *Banković*), the potential for harm was present and manifested itself but the party carrying out the attack was not looking to apply their rules with regard to the individuals affected. The pilots may have been acting in accordance with the law, following rules or orders but these were not aimed at influencing the harmed individuals, let alone the area of human activity protected by the right to life. A checkpoint is different. It implies that whoever is present at the checkpoint does not only have the potential to exercise physical control but also applies their rules as the clear demand towards persons passing through to obey any orders given. It is telling in this respect that the Court in *Jaloud* took great care to establish that the Dutch troops exercised some command and the Netherlands established policies for their armed forces but neglected to differentiate between the models of jurisdiction.[41] All of this points to the fact that the ECtHR is not actually utilizing its models of extraterritorial jurisdiction but is looking for observable proxies of what it understands to be the relevant kind of power.

It is important to note here, that the criterion of "whose rules apply" seems to be rather thin in the sense that even an implicit appeal not to escape (as in the case of arrest or detention) or to stop a vehicle (as with the checkpoint) suffices. I am thus not

[40] *Banković v Belgium* (App. No. 52207/99) decision of December 12, 2001.

[41] *Jaloud v Netherlands* (2015) 60 E.H.R.R. 29 at [142] – [149].

suggesting anything as ambitious as political or even legal authority.[42] The thinner interpretation suggested here also chimes in with the ECtHR's specification of public powers as encompassing "executive or judicial functions"[43] as opposed to legislative or other political functions. In accordance with arguments above, directing potential for harm with rules that are being applied to individuals should not be understood to require situations that trigger jurisdiction to be legal.

To make more detailed sense of what the Court is doing when it is describing power and looking for proxies, *Jaloud* and *Pisari* need to be read a) in combination and b) as revisiting the place and role of the criterion of "public powers" that puzzled us in *Al-Skeini*. Essentially, the two cases reconceive the case law on extraterritoriality in general and *Al-Skeini* in particular in two ways. First, the spatial and the personal model of jurisdiction are no longer separate. Neither of the cases makes this distinction and, as I have argued above, rightly so.[44] Second, the model actually applied is one that understands jurisdiction as power in the form a potential for harm or control and a capacity to chose and apply rules to the affected areas of human activity in relation to the potential victims. This means that the principle

[42] For a defence of this thicker version see S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 Leiden Journal of International Law 857, pp. 864-66.

[43] *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 at [135]; *Pisari v Moldova and Russia* (App. No. 42139/12), judgment of October 19, 2015 at [33]. This is true notwithstanding the fact that the Court refers to "exercising" these functions and thus still commits the exercise fallacy.

[44] In this sense, *Chiragov v Armenia* (App. No. 13216/05), judgment of 16 June 2015 at [169] is a regrettable lapse back to old ways because it explicitly relies on the distinction rejected here. This may possibly be explained by the close resemblance with cases like *Loizidou v Turkey* (1995) 20 E.H.R.R. 99. The actual analysis in *Chiragov* at [172] - [187], however, displays little regard of the precise formulation of the spatial model and is similar to the one in *Jaloud*.

similar to the "public powers" that was originally used by the Court to delimit the personal model replaces it in cases involving checkpoints.

But could this overarching model make sense of cases ranging from shootings on military patrols (as in *Al-Skeini*) to expropriations in the aftermath of conflict and occupation (as in *Loizidou*)? I argue that it can. A combination of the a potential for harm and the application of rules allows us to look for very diverse proxies and is thus flexible but it also acts a delimiting criterion of jurisdiction. The proxy for the potential to cause harm consisted in the proximity of armed state agents or agents tasked with enforcement in some other way. This can be applied equally to very unstable situations like a military patrol or a checkpoint and to stable administrative and economic arrangements. The same goes for the application of rules. In both scenarios the potential for harm is not an end in itself but rather a means to an end, the latter of which is directed by said rules.

Lastly, the latter part of the description of power captures exactly why we care about the application of Convention rights. It is not just the bad or even devastating outcome of a rights violation that we want to prevent. On the contrary, the relevant and distinguishing part of international legal human rights is that they constrain state power when it is directed by rules.[45] This, of course, is closely associated with the nature of the state as a political entity embodying authority and relying on a legal system, which in turn explains why the Court at times seems to struggle to distinguish power and authority. Overall, the principle of jurisdiction described as potential for control and applying directing rules is more promising than either of the models the Court has been using so far.

[45] G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), pp. 29-36.

Conclusion

The implication of the above is that *Jaloud* and especially the Court's silence on whether a checkpoint would be examined under the personal of the territorial model could become a pivotal moment for extraterritoriality. In combination with *Pisari*, *Jaloud* could mark the emergence of a new and potentially decisive principle that would replace the seemingly separate application of the personal and the geographical models. In turn, this could be read as a concession to the effect that the Court looks for proxies for what it sees as the kind of power that constitutes jurisdiction. This article has argued that this development should be welcomed for two reasons. First, the two models of jurisdiction need no longer be separated, which is bound to remove a lot of confusion surrounding the case law on extraterritoriality. Second, and perhaps more importantly, the model relying on power and proxies is more successful in making sense of hard cases than the separate ones and in addition captures why we should and do care about the Convention's application. Hopefully, this new line of case law means that the Court is ready to take the leap.