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## Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons

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# REVISITING EXTRATERRITORIALITY AFTER *AL-SKEINI*: THE ECHR AND ITS LESSONS

*Barbara Miltner\**

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## INTRODUCTION

On July 7, 2011, the European Court of Human Rights, sitting as a Grand Chamber, handed down two long-awaited judgments on the subject of the extraterritorial reach and scope of the European Convention on

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Human Rights (ECHR).<sup>1</sup> In both *Al-Skeini v. United Kingdom*<sup>2</sup> and *Al-Jedda v. United Kingdom*,<sup>3</sup> the underlying issue was whether or not the United Kingdom was bound by its treaty obligations under the ECHR with regard to its military presence in Iraq. *Al-Skeini* involved the joined claims of six Iraqi nationals whose relatives were killed while allegedly under U.K. jurisdiction in Iraq; they claimed a lack of effective investigation into the deaths under Article 2. In *Al-Jedda*, a dual Iraqi-U.K. citizen challenged the lawfulness of his three-year detention in a British-controlled detention facility in Basrah City, Iraq. Both cases touch on the pivotal issue of U.K. jurisdiction over persons in Iraq, though the paths taken in the analysis of each case diverge from the outset. For *Al-Skeini*, the critical calculus was determining the existence of Article 1 jurisdiction, from which all ECHR obligations follow, while *Al-Jedda's* inquiry focused primarily on the presence of attribution, without which no international responsibility could lie. Because of its greater bearing on Article 1 jurisdiction, *Al-Skeini* will be the primary focus of attention here. This Article seeks to comprehensively examine the Court's treatment of extraterritoriality by tracing the history of provisions relevant to the issue as well as its evolving jurisprudence, including these recent landmark cases.

#### A. The Pertinence of Extraterritoriality

Why were these judgments so long awaited? Although both cover a range of legal issues, their bearing on the issue of the extraterritorial scope of the ECHR has been particularly anticipated for several reasons. At the outset, the European Court of Human Rights has arguably generated the most prolific jurisprudence on the subject of a treaty's extraterritorial application, contributing to the sense that *any* judgment on the issue would be closely watched. Added to that has been the persistent state of flux and confusion permeating the Court's jurisprudence on extraterritoriality since 2001, when the high-profile *Banković v. Belgium* decision emerged as a controversial retrenchment of extraterritoriality by establishing several limiting criteria for the Convention's application.<sup>4</sup> Surprisingly, what has followed in its ten-year wake has not been a new line of post-*Banković* corrections limiting the recognition of extraterritoriality. Instead, the Court has gently sidestepped it, proceeding apace with its earlier practice in which extraterritorial jurisdiction was recognized seemingly on an ad hoc basis.<sup>5</sup> The result

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter ECHR]. The Convention has been amended several times, most recently in 2010, and the current text of the treaty can be found online at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf).

2. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18 (2011).

3. *Al-Jedda v. United Kingdom*, App. No. 27021/08, 53 Eur. H.R. Rep. 789 (2011).

4. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

5. *See infra* Part III.

has been confusion and ambiguity about when a state party has exercised extraterritorial jurisdiction so as to trigger the full panoply of Convention rights and obligations—and when it has not. Against this backdrop lie the cases of *Al-Skeini* and *Al-Jedda*, whose advancement from the U.K. divisional courts to the House of Lords did nothing to quell the confusion over the influence of *Banković* vis-à-vis the Court's later jurisprudence on extraterritoriality. It is in this light that the two cases were anticipated—in the hope that they would herald a long-awaited clarification of the Court's case law on extraterritorial jurisdiction.

Problematically, these two judgments may ultimately do more to perpetuate confusion than to articulate a clear and principled basis for extraterritoriality under the Convention. First, they simultaneously ratify certain aspects of *Banković* while carefully reversing others—thereby seemingly leaving intact questions over the case's authoritative status.<sup>6</sup> At the same time, the judgments seem to indicate a policy preference for staying within recognized grounds for extraterritoriality.<sup>7</sup> This Article takes as its starting point the most current state of affairs on extraterritorial jurisdiction under the ECHR by canvassing these recent developments in the Court's extraterritorial jurisprudence. This introductory examination of the recent developments and dominant characteristics of Article 1 jurisdiction sets the stage for a more comprehensive historical investigation into the origins and progressive evolution of factors influencing the extraterritorial applicability of the ECHR.

### B. Context of the Judgments

Prior to the issue of the *Al-Skeini* and *Al-Jedda* judgments, the 2001 *Banković* decision loomed large as a watershed decision that struck out against seemingly ever-expanding extraterritorial jurisprudence. It sharply reframed the issues, emphasizing in the process several key characteristics of the Convention that shape the Court's jurisprudence on extraterritoriality. The first of these was to characterize jurisdiction as “primarily territorial,”<sup>8</sup> while extraterritorial bases of jurisdiction were to remain “exceptional,” requiring special justification.<sup>9</sup>

Within this predominantly territorial context, the *Banković* Court went on to recognize certain limited exceptional bases for extraterritorial jurisdiction. In addition to those bases already acknowledged under international law through custom or treaty provisions,<sup>10</sup> the Court also identified acts of a state's authorities performed outside its territory<sup>11</sup> and the exercise of

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6. See generally *infra* Introduction, Section C.

7. See *infra* Introduction, Section C.

8. *Banković*, 2001-XII Eur. Ct. H.R. ¶ 59.

9. *Id.* ¶ 61.

10. *Id.* ¶ 73. Bases for extraterritorial jurisdiction include “nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality.” *Id.* ¶ 59.

11. *Id.* ¶ 69.

*effective control of an area* (ECA) as a consequence of lawful or unlawful military action.<sup>12</sup> Importantly, it collectively characterized these extraterritorial bases as occurring

when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, *exercises all or some of the public powers normally to be exercised by that Government*.<sup>13</sup>

Second, the Court in *Banković* roundly rejected applicants' novel argument that Convention obligations adhere proportionally to the level of control exerted by a state party. It did so on the grounds that Convention rights could not be "divided and tailored" to the particular circumstances of an extraterritorial act.<sup>14</sup> Accordingly, if extraterritorial jurisdiction was found to exist, the entire panoply of Convention rights must consequently apply.

Third, the Court emphasized the "special character" of the Convention as "a constitutional instrument of *European* public order" in order to stress its role "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States."<sup>15</sup> The Court distinguished its prior jurisprudence aimed at avoiding a legal vacuum as limited to instances where one contracting state exercised jurisdiction in the territory of another. As for the conduct of a contracting state outside the Convention's legal space, the Court indicated that "[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."<sup>16</sup>

Finally, the Court rejected as unpersuasive the applicants' attempt to characterize some of its earlier jurisprudence as constituting recognition of a separate basis for extraterritorial jurisdiction amounting to *state-agent authority* (SAA) over persons<sup>17</sup> in a foreign territory.<sup>18</sup>

### C. Content of the Judgments

For its part, *Al-Skeini* weighs in on each of these notable aspects of the *Banković* decision. On the issue of the recognized bases for extraterritorial jurisdiction, the Court reiterated its position that jurisdiction is "primarily

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12. *Id.* ¶ 70.

13. *Id.* ¶ 71 (emphasis added).

14. *Id.* ¶ 75.

15. *Id.* ¶ 80.

16. *Id.*

17. This basis for extraterritorial jurisdiction first came to be so characterized in the U.K. Court of Appeal (Civil) review of *Al-Skeini*. See *Al-Skeini v. Secretary of State for Defence*, [2005] EWCA (Civ) 1609, [147]–[148] (Eng.).

18. *Banković*, 2001-XII Eur. Ct. H.R. ¶ 81.

territorial” and extraterritorial bases are “exceptional.”<sup>19</sup> Significantly, however, it reversed *Banković*’s position on SAA,<sup>20</sup> recognizing as a valid basis for extraterritorial jurisdiction a ground that many believed had been rejected under *Banković*.<sup>21</sup> It described this category as embracing a variety of circumstances, including acts of diplomatic and consular agents (legitimately on foreign soil) who “exert authority and control over others,”<sup>22</sup> as well as instances in which a state, “through the consent, invitation or acquiescence of the Government of that territory . . . exercises all or some of the public powers normally to be exercised by that Government.”<sup>23</sup>

In addition to these internationally legitimate instances, the Court also recognized that “the use of force by a State’s agents operating outside its territory” (legitimately or not) may also bring individuals under control of its authorities, such as where an “individual is taken into custody of State agents abroad.”<sup>24</sup> This newly recognized SAA basis for extraterritorial jurisdiction was later restated to form the basis of another reversal of *Banković*, with the Court holding:

[W]henever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention *that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored.”*<sup>25</sup>

As a result, cherry-picking Convention rights is now endorsed by the Court under the newly recognized SAA basis for Article 1 jurisdiction.

Alongside this newly recognized basis for extraterritorial jurisdiction, the *Al-Skeini* Court ratified the previously recognized ground of ECA.<sup>26</sup> In a notable departure from *Banković*, however, it distinguished the legal effect of this basis from that of SAA so that whereas the latter was subject to

19. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18, ¶ 131 (2011).

20. *Id.* ¶¶ 133–137.

21. Rick Lawson, *Life After Banković: On the Extraterritorial Application of the European Convention of Human Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 83, 120 (Fons Coomans & Menno T. Kamminga eds., 2004). *But see* Michael O’Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on ‘Life After Banković,’* in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, *supra*, at 125, 138–39.

22. *Al-Skeini*, 53 Eur. H.R. Rep. ¶ 134.

23. *Id.* ¶ 135. Notably, this characterization in *Banković* applied only to extraterritorial control over an *area*, not to SAA over *persons*. Compare *id.* ¶¶ 134–135 (recognizing extraterritorial jurisdiction as arising from either SAA or ECA) with *Banković*, 2001-XII Eur. Ct. H.R. ¶¶ 69–71 (recognizing extraterritorial jurisdiction as arising from ECA).

24. *Al-Skeini*, 53 Eur. H.R. Rep. ¶ 136.

25. *Id.* ¶ 137 (emphasis added) (comparing *Banković*, 2001-XII Eur. Ct. H.R. ¶ 75).

26. *Id.* ¶ 138.

Convention rights and obligations being “divided and tailored,” the former was not. Accordingly, when, as a consequence of lawful or unlawful military action, a contracting state exercises ECA outside its national territory, “[t]he controlling State has the responsibility under Article 1 to secure, within the area under its control, *the entire range of substantive rights* set out in the Convention and those additional Protocols which it has ratified.”<sup>27</sup> Determinations of this basis for extraterritorial jurisdiction remain questions of fact “separate and distinct” from the Article 56 mechanism governing Convention applicability to parties’ dependent territories.<sup>28</sup>

Finally, the *Al-Skeini* Court revisited the concept of the Convention’s character as a regional instrument of European public order with regard to its applicability outside the Convention’s *espace juridique*.<sup>29</sup> Here again, the Court broke new ground by clarifying that while the “legal vacuum” principle operates only where a contracting state exercises jurisdiction in the territory of another, it should not be taken to mean that “jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States.”<sup>30</sup> With this single statement, the Court effectively abandoned the very notion of regionally confined extraterritoriality it had so deliberately intimated in *Banković*.

On the basis of these new principles, the Court proceeded to recognize the role of the United Kingdom (together with the United States) as an occupying power in Iraq from May 1, 2003, until the installation of the interim government. Accordingly, the Court found that it was in the United Kingdom’s capacity as an occupying power in southeast Iraq that it “assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government”<sup>31</sup>—a statement evoking its *Banković* heritage.<sup>32</sup> On this basis, the Court found that the United Kingdom “exercised authority and control over individuals killed in the course of [its military] security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”<sup>33</sup> After dispensing with the attribution issue, the Court came to the identical conclusion in *Al-Jedda*: that the applicant’s internment in a detention facility in Basrah City under the United Kingdom’s exclusive control throughout his detention placed him “within the authority and control of the United King-

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27. *Id.* ¶¶ 137–138 (emphasis added).

28. *Id.* ¶¶ 139–140.

29. *Id.* ¶ 141; accord *Banković*, 2001-XII Eur. Ct. H.R. ¶ 80. The European Court of Human Rights’ assertion that “[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States” was justified by reference to the fact that “the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.” *Banković*, 2001-XII Eur. Ct. H.R. ¶ 80.

30. *Al-Skeini*, 53 Eur. H.R. Rep. ¶ 142.

31. *Id.* ¶¶ 143, 149.

32. See *supra* note 23 and accompanying text.

33. *Id.* ¶ 149.

dom” and therefore within its Article 1 jurisdiction.<sup>34</sup> In a sweeping gesture, therefore, these twin cases recognized the United Kingdom’s military occupation in Iraq to constitute an exercise of Article 1 jurisdiction *not* on the basis of ECA—the touchstone for extraterritoriality in *Banković*—but on the newly recognized ground of SAA over persons, freshly appointed as embracing instances in which a state exercises “all or some of the public powers normally to be exercised by that Government.”<sup>35</sup>

#### D. Issues Raised

*Al-Skeini* raises several issues with regard to the extraterritorial application of the Convention. Among them: On what grounds did the exercise of “all or some of the public powers normally to be exercised by that Government” suddenly revert from comprising ECA jurisdiction to SAA jurisdiction? What is the effect of allowing Convention rights to be “divided and tailored” for one jurisdictional basis (SAA) but not for another (ECA)?<sup>36</sup> And finally, if the formal existence of a military occupation is not sufficient to constitute ECA, what is? On many levels, the judgment would seem to raise more questions than answers with regard to the Court’s extraterritorial-jurisdiction cases.

#### E. Issues of Territoriality and Extraterritoriality

This Article starts from the premise that the Court’s most recent cases on extraterritorial jurisdiction do little to quell the growing confusion surrounding its Article 1 jurisprudence. Indeed, the Court’s insistence on continued development of its existing line of cases arguably leads it further down a path of incoherence.<sup>37</sup> In response, this Article undertakes a *de novo* investigation of elements influencing the Convention’s territorial and extraterritorial scope, examining the complex interplay of factors contributing to extraterritoriality. In addition to the influence of the ECHR’s Article 1 jurisdiction clause, this Article recognizes the equally significant contribution of a *second* treaty provision—Article 56—to the question of extraterritoriality: a colonial clause,<sup>38</sup> about which very little has been written.<sup>39</sup> In particular, it

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34. *Al-Jedda v. United Kingdom*, App. No. 27021/08, 53 Eur. H.R. Rep. 789, ¶¶ 85–86 (2011).

35. *Al-Skeini*, 53 Eur. H.R. Rep. ¶ 135 (citing *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 71).

36. On that note, given that the exercise of SAA jurisdiction can trigger the operation of only certain Convention rights, but ECA automatically results in the application of the entire panoply of rights, it appears that the Court has essentially created a two-tiered system of Convention rights in the extraterritorial setting.

37. See *Al-Skeini*, 53 Eur. H.R. Rep. at 78 (Bonello, J., concurring).

38. Colonial clauses are generic treaty provisions that specify the extent to which a given treaty may or may not extend its application to a state party’s territorial dependencies. See *infra* Part I.A.

39. One notable exception can be found in Louise Moor & AW Brian Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*, 76 BRIT. Y.B. INT’L L. 121,



emphasizes the influential role of Article 56 in shaping conceptions of the Convention's *territorial* application, while simultaneously interfering with the jurisprudential development of the Convention's *extraterritorial* application under Article 1. In the process, this Article examines the interrelationship between these two provisions, their drafting history, and the state of Convention jurisprudence on extraterritoriality. What it reveals is a complex interplay between two provisions whose case law is as difficult to reconcile as it is to coherently apply. More broadly, these findings are significant for suggesting that a treaty's unique drafting history and text, as well as the interplay among its provisions, may have greater bearing and relevance upon determinations of its geographic scope of application than the mere existence of similarly framed jurisdiction clauses found in other instruments.

Parts I and II of this Article therefore introduce the content and drafting history, respectively, of the two ECHR provisions bearing directly on the issue of the instrument's territorial scope. In Part III, the jurisprudence of each of these provisions is individually examined in order to shed light on the very different approaches taken by the Court with respect to each provision, and also to observe the manner in which each provision has, or has not, evolved over time.

## I. RELEVANT CONVENTION PROVISIONS

### A. Article 56 ECHR

Any examination of the Convention's extraterritorial application is complicated by the fact that it is governed by at least two provisions.<sup>40</sup> The first, Article 56 (former Article 63) is a territorial-application provision governing the extension of the Convention to the dependent territories of the contracting parties. More commonly known as a colonial clause, it governs the application of the Convention to the former colonial territories by reference to "territories for whose international relations the Contracting Party is responsible."<sup>41</sup>

Its modern day text has been renumbered and slightly modified by Protocol 11, and it provides as follows:

ECHR Article 56—Territorial application<sup>42</sup>

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121, 125–26 (2005) (noting, however, that the "colonial clause" language was not included in the text of the Convention).

40. Several of the Convention protocols contain separate colonial or territorial clauses that will not be examined here. See ECHR.

41. *Id.* art. 56.

42. Formerly Article 63, this provision was renumbered and amended by Protocol No. 11 to the ECHR art. 2, *opened for signature* May 11, 1994, E.T.S. No. 155 [hereinafter Protocol No. 11].

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.<sup>43</sup>

Of the four subprovisions, Article 56(1) constitutes a classic example of a negative colonial clause,<sup>44</sup> permitting state parties to extend the Convention to “all or any of the territories for whose international relations it is responsible”<sup>45</sup> if it so chooses. As some commentators have noted, this power to extend Convention protection also constitutes by default the power to withhold it,<sup>46</sup> and though this type of colonial clause was not uncommon in international instruments of that era, it was, even at the time, a feature “strangely out of place . . . in a Convention of this kind.”<sup>47</sup> As a result, Article 56(1) proved controversial during the Convention’s drafting stage, discussed in greater detail below.<sup>48</sup> Article 56(2) concerns the procedural

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43. ECHR art. 56.

44. Colonial clauses typically take one of three forms, including “optional application” by which “the instrument does not apply to the dependent territories of any contracting state unless the latter chooses to extend the application of the instrument to all or any of its dependent territories.” Yuen-Li Liang, *Notes on Legal Questions Concerning the United Nations*, 45 AM. J. INT’L L. 108, 108 (1951). Colonial clauses that presumptively excluded dependent territories absent a contrary declaration were also referred to as “negative” clauses. See J.E.S. Fawcett, *Treaty Relations of British Overseas Territories*, 26 BRIT. Y.B. INT’L L. 86, 96–97 (1949).

45. ECHR art. 56(1).

46. Moor & Simpson, *supra* note 39, at 121.

47. Eur. Consult. Ass., *First Part of Second Session of the Consultative Assembly (Strasbourg 7 to 28 August 1950)*, reprinted in 5 COUNCIL OF EUR., COLLECTED EDITION OF THE “TRAVAUX PRÉPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 172, 280 (1979) [hereinafter *Consultative Assembly: Second Session Part One*] (statement of Fr. Rep. Mr. Silvanre).

48. See *infra* Part II.

effect of such a notification, and Article 56(3) constitutes a colonial general-limitations clause permitting modified application of Convention provisions in dependent territories. Because subprovisions (2) and (3) do not directly concern territorial treaty application as such, they will not be examined in detail in this Article. Article 56(4) is relevant, however, as it requires a further explicit declaration in order for the right of individual petition to apply to any territories where the Convention has already been applied under subprovision (1).<sup>49</sup>

As noted above, Article 56 was amended by Protocol 11,<sup>50</sup> which renumbered the provision and also amended the texts of subprovisions (1) and (4) concerning declarations of extension for the Convention and the right of individual application.<sup>51</sup> One significant effect of Protocol 11 has been to make the right of individual application mandatory for the contracting parties, although curiously it has not resulted in a repeal of Article 56(4), which continues to require an explicit declaration of extension before it can have effect in the dependent territories. Therefore, notwithstanding the entry into force of Protocol 11 and the now-automatic right of the Court to receive applications from anyone "claiming to be the victim of a violation by one of the High Contracting Parties,"<sup>52</sup> no such right is recognized in the "territories" unless a valid declaration of extension has been made under both Articles 56(1) and 56(4). Because the present inquiry is concerned with an examination of the extraterritorial application of the Convention, discussion of the relevant colonial-clause case law will focus primarily on Articles 56(1) and 56(4) of the ECHR.<sup>53</sup> Similarly phrased colonial clauses found in other Convention protocols will not be examined.<sup>54</sup>

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49. ECHR art. 56(4).

50. Protocol No. 11, *supra* note 42, art. 2(1).

51. *Id.* art. 2(3). The Protocol reads:

In new Article 56, in paragraph 1, the words "subject to paragraph 4 of this Article," shall be inserted after the word "shall"; in paragraph 4, the words "Commission to receive petitions" and "in accordance with Article 25 of the present Convention" shall be replaced by the words "Court to receive applications" and "as provided in Article 34 of the Convention" respectively. In new Article 58, paragraph 4, the words "Article 63" shall be replaced by the words "Article 56."

*Id.*

52. *Id.* art. 1 (amending Article 34 on individual applications).

53. This provision will be referred to as Article 56 throughout this Article for the sake of consistency, except when historical references require a reference to former Article 63 for purposes of clarity.

54. Colonial clauses similar to Article 56(4) can be found in Protocols 4, 6, 7, 12, and 13 but will not be canvassed here for reasons related to variability of drafting language and dearth of case law. Many of these instruments contain a reference simply to "territory" in lieu of the standard colonial phrase "territories for whose international relations it is responsible," e.g., ECHR art. 56(1), a deviation that renders their construction both more complex and more dependent on the parent instrument. In addition, several of the protocols also permit a sliding scale of application in which a party may communicate a declaration "stating the extent to which it undertakes" to apply the provisions of a given protocol, e.g., Protocol to the ECHR,

Since its first examination by a Convention body, the phrase “territories for whose international relations [a state party] is responsible” has been construed broadly to encompass a wide array of territories enjoying diverse legal statuses. As early as 1961, the European Commission observed that the phrase “has succeeded other, more restrictive terms employed such as ‘colonies,’ or ‘non-metropolitan areas’” and that “this change represents an effort to facilitate, although without rendering compulsory, the application of the more important international treaties to territories the status of which is as varied as it is changeable but without assigning a final degree of importance to any one such status.”<sup>55</sup> Although termed a “colonial clause,” Article 56 remains applicable to dependent territories irrespective of domestic legal status.<sup>56</sup>

Article 56 relates to territorial application in the sense that it dictates the circumstances under which the Convention will apply to certain territories. More important, however, is its effect upon the concept of territorial application for the Convention at large. By relegating the dependent territories to these provisions, Article 56 operates to circumscribe the default application of the Convention to the metropolitan territories.<sup>57</sup> Thus, an application brought by two Belgian nationals residing in the Congo and alleging Belgian violations under the First Protocol failed to establish that the Convention’s “territorial field of application” extended to the Congo because of the absence of a valid declaration as required by that Protocol’s Article 4, notwithstanding that at the relevant time Belgium’s domestic law treated the Congo as part of its metropolitan territory.<sup>58</sup> This rejection of a territory’s status under domestic law was later confirmed when the Commission observed that Article 56 territories are not considered to formally comprise an integral part of the contracting party.<sup>59</sup> When viewed in this

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*opened for signature* Mar. 20, 1952, E.T.S. No. 009 (entered into force May 18, 1954) [hereinafter First Protocol]. Because of these inconsistencies and complexities, the protocol clauses will not be separately examined, though cases where protocol clauses are applied alongside the Convention may be discussed.

55. *X v. Belgium*, App. No. 1065/61, 1961 Y.B. Eur. Conv. on H.R. 260, 266 (Eur. Comm’n on H.R.).

56. Whether this extends to trust territories and *condominia* is perhaps a more debatable and complex issue. Moor & Simpson, *supra* note 39, at 128–30.

57. Metropolitan territories are distinguished from dependent territories for purposes of the scope of a treaty’s territorial application.

58. *X v. Belgium*, 1961 Y.B. Eur. Conv. on H.R. at 266, 268.

59. *X v. United Kingdom*, App. No. 8873/80, 28 Eur. Comm’n H.R. Dec. & Rep. 99, 104–05 (1982) (“The specific constitutional status of Jersey has been recognised in the system of the European Convention on Human Rights because the Convention was formally extended to Jersey under Article 63 of the Convention. This reflects the fact that Jersey is treated as a territory for whose international relations the United Kingdom is responsible but which does not, in itself, form part of the United Kingdom.”); *X v. United Kingdom*, App. No. 7444/76, 11 Eur. Comm’n H.R. Dec. & Rep. 111, 111–12 (1977) (“The applicant’s complaints are directed solely against the actions of the courts and authorities of Dominica, a territory for whose international relations the United Kingdom is responsible and to which the Convention extends by virtue of a declaration made by the United Kingdom under Article 63, paragraph 1

manner, Article 56 not only has relevance to the territorial application of the Convention as a general matter—it also directly governs an aspect of the *extraterritorial* application of the Convention vis-à-vis the parties' nonmetropolitan territories by stipulating an explicit set of conditions under which the Convention can come to apply to territories that would otherwise remain beyond its scope. The jurisprudence pertaining to this provision will be seen to be, for reasons directly related to the rapid decline of colonialism following the Convention's drafting, both static and strictly construed.<sup>60</sup> Over time, the jurisprudential development of Article 56 has come to produce a problematic inconsistency with another provision, Article 1.<sup>61</sup>

### B. Article 1 ECHR

The second provision governing the territorial and extraterritorial scope of application of the Convention is Article 1, which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."<sup>62</sup> Article 1 is of special significance to the Convention. It has been interpreted not as a stand-alone substantive right but as a so-called "framework provision" that enables and gives effect to the Convention's system of rights.<sup>63</sup> This special status makes it "determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system."<sup>64</sup> As such, Article 1 has immediate bearing and relevance to the Convention's scope of application *ratione loci*, *ratione materiae*, and *ratione personae*.<sup>65</sup> Perhaps because of its breadth, Article 1 has generated not only a large body of case law, but also has shown itself capable of an evolving and dynamic jurisprudence consistent with the Court's "living

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of the Convention. However, the Commission may only deal with an individual application directed against the authorities of such a territory where the High Contracting Party concerned has also made a declaration under Article 63, paragraph 4 of the Convention on behalf of the territory concerned . . .")

60. See *infra* Parts II.A, III.A.2.

61. See *infra* Part III.E.

62. ECHR art. 1.

63. *Streletz v. Germany*, 2001-II Eur. Ct. H.R. 409, ¶ 112; *K.-H. W. v. Germany*, 2001-II Eur. Ct. H.R. 495, ¶ 118; *United Communist Party of Turk. v. Turkey*, 1998-I Eur. Ct. H.R. 1, ¶ 29; *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 238 (1978).

64. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 65.

65. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (Bosphorus Airways)*, 2005-VI Eur. Ct. H.R. 107, ¶ 137. Convention jurisprudence uses the terms *ratione loci*, *ratione materiae*, and *ratione personae* to refer to the Convention's scope of application over territory, subject matter, and persons, respectively. For the sake of consistency, this Article will rely on the same terminology, with a particular emphasis on territorial scope (scope *ratione loci*) or territorial jurisdiction (jurisdiction *ratione loci*).

instrument” approach<sup>66</sup> to interpretation, notwithstanding *Banković’s* suggestion that Article 1 is somehow uniquely exempt therefrom.<sup>67</sup>

The coexistence of two separate provisions with overlapping territorial subject matter has long posed problems for ECHR jurists and commentators. Although it is formally conceded that Articles 1 and 56 jointly operate to inform the scope of the Convention *ratione loci*,<sup>68</sup> most of the literature concerning its extraterritorial scope has focused on the role of Article 1 with little or no analysis of the supporting role played by Article 56.<sup>69</sup> In some instances, the examination of extraterritorial application has focused on trends across multiple human rights instruments<sup>70</sup> or in regard to the intersection of

66. *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. 1, ¶ 31 (1978) (recalling that the Convention is a “living instrument” that “must be interpreted in the light of present-day conditions”).

67. *Banković*, 2001-XII Eur. Ct. H.R. ¶¶ 64–65.

68. See, e.g., P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 17–23 (4th ed. 2006); *infra* Part III.E.

69. E.g., J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3–32, 399 (1987) (dedicating twenty-nine pages to Article 1 analysis, but only one page to Article 63); Lawson, *supra* note 21, at 83 (discussing Article 1 jurisdiction without mentioning Article 56); Michal Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?*, 52 NETH. INT’L L. REV. 349, 352 (2005) (“The scope of extraterritorial applicability of the ECHR must therefore be determined by reference to its own provisions, mainly Article 1 ECHR. It is this provision that lies at the heart of the legal controversy on the issue.”); Michael Kearney, *Extraterritorial Jurisdiction of the European Convention on Human Rights*, 5 TRINITY C. L. REV. 126, 146 (2002) (noting that Article 1 jurisdiction extends “to acts committed by State organs outside the national territory of that State,” but also interpreting Article 1 in conjunction with Article 15 on derogations); Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention*, 20 EUR. J. INT’L L. 1223, 1226 (2009) (discussing the “Incoherence of the Court’s Recent Extraterritorial Jurisprudence” concerning Article 1); Georg Ress, *Problems of Extraterritorial Human Rights Violations—The Jurisdiction of the European Court of Human Rights: The Banković Case*, 12 IT. Y.B. INT’L L. 51, 53 (2002) (“In order to properly assess the Court’s reasoning in *Banković* it is necessary to briefly outline the development of the jurisprudence regarding the term ‘jurisdiction’ in Article 1 of the Convention.”); see also CLARE OVEY & ROBIN C.A. WHITE, *JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 18–37 (4th ed. 2006) (dedicating an entire chapter to exploring “a number of significant issues arising from the obligation in Article 1,” but only mentioning Article 56 as one of the “Other Issues Relating to Territorial Scope”); Morten Peschardt Pedersen, *Territorial Jurisdiction in Article 1 of the European Convention on Human Rights*, 73 NORDIC J. INT’L L. 279, 280 (2004) (“The aim of this article is to evaluate the case law on jurisdiction in Article 1 of the Convention in light of principles of jurisdiction in international public law and the rules of treaty interpretation . . .”).

70. See, e.g., Damira Kamchibekova, *State Responsibility for Extraterritorial Human Rights Violations*, 13 BUFF. HUM. RTS. L. REV. 87 (2007); Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 HUM. RTS. L. REV. 521 (2009); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995); Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 HUM. RTS. L. REV. 411 (2008); Kelvin Widdows, *The Application of Treaties to Nationals of a Party Outside Its Territory*, 35 INT’L & COMP. L.Q. 724 (1986); Ralph Wilde,

extraterritorial application of human rights instruments with international humanitarian law in times of armed conflict.<sup>71</sup> Whatever the reason may be, studies of the Convention's drafting history indicate that the overlap between Articles 1 and 56 may have simply passed unnoticed by drafters at the time.<sup>72</sup> Today the body of Convention case law makes it clear that, notwithstanding the diminishing relevance of Article 56, an inevitable clash between the two provisions has occurred, and the poorly articulated relationship between them has resulted in awkwardly inconsistent doctrine concerning the Convention's extraterritorial application.<sup>73</sup> Having briefly introduced each of the provisions and their relevance to the Convention's extraterritorial application, this Article will next examine the historical context forming the backdrop to the Convention negotiations and provide a detailed drafting history of the two provisions. The analysis gives rise to certain conclusions about the interaction and relationship between Articles 1 and 56, which will then be examined in light of the body of jurisprudence that has developed in relation to them over time.

## II. HISTORICAL CONTEXT OF TERRITORIAL PROVISIONS

### A. Article 56: British Colonial Influence

The reference in Article 56 to "territories for whose international relations [a state party] is responsible" highlights its colonial origins.<sup>74</sup> In terms of its drafting history, a colonial clause granting discretionary authority to extend or withhold the Convention from colonies was sought unilaterally by the United Kingdom.<sup>75</sup> Britain actively pursued such a clause in order to give effect to its constitutionally required practice of local consultation,

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*Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 ISR. L. REV. 503 (2007).

71. John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISR. L. REV. 396, 398 (2007); Michael J. Dennis, *Application of the Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 121-22 (2005); Kearney, *supra* note 69, at 127-28.

72. Moor & Simpson, *supra* note 39, at 136-50; *see also* A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 773 (2001) ("[T]hroughout the negotiation of both the convention and the Protocol there never was a serious discussion of whether it made much sense to draft a European instrument embodying the fundamentals of European liberal democracy and then made possible its application to colonies which in no sense belonged to the club.").

73. *See infra* Part III.

74. T.O. ELIAS, *THE MODERN LAW OF TREATIES* 51 (1974) ("The modern use of the colonial application clause is to avoid enumerating the various categories of dependencies and to employ a phrase referring to 'territories for whose international relations the Government of the metropolitan is responsible.'").

75. SIMPSON, *supra* note 72, at 290 ("The battle for colonial applications clauses was entirely fought by the United Kingdom; other colonial powers, and France in particular, had, as we have seen, a different relationship with dependencies."); *see also id.* at 476-77.

whereby it was precluded from enacting treaties in its dependent territories without first undertaking a consultation process in each.<sup>76</sup> To critics, Britain's consultation argument was seen as a thinly disguised veil of colonial subjugation and oppression<sup>77</sup> and an attempt to withhold the Convention from its dependencies. According to Simpson, any fears that Britain would exclude its dependencies from the Convention were unfounded because "it was politically out of the question for Britain or its Colonial Office to oppose the idea that protection must extend to colonial territories."<sup>78</sup> The British

strategy was, somewhat perversely, a defensive one driven by anticolonial-inspired *realpolitik*:

The primary motive was not to improve the lot of colonial subjects, since the assumption was that in general the situation in the colonies conformed to the convention, though in some few cases changes in law or practice might be needed. Instead the motive was to present British colonial policy and practice in a favourable light, by publicly committing colonial governments to respect for human rights and to furnish an argument for not accepting a UN Covenant if one was ever adopted.<sup>79</sup>

The extent to which Britain's stated policy of extension to the territories could be successfully reconciled with its dogged pursuit of a colonial clause permitting their exclusion is somewhat debatable. Within the Council of Europe, opposition to such a clause was grounded in concerns of Soviet opprobrium of the West, and a colonial clause was viewed as unnecessarily inviting just such criticism. For example, according to a Danish member of the Consultative Assembly:

The application of a colonial clause in the year 1950 presents, among other things, invaluable opportunities for Communist propaganda. Such a clause which aims at excluding colonial territories

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76. See U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 1951, *Draft Convention Relating to the Status of Refugees*, 3–4, U.N. Doc. A/CONF.2/21 (July 3, 1951) [hereinafter *1951 Draft Convention on the Status of Refugees*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL5/105/39/PDF/NL510539.pdf?OpenElement> (stating that at the conference "[a]s a rule the U.K. Government undertook no obligations on behalf of the colonies under any convention or treaty without consulting the local Governments" and if the clause were excluded, "metropolitan Governments would be obliged to consult all their colonial territories before ratifying the covenant"); Geoffrey Marston, *The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950*, 42 INT'L & COMP. L.Q. 796, 823 (1993).

77. See, e.g., *1951 Draft Convention on the Status of Refugees*, *supra* note 76, at 12 (including comments by the Saudi Arabian delegate on colonial clauses condemning the "consultative" arguments by colonial powers on grounds that he "had seen indigenous inhabitants ask for enjoyment of inalienable rights . . . and had seen them brutally refused in the name of the law and public order").

78. SIMPSON, *supra* note 72, at 305.

79. *Id.* at 825.



from the protection of human rights will inevitably provide a weapon which can be used with considerable success against the Council of Europe and the Western Democracies, first and foremost in their overseas territories, but also in all ex-colonial territories in Asia, Africa and South America.<sup>80</sup>

Complicating Britain's somewhat tenuous position was the fact that the other colonial powers on the Council of Europe did not necessarily support its pursuit of a colonial clause. During the Convention negotiations there were five colonial powers in the Council of Europe: Britain, France, Belgium, the Netherlands, and Denmark.<sup>81</sup> Of these, Denmark and the Netherlands showed little to no interest in securing a colonial clause. Denmark, as indicated above, actively opposed the colonial clause,<sup>82</sup> possibly in part because of its lack of need for one: Of its two territories, the Faroe Islands enjoyed legal autonomy and had been self-governing since 1948.<sup>83</sup> Greenland briefly enjoyed a declaration of extension under Article 63 on April 13, 1953, though this quickly ceased to be of relevance when it was made part of Danish metropolitan territory less than two months later, on June 5, 1953.<sup>84</sup>

The Netherlands similarly had little need for a colonial clause. It too had only two colonial territories at the time, Suriname and the Dutch West Indies, both of which became self-governing in 1954.<sup>85</sup> Although the Netherlands ultimately extended the Convention to these territories by a declaration on December 1, 1955,<sup>86</sup> it has been suggested that the Netherlands' lack of any tradition of local consultation "presumably explains the fact that the Dutch never became involved in pressing for special colonial applications clauses in international treaties."<sup>87</sup> The Netherlands did, however, eventually support Britain's version of the colonial clause.<sup>88</sup>

The constitutional treatment of colonial territories by France and Belgium was also markedly different from Britain's convention of local

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80. *Consultative Assembly: Second Session Part One*, *supra* note 47, at 240 (statement of Den. Rep. Mr. Lannung).

81. SIMPSON, *supra* note 72, at 283 (noting that Spain and Portugal were not yet members of the Council of Europe).

82. *Consultative Assembly: Second Session Part One*, *supra* note 47, at 240 (statement of Den. Rep. Mr. Lannung).

83. See Home Rule Act of the Faroe Islands (Translation), No. 137 of March 23, 1948, § I (Den.), available at [http://www.stm.dk/\\_p\\_12710.html](http://www.stm.dk/_p_12710.html) ("Within the framework of this Act the Faroe Islands shall constitute a self-governing community within the State of Denmark.')

84. SIMPSON, *supra* note 72, at 283; Karel Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe*, 12 INT'L & COMP. L.Q. 1206, 1210 (1963).

85. SIMPSON, *supra* note 72, at 283 & n.26.

86. Vasak, *supra* note 84, at 1210.

87. SIMPSON, *supra* note 72, at 284.

88. Eur. Consult. Ass., *Fifth Session of the Comm. of Ministers Held in Strasbourg, 3-9 August 1950*, reprinted in 5 COUNCIL OF EUR., *supra* note 47, at 50, 118 [hereinafter *Committee of Ministers: Fifth Session*] (statement of Neth. Rep. Mr. Stikker on Aug. 7, 1950).

consultation. Under France's Fourth Republic, although its constitution distinguished between various colonial territories depending on their particular status as either *départements* or *territoires d'outre mer*, in substance legislative activities were centralized in the French Parliament in Paris.<sup>89</sup> This created the effect of granting "the same rights and freedoms to all citizens of the French Union"<sup>90</sup> and explains why, from France's perspective, it anticipated that the Convention would inevitably apply throughout its territories, as well as why it viewed such a clause as unnecessary. Although France did not ratify the Convention until 1974,<sup>91</sup> its representatives in the Consultative Assembly expressed vocal criticism of the colonial clause<sup>92</sup> and even succeeded in securing approval in the Assembly for its deletion,<sup>93</sup> although the Committee of Ministers chose not to follow that recommendation. No tradition of local consultation existed in Belgium either, and its legislative power was similarly consolidated in the governmental institutions of the metropolitan territory.<sup>94</sup> Although Belgium never extended the Convention to the Congo, it has been argued that it could not have made an Article 56 declaration without prior approval of its Parliament.<sup>95</sup> Notwithstanding the constitutional situation of France and Belgium, the text of the colonial clause that eventually became Article 56 would nonetheless require all parties to issue a declaration of extension for such territories.<sup>96</sup> France's declaration reflects the tension between the requirements of Article 56 and its own constitutional treatment of overseas territories as an integral part of its metropolitan territory.<sup>97</sup>

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89. SIMPSON, *supra* note 72, at 284–86.

90. *Consultative Assembly: Second Session Part One*, *supra* note 47, at 280 (statement of Fr. Rep. Mr. Silvandre).

91. Council of Eur. Treaty Office, *Status of Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=22/04/2010&CL=ENG> (last updated Apr. 22, 2010) (stating that France ratified the Convention on May 3, 1974).

92. Eur. Consult. Ass., *Second Session of the Consultative Assembly (7–28 August 1950)*, reprinted in 6 COUNCIL OF EUR., COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2, 172–77, 180–82 (1985) [hereinafter *Consultative Assembly: Aug. 1950*] (statements of Fr. Reps. Mr. Senghor and Mr. Silvandre).

93. *Id.* at 182 (putting Mr. Senghor's amendment to delete the whole of Article 63 to a vote, which carried by forty-six votes to thirty-seven votes).

94. SIMPSON, *supra* note 72, at 288; Moor & Simpson, *supra* note 39, at 135.

95. Vasak, *supra* note 84, at 1211 n.7.

96. See ECHR art. 56(1) (stating that, should a state party want to extend jurisdiction to such territories, this declaration should be done by notification to the Secretary General of the Council of Europe).

97. France, in its instrument of ratification, deposited May 3, 1974, declared: "The Government of the Republic further declares that the Convention shall apply to the whole territory of the Republic, having due regard, where the overseas territories are concerned, to local requirements, as mentioned in Article 63 [Article 56 since the entry into force of Protocol No. 11]." Council of Eur. Treaty Office, *List of Declarations Made with Respect to Treaty No. 005*,

### B. Article 56 (Formerly 63) Drafting History

It was not always clear that the Convention would contain a colonial clause. The earliest drafts of the Convention, both prior to<sup>98</sup> and within the Council of Europe,<sup>99</sup> contemplated the instrument applying throughout the entirety of member states' metropolitan and dependent territories:

As regards the question of whether or not the rights set out in Article 2 of the draft Resolution should be guaranteed by each State, not only to all persons residing within its metropolitan territory *but also to all persons residing within its overseas territories or in its colonial possessions*, the majority of the Committee replied in the affirmative.<sup>100</sup>

Once out of the Consultative Assembly, however, the Committee of Experts<sup>101</sup> immediately began to restrict the automatic application of the "universal"<sup>102</sup> convention. Within six months, three separate provisions restricting the Convention's application to the dependencies had made their way into the draft Convention. The first of these was a self-contained provision strictly limiting free elections and political-speech protections to the metropolitan territories.<sup>103</sup> The second constraint on the Convention's application to the colonies was a general-limitations clause for the overseas territories, proposed by Belgium:

*Art. 6.* The rules given above shall be applied within the overseas territories, in conformity with local needs and the standard of civilization of the native population, which may not yet have been able

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COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=08/02/2011&CL=ENG&VL=1> (last visited July 6, 2012).

98. Eur. Consult. Ass., *Draft European Convention on Human Rights*, reprinted in 1 COUNCIL OF EUR., COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 296, 296 (1975) [hereinafter *Draft ECHR*].

99. Eur. Consult. Ass., *First Session of the Consultative Assembly Held at Strasbourg 10 August to 8 September 1949: Sitzings Held From 16 August to 8 September 1949*, reprinted in 1 COUNCIL OF EUR., *supra* note 98, at 28, 202 [hereinafter *Consultative Assembly: First Session*] (report of Mr. Pierre-Henri Teitgen, Comm. on Legal & Admin. Questions).

100. *Id.* at 224 (emphasis added).

101. The Committee of Experts is appointed by the Committee of Ministers.

102. The term "universal" is used in this context to denote the Convention's application throughout both metropolitan and dependent territories.

103. Eur. Consult. Ass., *Meetings of the Committee of Experts Held in Strasbourg from 2nd–8th February 1950 and 6th–10th March 1950*, reprinted in 3 COUNCIL OF EUR., COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 180, 238 art. III (1976) [hereinafter *Committee of Experts: Feb.–Mar. 1950*]. These rights would eventually be excised entirely from the Convention and later renegotiated to become the basis for the First Protocol, which contains its own colonial clause. First Protocol, *supra* note 54, art. 4; *see* SIMPSON, *supra* note 72, at 753.

to reach the conditions necessary for the practice of democratic freedom.<sup>104</sup>

This clause was intended to allow the Convention to apply throughout both metropolitan and dependent territories of the parties while permitting the application of some or all of its provisions to be substantively limited “in conformity with local needs.”<sup>105</sup> The ambiguous and subjective framing of the provision was designed to allow significant leeway in the manner in which the Convention would apply. Such an approach presumed the Convention’s automatic application to the dependent territories and sought instead to temper the manner in which the provisions would be applied there. As a legal tactic, it reflected a willingness to leave unaltered the scope of the Convention *ratione loci* by presuming its automatic extension to both metropolitan territories and dependencies.<sup>106</sup> Moreover, it preserved the scope of the Convention *ratione personae*, taking as a given that persons in such territories would remain in the Convention’s ambit. What it instead altered was the extent of the Convention’s subject-matter scope, or application *ratione materiae*, in the colonies. As an amendment, it sought to permit ad hoc adaptations of substantive Convention provisions in the dependencies. This proposal quickly evolved into a shorter form:

[Art. 8.] *d*) The rules stated above shall be applied in overseas territories in the light of local exigencies.<sup>107</sup>

Later on, it evolved into a new euphemistic standard:

[Art. 7.] *d*) In the overseas territories the provisions of this Convention shall be applicable with due regard, however, to local necessities.<sup>108</sup>

This latter formulation of the provision would endure throughout the negotiations and eventually become the basis for Article 56(3). Although Britain never actively sought this provision, over time, it came to be considered as a useful backdoor reservation.<sup>109</sup> After the Convention came into effect, Britain relied on the “local necessities” clause on several occasions without success.<sup>110</sup> To date, the provision has only been successfully

104. *Committee of Experts: Feb.–Mar. 1950, supra* note 103, at 210 (amendment proposed by the Belgian expert).

105. *Id.*

106. *See Moor & Simpson, supra* note 39, at 138 (agreeing that former Article 63(3) does not relate to territorial application but instead relates to the Convention’s subject-matter applicability throughout the dependencies).

107. *Committee of Experts: Feb.–Mar. 1950, supra* note 103, at 224 (draft art. 8(d)).

108. *Id.* at 238 (draft art. 7(d)).

109. SIMPSON, *supra* note 72, at 827.

110. *See, e.g., Wiggins v. United Kingdom*, 13 Eur. Comm’n H.R. Dec. & Rep. 40, 48 (1978); *Mathews v. United Kingdom*, 1999-I Eur. Ct. H.R. 250, ¶¶ 55–59 (examining and rejecting the applicability of former Art 63(3) even where not raised by the contracting party);

invoked once: by France with regard to its overseas territory, New Caledonia.<sup>111</sup>

The third restriction imposed on the Assembly's draft Convention was a requirement that parties obtain consent from semiautonomous or self-governing dependencies in order for the Convention to apply in such territories. The consent requirement was determined by the existence of local legislative competence in the subject matter:

*Art. 42.* This Convention shall only apply to territories of the High Contracting Parties possessing jurisdiction within the fields covered by the present Convention when the consent of the appropriate authorities of these territories has been obtained. The High Contracting Parties responsible for those territories shall, if necessary take steps to obtain this consent.<sup>112</sup>

This proposed article represents the first articulation of a colonial clause in the Convention.<sup>113</sup> In contrast to other colonial clauses of the time,<sup>114</sup> this early formulation did not determine a treaty's applicability based on the existence of a party's declaration of territorial extension, but upon the extent of local legislative competence and consent.<sup>115</sup> Given the tendency of both Bel-

Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, ¶¶ 36–40 (1978). The phrase "local necessities" became "local requirements" in the final version of the Convention. ECHR art. 56(3) ("The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.").

111. *Py v. France*, 2005-I Eur. Ct. H.R. 2, ¶ 64. Perhaps tellingly, this case involved the only instance of a Convention right being limited in order to confer a benefit on a native population during the territory's transition to full sovereignty. *See id.* ¶¶ 61–65 (noting that the New Caledonian process of self-determination and local law on residency requirements for voting constituted "'local requirements' warranting the restrictions imposed on the applicant's right to vote").

112. *Committee of Experts: Feb.–Mar. 1950*, *supra* note 103, at 246 (draft art. 42).

113. *Id.* at 276 ("Art. 42 (new). This article contains the so-called Colonial clause. It was introduced in order to make provisions for the autonomous powers enjoyed by certain overseas territories, in this matter.").

114. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide art. XII, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] ("Any Contracting Party may, at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to any or all of the territories for the conduct of whose foreign relations that Contracting Party is responsible."); Convention on Road Traffic art. 28(1), Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 3. Even the colonial clauses being considered for insertion into the U.N. human rights covenant were framed in terms of discretionary territorial application "in respect of any colony or overseas territory of a State party hereto . . . where that State has acceded on behalf and in respect of such colony or territory." SIMPSON, *supra* note 72, at 477 (quoting *Sessions of Organs of the United Nations Which Have Considered Questions Relating to Human Rights*, 1947 Y.B. ON HUM. RTS. 449, 554).

115. Local legislative competence existed among territories "possessing jurisdiction within the fields covered by the present Convention"; but even for such territories, the Convention could not apply until "the consent of the appropriate authorities of these territories [had] been obtained." Eur. Consult. Ass., *Conference of Senior Officials Held at Strasbourg 8–17*

gium and France to retain centralized legislative jurisdiction in their national parliaments,<sup>116</sup> this provision may have represented a misguided attempt to accommodate Britain's expressed need for local consultation, though it missed the mark since Britain's consultation requirement was based on a constitutional convention applicable to all territories, self-governing or not.<sup>117</sup>

Notwithstanding the other two constraints in operation, the effect of this provision was merely to disqualify a very small subset of Convention provisions from applying to an even smaller subset of self-governing territories. The broader impact of the Convention, left unstated, was that it continued to apply, notwithstanding these three narrow restrictions, throughout both metropolitan and dependent territories.<sup>118</sup> Therefore, the draft Convention still largely contemplated automatic application throughout the entirety of state territories.

It was only after the Committee of Experts had finished modifying the Assembly's preliminary draft Convention that the United Kingdom submitted its own draft Convention for the Committee to consider.<sup>119</sup> Unlike the existing draft that contained enumerated rights, the British draft sought to articulate comprehensive definitions.<sup>120</sup> Faced with two alternative drafts, the Committee of Experts declined to choose between them, instead submitting both versions for the Ministers' consideration.<sup>121</sup> Alternative A comprised the original working draft containing enumerated rights, while Alternative B contained the United Kingdom's submission favoring a detailed definition of rights. Reflecting these differences, Alternative A retained the Belgian-inspired general-limitations clause,<sup>122</sup> while Alternative B did not. *Both*

June 1950, reprinted in 4 COUNCIL OF EUR., COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 100, 238 (1977) [hereinafter *Conference of Senior Officials*] (draft art. 60(B)).

116. Simpson characterizes France's imperialism as centralized, at least up until 1958. SIMPSON, *supra* note 72, at 284–87. Similarly, Belgium's Constitution treated its overseas territories as part of its metropolitan territory. *Id.* at 288; Moor & Simpson, *supra* note 39, at 142.

117. SIMPSON, *supra* note 72, at 721–22.

118. It continued to apply by virtue of operation of the draft provision. *See supra* notes 97–98. Moor and Simpson also characterize the draft provision as being premised on the idea that the ECHR would apply automatically to overseas dependencies. Moor & Simpson, *supra* note 39, at 142.

119. *Conference of Senior Officials*, *supra* note 115, at 180.

120. Gordon L. Weil, *The Evolution of the European Convention on Human Rights*, 57 AM. J. INT'L L. 804, 806 (1963) (describing Britain as "especially anxious to limit clearly the extent of their commitment" under the Convention and observing that the practice mirrored the policy it adopted toward the colonies).

121. *Meetings of the Committee of Experts Held in Strasbourg from 2 to 8 February 1950 and 6 to 10 March 1950*, reprinted in 4 COUNCIL OF EUR., *supra* note 115, at 216; *see also Conference of Senior Officials*, *supra* note 115, at 206, 242.

122. *Committee of Experts: Feb.–Mar. 1950*, *supra* note 103, at 324 art. 7(d) ("The provisions of this Convention shall be applied in the overseas territories with due regard, however, to local requirements.").

versions, however, contained the colonial clause framed in terms of legislative competence as quoted above.<sup>123</sup>

To assist in deciding between the two alternative drafts, the Ministers convened a Conference of Senior Officials that ultimately produced a single Convention text and drew up a report. They were, however, “unable to come to a unanimous decision on the most important of these problems,”<sup>124</sup> among which the colonial clause figured prominently.<sup>125</sup> At this Conference, the United Kingdom proposed its own colonial clause permitting discretionary declarations of extension to dependent territories:

Article 60 A

- 1) Any State may at the time of accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for which it has international responsibility.
- 2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.<sup>126</sup>

As a result, the Convention now contained competing colonial clauses: the United Kingdom’s above proposal in 60 A, and an amalgam of the Belgian “local requirements” clause and the “legislative competence” colonial clause in 60 B:<sup>127</sup>

Article 60 B

- 1) The provisions of this Convention shall be applied in the overseas territories with due regard, however, to local requirements.
- 2) This Convention shall only apply to territories of the High Contracting Parties possessing jurisdiction within the fields covered by the present Convention when the consent of the appropriate authorities of these territories has been obtained.
- 3) The High Contracting Parties responsible for these territories shall, if necessary, take steps to obtain this consent.<sup>128</sup>

The net effect of the U.K. proposal was dramatic because of what it left unstated. In effect, it wrought a fundamental change in the default geograph-

123. *Id.* at 334 (draft art. 52(48)); *see supra* note 112 and accompanying text.

124. *Conference of Senior Officials, supra* note 115, at 246.

125. *See infra* notes 134–136 and accompanying text.

126. *Conference of Senior Officials, supra* note 115, at 180–82, 238.

127. *See id.* at 238.

128. *Id.*

ic scope of the Convention with regard to the dependent territories. Instead of impliedly including them in its ambit, it impliedly *excluded* them. Discreetly framed in positive terms (“[a]ny state *may* . . . declare . . . that the present Convention *shall* extend”),<sup>129</sup> it operated to reverse the previously expansive territorial application inclusive of dependencies. That expansive interpretation is still evident in version 60 B, which takes for granted that the provisions shall be applied in the overseas territories, providing the caveat that they shall apply, “*however*,”<sup>130</sup> with possible limitations.

The contrasting provisions provoked a controversy of sorts that first arose in the Assembly’s Committee on Legal and Administrative Questions, which expressed its own preference for draft Article 60 B—which by that point had become Article 59 B—as “the more liberal solution.”<sup>131</sup> It sought to resolve the situation by asking the Ministers to “find a way of overcoming the constitutional objections raised by certain Members.”<sup>132</sup> At that time, Belgium proposed a compromise solution of adopting British version 59 A but adding into it the “local requirements” as an additional subprovision. No solution was forthcoming.<sup>133</sup>

By this stage, a Subcommittee of Advisers had now placed the colonial clause under a section titled “Provisions of the Draft Convention about which agreement was not reached in the Sub-Committee,”<sup>134</sup> and, absurdly exacerbating the indecision, it decided to present *three* alternative colonial clauses to the Committee of Ministers. The first of these was the British model and the second alternative was the Belgian model, both listed above. The third alternative was a hybrid of the first two: it contained the British declaration of extension, its thirty-day effect, and the Belgian “local requirements” clause.<sup>135</sup> Ultimately, the Committee of Ministers unanimously accepted a variant of this compromise on August 7, 1950, that would closely resemble the final version:

Article 63:

- 1) Any State may at the time of its ratification or accession or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present

129. *Id.*

130. *Id.* (emphasis added).

131. Draft Articles 60 A and B later evolved, respectively, into draft Articles 59 A and B during the Second Conference of Senior Officials on June 19, 1950. *Conference of Senior Officials*, *supra* note 115, at 100, 292–94; *Meetings of the Committee on Legal and Administrative Questions of the Consultative Assembly Held in Strasbourg, 23 and 24 June 1950*, reprinted in 5 COUNCIL OF EUR., *supra* note 47, at 2, 30.

132. *Meetings of the Committee on Legal and Administrative Questions of the Consultative Assembly Held in Strasbourg, 23 and 24 June 1950*, reprinted in 5 COUNCIL OF EUR., *supra* note 47, at 2, 30.

133. *See Committee of Ministers: Fifth Session*, *supra* note 88, at 50, 62.

134. *Id.* at 98–100.

135. *Id.* at 100–02.



Convention shall extend to all or any of the territories of whose international relations it is responsible.

- 2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
- 3) The provisions of this Convention shall be applied in the overseas territories with due regard, however, to local requirements.
- 4) Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of those territories to which the Convention extends that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals, in accordance with Article 25 of the present Convention.<sup>136</sup>

Rather dramatically, when the Consultative Assembly was asked to provide its views on the Ministers' draft Convention, it vociferously condemned the colonial clause proposed by the Ministers. The Danish delegate denounced the clause as unnecessarily exclusionary and an invitation to Soviet criticism of the West,<sup>137</sup> while the Italian delegate suggested that it should be made into an automatic-application clause so that parties would not have the option of excluding application to any of their territories.<sup>138</sup> Léopold Senghor, a Senegalese anticolonialist and delegate of France, articulated the fundamental problem:

Article 63 enables Member states to discriminate between territories under their jurisdiction, or more precisely, to exclude one or several territories from the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>139</sup>

He then proceeded to relate former Article 63 to a more significant difficulty involving conflicts with other provisions, including Article 1:

I should like first of all to point out that this Article 63 runs counter to the general principles of the Declaration of Human Rights and particularly to Article 14 which condemns all discrimination, *as also to Article 1 which states that "the High Contracting Parties shall*

136. *Id.* at 166–68.

137. *See Consultative Assembly: Second Session Part One, supra* note 47, at 240 (statement of Den. Rep. Mr. Lannung).

138. *See id.* at 260 (statement of It. Rep. Mr. Persico).

139. *Consultative Assembly: Aug. 1950, supra* note 92, at 172.

*secure to each person within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.*"<sup>140</sup>

Senghor went on to criticize the colonial clause on both legal and moral grounds, emphasizing the absence of such a clause from the U.N. Declaration and the Declaration of American States signed in Bogotá.<sup>141</sup> At a practical level, he sought to warn against the potential support it would provide for Soviet criticism of the West and the dangerous resonance it might have in Africa, which "cleaves more to the ideal of equality than to that of independence. . . . There, Article 63 would be regarded as an affront to the dignity of the overseas peoples."<sup>142</sup>

The combined effect of these comments produced a majority opposition to the clause in the Assembly, which voted by forty-six to thirty-seven to delete the provision.<sup>143</sup> It is not known which aspects of the clause proved most objectionable, but Senghor's comment about its irreconcilability with Article 1 represents the only mention of this conflict in the *Travaux Préparatoires*; therefore, whether it was received as an obscure technical point of minor importance or as a compelling insight only just discerned remains unclear. In any event, such criticisms carried more weight in the Assembly than in the Committee of Ministers, who chose to override the Assembly's views on the matter. Thus, despite the Assembly's damning rejection of Article 63, it was retained in the final draft by the Committee of Ministers.<sup>144</sup> Today, despite Senghor's unusually prescient observation of the ineluctable conflict between former Article 63 and Article 1, the two provisions continue to sit uneasily alongside one another in the Convention, the former firmly anchored to its colonial roots and rigidly literal application as if frozen in time, the latter expanding and contracting uncomfortably in an effort to find a coherent limit to Convention obligations.<sup>145</sup> The subsequent jurisprudential developments of these two provisions now serve to confirm an incompatibility first noticed nearly sixty years ago.

### C. Article 1 Drafting History

The debate and controversy surrounding the colonial clause has yielded only a modest body of conservative and static jurisprudence, a phenomenon more readily explained by its near obsolescence today than by particularly incisive drafting. In contrast, the sweeping and ambiguous scope of the Convention's Article 1 application "to each person within the jurisdiction" has yielded a vast and dynamic body of jurisprudence quite inversely proportionate to the scant debates to which it gave rise in the negotiations.

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140. *Id.* at 174 (emphasis added).

141. *Id.*

142. *Id.* at 176.

143. *Id.* at 182.

144. See ECHR art. 56.

145. See *infra* Part III.

As noted above, the earliest form of a draft European Convention was produced by the European Movement, which conceived of the Convention as applying in territorial terms, requiring each party to guarantee the Convention rights “to all persons within its territory.”<sup>146</sup> After the establishment of the Council of Europe, this formulation was modified in the early draft put forward by the Committee on Legal and Administrative Questions of the Consultative Assembly, where Article 2 framed the obligation as extending “to all persons *residing* within their territories.”<sup>147</sup>

The draft article was then reviewed by the Committee of Experts, which found the emphasis on persons *residing* in the territory to be too narrow. As a result, it proposed to replace the words “residing in” with the words “within its jurisdiction”—a phrase at that time found in the draft U.N. human rights covenant.<sup>148</sup>

Since the aim of this [Article 2] amendment is to widen as far as possible the categories of persons who are to benefit by the guarantee contained in the Convention, and since the words “living in” might give rise to a certain ambiguity, the Sub-Committee proposes that the Committee should adopt the text contained in the draft Covenant of the United Nations Commission: that is, to replace the words “residing within” by “within its jurisdiction.”<sup>149</sup>

On this basis, the provision was redrafted as Article 1:

The High Contracting Parties undertake to guarantee to all persons within their jurisdiction the rights listed.<sup>150</sup>

This was subsequently slightly modified to replace “guarantee” with “accord to any person within their jurisdiction.”<sup>151</sup>

The language was again modified so that “any person” became “everyone,” and the current language of Article 1 was eventually adopted.<sup>152</sup> The

146. *Draft ECHR*, *supra* note 98, at 296.

147. *Consultative Assembly: First Session*, *supra* note 99, at 228 (emphasis added); Eur. Consult. Ass., *First Session of the Consultative Assembly Held in Strasbourg, 10 August to 8 September 1949*, reprinted in 2 COUNCIL OF EUR., COLLECTED EDITION OF THE “TRAVAUX PRÉPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2, 276 (1975).

148. One of the documents reviewed by the Committee of Experts was a preparatory report by the Secretariat General concerning a preliminary draft convention. The document, which was undated, provided a collective guarantee of human rights and compared the draft international covenant on human rights with the Consultative Assembly draft. With regard to Article 2, it observed: “This [U.N. covenant] article guarantees all individuals within the State’s jurisdiction the rights defined. Article 2 of the Strasbourg draft provides that the *Member States* shall undertake to ensure to all persons *residing* within their territories the rights defined.” *Working Papers Prepared by the Secretariat General for the Committee of Experts (Undated)*, reprinted in 3 COUNCIL OF EUR., *supra* note 103, at 2, 26.

149. *Committee of Experts: Feb.–Mar. 1950*, *supra* note 103, at 200.

150. *Id.* at 222.

151. *Id.* at 236.

152. *See* ECHR art. 1.

Committee reiterated the reasons for the semantic change a few weeks later, observing:

It seemed to the Committee that the term “residing” might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. This word, moreover, has not the same meaning in all national laws. The Committee therefore replaced the term “residing” by the words “within their jurisdiction,” which are also contained in Article 2 of the Draft Covenant of the United Nations Commission.<sup>153</sup>

Taken together, these comments highlight a critical premise for the drafters that directly challenges today’s expansively extraterritorial interpretations of the provision. Although the modern jurisprudential gloss on Article 1 reveals a preoccupation with its bearing on the extraterritorial scope of the Convention,<sup>154</sup> the drafting history clearly indicates that the drafters’ intent in replacing “residing in the territory” with “in the jurisdiction,” was decidedly not to expand the *territorial* scope of the Convention, but rather its *personal* scope. What mattered, and what proved persuasive as far as the drafters were concerned, was that coverage to persons “within the jurisdiction” was more expansive because it covered *all persons* in the territory, regardless of their formal status as permanent resident, temporary migrant, or tourist. When taken together with Article 56, the drafting history militates against an interpretation that the Convention’s geographic scope was originally intended to be expansive; on the contrary, it was conceived as territorially limited.

#### D. Drafting History Summary

An analysis of the drafting history of these territorial provisions gives rise to several conclusions. The first is that former Article 63, by permitting optional extension of the Convention to colonial territories, represented a significant regression from the early visions of uniform Convention application throughout the colonies. The practical result is an instrument that formally excludes all colonial territories unless steps are taken via the provision to expressly include them.

Where no declarations of extension under Article 56 are made, the scope of the Convention *ratione loci* appears to be strictly limited to the metropolitan territories of the contracting parties. This is indicated by the fact that under Article 56(1) parties “may . . . declare . . . that the present Convention shall . . . extend to all or any of the territories for whose

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153. *Committee of Experts: Feb.–Mar. 1950, supra* note 103, at 260.

154. *See infra* Parts III.B–III.E.

international relations it is responsible.”<sup>155</sup> Such a provision exemplifies the exception to the rule in Article 29 of the Vienna Convention on the Law of Treaties that, “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”<sup>156</sup> In the Convention context, the optional extension under Article 56 constitutes precisely such a “different intention.”

Reluctance to provide the Soviets with a further opportunity to criticize the West constituted an additional basis for opposition to the colonial clause. Pure anticolonial sentiments and the seeming incompatibility of such a provision in a human rights instrument emerged as other reasons. Throughout the extensive debates on former Article 63, however, it was only the Senegalese anticolonialist Senghor who raised what has today become its overriding defect: its glaring incompatibility with Article 1.<sup>157</sup> As he observed nearly sixty years ago, if Article 1 obliges parties to secure Convention rights to each person “within their jurisdiction,” how could former Article 63 create a presumption of their exclusion from the dependencies? In other words, how can Articles 1 and 56 be reconciled? Today, commentators have examined three possible relationships: that Article 56 operates to restrict Article 1 jurisdiction, that Article 56 operates to broaden Article 1 jurisdiction, or that Article 56 performs a combination of these two functions.<sup>158</sup>

The first option is that Article 56 operates to limit the scope of Article 1 jurisdiction to metropolitan territories only. In other words, it is because of the exclusionary nature of Article 56 that Article 1 jurisdiction must be construed as confined only to the parties’ metropolitan territory. Under such a reading, the two provisions are construed so as to avoid any conflict in their interaction with one another. This option was likely not the interpretation taken by Senghor, unless his opposition to the conflicting provisions was grounded in the inevitable effect that such a reading would produce. In other words, he may have opposed Article 56 for the precise reason that it would restrict Article 1 jurisdiction to metropolitan territories only, subject to a contrary declaration.

Under the second reading, Article 56 operates to expand Article 1 jurisdiction from a metropolitan-only scope to one capable of encompassing dependent territories. Certainly its provisions enable the Convention to extend to dependencies, but a strict reading of Article 56 as expanding Article 1 would overlook its primary role of impliedly limiting the Convention.

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155. ECHR art. 56(1).

156. Vienna Convention on the Law of Treaties art. 29, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (emphasis added).

157. *See supra* Part II.B.

158. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 15–16 (2011); MOOR & SIMPSON, *supra* note 39, at 121 (concluding that Article 56 likely embraces both a restrictive and expansive function).

This leaves a third option of a possible dual function. Because Article 56 is framed in positive terms—“may declare that the Convention *shall extend*”—it presumptively implies a scope limited to metropolitan territories only. Were Article 56 framed conversely—“may declare that the Convention shall *not extend*”—the presumption would be reversed, and the implication would then be one of default Convention application to metropolitan and dependent territories. As it stands, the presumptive limitation of the Convention to the metropolitan territories created by Article 56 must be read as *both* limiting the concept of Article 1 and of enabling its exceptional territorial expansion. Article 56 can thus be seen to operate somewhat like a switch: suppressing application of the Convention to the dependencies unless specifically activated by means of an express declaration. Once activated by Article 56, the territories are then brought within the ambit of the Convention’s Article 1 jurisdiction. Below, it is suggested that this interpretation constitutes not only the appropriate reading of the two provisions, but one that is confirmed by the Convention’s case law.<sup>159</sup>

It is more likely that the source of Senghor’s unease originated in his understanding of the term “jurisdiction,” taken as it was directly from the draft U.N. Covenant on Human Rights at the time.<sup>160</sup> But regardless of what meaning the Covenant’s jurisdiction clause may have had in 1950, it would have been of little assistance—or relevance—in reconciling the scope of Article 1 with that of Article 56. Already by that time, the controversy surrounding colonial clauses had taken hold in the United Nations and had become a source of bitter debate with regard to that draft instrument.<sup>161</sup> Within just four months of Senghor’s eloquent plea to delete former Article 63 from the European Convention, the U.N. General Assembly would issue a resolution to the same effect, calling upon the Commission on Human Rights to automatically extend the covenant “equally to a signatory metropolitan State and to all the territories, be they Non-Self-Governing, Trust or Colonial Territories, which are being administered or governed by such metropolitan State.”<sup>162</sup> Ultimately, the U.N. covenants to emerge from that process would be stripped of colonial clauses,<sup>163</sup> suggesting at least that

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159. See *infra* Part III.E. But see the recent characterization of Article 56 as comprising situations “separate and distinct” from those arising under ECA jurisdiction. Al-Skeini v. United Kingdom, 53 Eur. H.R. Rep. 18, ¶ 140 (2011).

160. U.N. Secretary-General, *Draft International Covenant on Human Rights and Measures of Implementation: The Federal Clause: Rep. of the Secretary-General*, ¶ 23, U.N. Doc. E/CN.4/651 (Mar. 17, 1952) [hereinafter *Draft Covenant on Human Rights*].

161. See, e.g., 1951 *Draft Convention on the Status of Refugees*, *supra* note 76; U.N. Secretary-General, *Rep. of the Commission on Human Rights: Federal and Colonial Clauses*, U.N. Doc. E/1721 (June 19, 1950); *Economic and Social Questions*, 1950 U.N.Y.B. 438, 519–25, U.N. Sales No. 1951.1.24.

162. G.A. Res. 422 (V), at 43, U.N. Doc. A/RES/422(V) (Dec. 4, 1950).

163. The U.N. covenants had previously contained a provision automatically extending covenant rights to all dependent territories. This was “attacked” by the Soviet Union and former colonies as “*implicitly endorses*[ing] . . . colonialism” and was ultimately eliminated

the jurisdiction clause in Article 2(1) of the International Covenant on Civil and Political Rights<sup>164</sup> would not be construed along the same lines as Article 1 of the ECHR. Instead, as a result of the Committee of Ministers' decision to retain the colonial clause, the scope of the European Convention's territorial application would be forever governed by two provisions whose interaction would ultimately be a matter for judicial determination.

This Part has sought to demonstrate that former Article 63 represents a significant regression from the early visions of uniform Convention application by permitting the optional extension of the Convention to dependencies. The practical result is an instrument that formally excludes all colonial territories unless steps are taken via the provision to expressly include them. It has also shown that the drafters' objective underlying Article 1 was to expand the Convention's *personal* scope as widely as possible within parties' territorial sphere.

### III. JURISPRUDENCE

#### A. Early Case Law on Article 56

Article 56 governs the extension of the Convention to "territories for whose international relations . . . [a state party] is responsible," but the phrase is not defined, leaving the task to the judicial bodies of the Convention.<sup>165</sup> As noted earlier, the Commission had, by 1961, determined that the phrase had "succeeded other, more restrictive terms employed such as 'colonies,' or 'non-metropolitan areas'" and therefore constituted a broad catchall term designed to accommodate all dependencies regardless of specific legal status or designation.<sup>166</sup> The Commission went on to observe that "this change represents an effort to facilitate, although without rendering compulsory, the application of the more important international treaties to territories the status of which is as varied as it is changeable but without assigning a final degree of importance to any one such status."<sup>167</sup> At first glance, this comment manages to convey the drafters' intent to make the Convention capable of application to the entire diverse array of dependent territories regardless of their specific legal status. Upon closer reading, however, the comment is wholly noncommittal; it merely asserts that such

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altogether in the Third Committee in 1966. Robert Starr, *International Protection of Human Rights and the United Nations Covenants*, 1967 WIS. L. REV. 863, 872.

164. International Covenant on Civil and Political Rights art. 2(1), *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; *accord* International Covenant on Economic, Social and Cultural Rights art. 2(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

165. See ECHR art. 56.

166. X v. Belgium, App. No. 1065/61, 1961 Y.B. Eur. Conv. on H.R. 260, 266 (Eur. Comm'n on H.R.).

167. *Id.*

“territories” encompass a diverse array of dependencies without either distinguishing them or settling upon a precise term of reference that might help to define them. Aside from confirming the expansive character of the phrase, the Commission ultimately failed to clarify what characteristics such “territories” might have, or how they might be identified. As shall be seen, the issue of identifying and distinguishing the features of Article 56 territories became more difficult as the decolonization process accelerated and the prevalence of colonies declined.

1. Article 56(1): “Territories for Whose International Relations . . . [the State Party] Is Responsible”

Rather unsurprisingly, the determination as to whether a particular territory was one “for whose international relations . . . [a state party] is responsible” was a relatively straightforward inquiry in the early days of the Convention. In such cases, the objectively colonial character of a territory was capable of overriding its constitutional status as an integral part of the metropolitan territory.<sup>168</sup> Thus, in the case of *X v. Belgium*, the Commission found it “manifest” that the Congo qualified as one of the “territories for whose international relations” Belgium was responsible. At the same time, it considered that any special status the Congo may have enjoyed under Belgium’s municipal legal system was entirely “superfluous” to the analysis.<sup>169</sup>

In more recent postcolonial times, however, the inquiry became more difficult, and the status of certain territories left room for ambiguity: How, for example, were noncolonial dependencies to be treated? Or those in the European space? In such instances, the Commission demonstrated greater flexibility and restraint than in its unilateral determination of traditional colonial territories such as the Belgian Congo. As will be discussed in the following paragraphs, the Commission has shown itself more willing to defer to the contracting party in determining a territory’s status, usually by reference to Article 56 declarations, without any independent determination of the status of such territories. In deferring to the contracting party with regard to the status of a European territory, the Commission and the Court have recognized an Article 56 declaration as *prima facie* proof of the status of the territory as one for whose international relations the contracting party is responsible.

Accordingly, when a resident of Jersey, located in the United Kingdom’s Channel Islands, alleged a violation of Article 3 of the First Protocol based on an inability to vote in U.K. parliamentary elections (notwithstanding the United Kingdom’s parliamentary jurisdiction over Jersey), the Commission found that the existence of a former Article 63 declaration was conclusive proof of Jersey’s status as a nonmetropolitan territory, a finding

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168. *Id.* (holding alleged violations arising in the Belgian Congo inadmissible for lack of Article 56 declaration extending the Convention to the Belgian Congo, notwithstanding Belgium’s domestic legal treatment of the Congo as part of its metropolitan territory).

169. *Id.*



that informed the merits of the case since it had bearing on whether or not the applicant was a U.K. resident.<sup>170</sup> The Commission observed:

The specific constitutional status of Jersey has been recognised in the system of the European Convention on Human Rights because the Convention was formally extended to Jersey under Article 63 of the Convention. This reflects the fact that Jersey is treated as a territory for whose international relations the United Kingdom is responsible but which does not, in itself, form part of the United Kingdom.<sup>171</sup>

Curiously, while emphasizing the relevance of the United Kingdom's declaration under former Article 63, the Commission failed to take the next step of assessing whether or not the United Kingdom had ever issued a declaration of extension under the First Protocol's nearly identical colonial clause.<sup>172</sup> When the same issue arose four years later with regard to Guernsey, the Court did not overlook this requirement.<sup>173</sup>

Just as a party's Article 56 declaration can conclusively establish the status of such territories, so too does it inform the existence of parallel declaration requirements under the Convention's protocols. In *Gillow v. United Kingdom*, for example, the European Court relied on a statement by the United Kingdom as to the status of Guernsey with regard to the First Protocol:

[T]he Court has ascertained that a statement concerning the position of the Channel Islands in relation to treaties and international agreements applicable to the United Kingdom was issued on behalf of the Government of the United Kingdom on 16 October 1950 and

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170. *X v. United Kingdom*, App. No. 8873/80, 28 Eur. Comm'n H.R. Dec. & Rep. 99, 104-05 (1982).

171. *Id.*; see also *X v. United Kingdom*, App. No. 7202/75, 7 Eur. Comm'n H.R. Dec. & Rep. 102, 102-03 (1976) (finding admissible an individual complaint nearly one year after Britain's declaration under former Article 63(4) on grounds of an allegedly continuing violation).

172. See First Protocol, *supra* note 54, art. 4 (showing that although the United Kingdom ratified the First Protocol on Nov. 3, 1952, it had not issued a declaration under that Protocol); Council of Eur. Treaty Office, *List of Declarations Made with Respect to Treaty No. 009*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=009&CM=7&DF=15/04/2010&CL=ENG&VL=1> (last visited July 6, 2012) (indicating that Britain's first declaration of extension to the Bailiwick of Jersey was not made until February 22, 1988, several years after the complaint at issue here). That no earlier declaration of extension to Jersey was made under the First Protocol was confirmed by email correspondence to the author from the Council of Europe's Legal Advice Department and Treaty Office. Email from the Webmaster, Legal Advice Dep't & Treaty Office, Directorate of Legal Advice & Public Int'l Law, Council of Eur., to Barbara Miltner (Apr. 15, 2010, 00:46 PDT) (on file with author). The Commission's lack of treatment of this provision would therefore appear to be an oversight, though of minimal relevance given its decision that the application was manifestly ill founded.

173. See *Gillow v. United Kingdom*, 109 Eur. Ct. H.R. (ser. A) (1986).

communicated to all foreign Governments with whom the United Kingdom Government were in diplomatic relations, the United Nations and other international organisations concerned, including, *inter alia*, the Council of Europe. *It was thereby established that the island of Guernsey should be regarded as a "territory for the international relations of which [the United Kingdom] is responsible" for the purposes of treaty provisions in the terms of Article 4 of this Protocol (P1-4); and this practice has been followed with regard to treaties concluded within the framework of the Council of Europe, including the Convention (Article 63).*<sup>174</sup>

In *Gillow*, the United Kingdom's declaration as to the status of the Isle of Guernsey, both generally and under Article 63, contributed to the Court's decision to require a declaration of extension under the First Protocol and to find that Protocol entirely inapplicable where such a declaration was lacking.<sup>175</sup> That the Court chose to emphasize this general U.K. statement alongside the subsequent Article 63 declaration further underscores the extent to which territorial status under the Convention and its protocols is viewed as originating with the contracting party's own determinations, at least inasmuch as European noncolonial territories are concerned.

It is through such deferential judicial practices that Article 56 has come to have broad application even within the European sphere. As a result, the Convention has been applied, by operation of Article 56, to the territories of the Isle of Man,<sup>176</sup> Guernsey,<sup>177</sup> Jersey,<sup>178</sup> and Gibraltar,<sup>179</sup> notwithstanding their European locale and noncolonial status.

## 2. Articles 56(1) and 56(4): The Declaration Requirements

Perhaps the clearest rule to emerge from Article 56 jurisprudence pertains to the declaration requirements found under Articles 56(1) and 56(4). Under these provisions, the Convention and the right of individual application, respectively, will extend to the relevant territory upon a state party's express declaration to do so. Other expressions of intent or domestic

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174. *Id.* at 21 ¶ 62 (emphasis added).

175. *See id.* Ironically, the absence of such a declaration and the claims it barred under *Gillow* may have been unintentional. It has been suggested that the United Kingdom's failure to extend the First Protocol to the Channel Islands in 1953 (at the time it extended the Convention there) was the result of oversight. *See* SIMPSON, *supra* note 72, at 842 n.107.

176. *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. 1, ¶¶ 38–39 (1978).

177. *See Gillow*, 109 Eur. Ct. H.R. (ser. A) at 25 (finding a breach of Article 8 of the Convention, implying that the Convention was applied to Guernsey by operation of Article 56); *Wiggins v. United Kingdom*, 13 Eur. Comm'n H.R. Dec. & Rep. 40, 48 (1978) (implicitly assuming application of the Convention via former Article 63).

178. *X v. United Kingdom*, App. No. 8873/80, 28 Eur. Comm'n H.R. Dec. & Rep. 99, 104–05 (1982); *X v. United Kingdom*, App. No. 7202/75, 7 Eur. Comm'n H.R. Dec. & Rep. 102, 102–03 (1976).

179. *Matthews v. United Kingdom*, 1991-I Eur. Ct. H.R. 250, ¶ 19.

treatment of it as metropolitan territory are insufficient<sup>180</sup>—both the Commission and the Court have consistently required strict adherence to the presence of a former Article 63 declaration for dependent territories. In 1977, for example, the Commission ruled an application from Dominica nonjusticiable on grounds that the United Kingdom's Article 63(4) declaration granting a right of individual application had expired a mere two months prior to the application's submission.<sup>181</sup> The stringency of the Commission's application of former Article 63 with regard to the more traditionally "colonial" territories can however, in rare instances, be contrasted with somewhat greater flexibility where European dependencies are involved. Such was the case in Jersey when a two-year-old claim was resurrected and held admissible after the British authorities made retroactive declarations extending the Convention and the right of individual petition there some two years after the original complaint was filed.<sup>182</sup> The Commission held that the issuance of an Article 56 declaration can resurrect a formerly invalid claim where the applicant has pursued his application since the declaration's date of effect, and where allegations involve continuing acts.<sup>183</sup> This case marks an atypical accommodation of Article 56 that is, for the most part, strictly applied, as this Subsection demonstrates.

A 2008 House of Lords judgment undertook an even narrower reading of Article 56 declarations in finding that they apply "to a political entity and not to the land which is from time to time comprised in its territory."<sup>184</sup> As a result, although the British-held Chagos Islands had once enjoyed a declaration of extension under Article 56 when the territories comprised part of the Mauritius Islands, the declaration ceased to have effect in the territory in 1965 when the islands were excised from Mauritius and administratively reconstituted to form part of the British Indian Ocean Territories, to which the Convention was never extended.<sup>185</sup> According to a majority of the House of Lords, the Convention ceased to apply following the Chagos Islands' rein-

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180. *Compare* X v. Belgium, App. No. 1065/61, 1961 Y.B. Eur. Conv. on H.R. 260, 264–70 (Eur. Comm'n on H.R.) (finding that the Convention and First Protocol did not extend to the Congo where Belgium passed a domestic law extending jurisdiction but "ultimately made none of the declarations"), *with* Piermont v. France, 314 Eur. Ct. H.R. (ser. A) at 20 ¶ 44 (1995) (noting that France made a formal declaration when depositing an instrument of ratification that the Convention protocol it ratified would apply to Polynesia), *and* Py v. France, 2005-I Eur. Ct. H.R. 2, ¶ 59 (noting that France made a formal declaration when depositing instruments of ratification to extend the Convention and First Protocol to New Caledonia).

181. X v. United Kingdom, App. No. 7444/76, 11 Eur. Comm'n H.R. Dec. & Rep. 111, 112 (1977).

182. X. v. United Kingdom, 7 Eur. Comm'n H.R. Dec. & Rep. at 102–03.

183. *Id.*

184. R (on the Application of Bancoult) v. Sec'y of State for Foreign and Commw. Affairs, [2008] UKHL 61 [64] (appeal taken from Eng.).

185. This is to be distinguished from the invalidity of Article 56 declarations to territory that becomes independent, which was recognized long ago. *See* X v. United Kingdom, App. No. 3813/68, 1970 Y.B. Eur. Conv. on H.R. 586, 596 (Eur. Comm'n on H.R.).

carnation in 1965 as “a new political entity.”<sup>186</sup> If the U.K. House of Lords’ interpretation on the matter is correct, then the Convention’s application is not only limited to territories benefiting from an express Article 56 declaration, but is further limited to exclude any territories that have undergone a transformation into a new, albeit still dependent, political entity.<sup>187</sup>

### B. Early Case Law on Article 1

From a relatively early stage, Convention jurisprudence began to indicate that Article 1 had some bearing on the Convention’s extraterritorial scope. These instances involved allegations of a party violating the Convention with regard to actions taken outside its traditionally territorial frontiers. The earliest examination of the Convention’s potentially extraterritorial application arose in 1965 in relation to a complaint against the Federal Republic of Germany regarding its consular and embassy officials in Morocco.<sup>188</sup> In that case, an individual alleged that German consular officials undertook to have Moroccan officials secure his deportation from that country.<sup>189</sup> Although the complaint was ultimately deemed inadmissible as manifestly ill founded, the Commission commented obiter that:

*Whereas* it is true that the Applicant attributes his deportation to unwarranted intrigues against him conducted by the Federal Republic of Germany with the Moroccan authorities; *Whereas* under Article 1 of the Convention “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention”; *Whereas, in certain respects, the nationals of a Contracting State are within its “jurisdiction” even when domiciled or resident abroad;* whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention; *Whereas, however, the Commission notes that the Applicant has not furnished sufficient proof in support of his allegations . . .*<sup>190</sup>

This decision represents the first recognition by the Commission that the Convention may “in certain respects” be capable of extraterritorial application. Even then, the comment was elaborately circumscribed: delivered only as obiter dicta; carefully limited to the factual context of diplomatic or consular representatives abroad; and subjected to multiple

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186. R (on the Application of Bancoult) v. Sec’y of State, [2008] UKHL at [64].

187. As of July 2012 this case is still pending before the European Court of Human Rights.

188. X v. Federal Republic of Germany, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 158 (Eur. Comm’n on H.R.).

189. *Id.* at 162–64.

190. *Id.* at 166–68 (emphasis added).

cautionary caveats—"certain duties . . . which may, in certain circumstances" trigger Convention obligations.<sup>191</sup>

The issue of the Convention's extraterritorial application would not re-surface for another decade, when the Commission would affirm its position in much more general terms. In 1975, the wife of Rudolph Hess, former Nazi deputy under Hitler, submitted an application against the United Kingdom seeking his release from life imprisonment in the Allied Military prison in Berlin-Spandau, located in the British sector of Berlin.<sup>192</sup> Citing its 1965 Moroccan consular precedent, the Commission recognized that although the case involved territory outside the United Kingdom, "a State is under certain circumstances responsible under the Convention for actions of its authorities outside its territory."<sup>193</sup>

Finding that "there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention,"<sup>194</sup> the Commission proceeded to examine whether Britain was constrained by Convention obligations in its role in the prison operations. What it concluded was a very tightly reasoned set of findings justifying its decision that the case was inadmissible on two grounds. First, it found that Spandau prison was governed by the Allied Kommandatura, which consisted of "four governors acting by unanimous decisions," and that its administration was "at all times quadripartite," as between the United Kingdom and the other three Allied Powers.<sup>195</sup> On this ground, the Commission held that

the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter "within the jurisdiction" of the United Kingdom, within the meaning of Art. 1 of the Convention.<sup>196</sup>

The Commission therefore found that Hess was not within Britain's Article 1 jurisdiction *ratione personae*. There was a further reason given, however, that compounded the inadmissibility finding and that related to the temporal scope of the claim. The Commission noted that the agreement establishing the Allied Kommandatura significantly predated the entry into force of the Convention, and it commented *obiter dicta* that it "could raise an issue under

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191. *Id.* at 168.

192. Hess v. United Kingdom, App. No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72, 72 (1975).

193. *Id.* at 73.

194. *Id.*

195. *Id.*

196. *Id.* at 74.

the Convention if it were entered into when the Convention was already in force for the respondent Government.<sup>197</sup>

Within two years, a third extraterritorial claim under the Convention opened up a new possible circumstance for its application: belligerent military occupation by a state party. *Cyprus v. Turkey* arose in response to Turkey's 1974 invasion of Cyprus and its commencement of military occupation there.<sup>198</sup> In a decision that would fundamentally broaden the Convention's extraterritorial application beyond traditionally recognized bases of consular jurisdiction and wartime occupation, the Commission rejected Turkey's argument that Article 1 *extraterritorial* jurisdiction was narrowly limited to a formal territorial annexation or to the establishment of a military or civil government.<sup>199</sup> Instead, the Commission articulated a general rule governing extraterritorial bases for Convention application:

[T]hat nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, *to the extent that they exercise authority over such persons or property*. Insofar as, by the acts or omissions, they affect such persons or property, the responsibility of the State is engaged.<sup>200</sup>

This decision represents a shift from the Commission's previously circumscribed attempts to narrowly frame the grounds for extraterritorial application on a case-by-case basis. Instead, the Commission declared an expansive general rule delineating the circumstances under which the Convention may apply extraterritorially. This rule is largely drawn from the concept of jurisdiction as a general legal principle,<sup>201</sup> according to which a state may exercise jurisdiction over its nationals beyond the frontiers of its own territory under narrowly crafted exceptions that include nationals of a state, including aircraft or vessels, and authorized agents, whether diplomatic or military.<sup>202</sup> Yet it also articulated a new ground, with slightly more

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197. *Id.*

198. *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 127 (1975).

199. *Id.* at 136.

200. *Id.* at 136 (emphasis added).

201. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306–16 (6th ed. 2003).

202. *Id.* at 308, 312–15. Reliance on the ordinary meaning of jurisdiction as a general legal principle was made explicit in *Banković*, where the Court observed that "from the standpoint of public international law," a state's competence is "primarily territorial," given that instances of extraterritorial jurisdiction are, "as a general rule, defined and limited by the sovereign territorial rights of the other relevant States." *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 59.

attenuated jurisdictional links to the member state: persons or property over whom authorized agents exercise authority. While the decision avoided any findings on the merits, it concluded that the armed forces were authorized agents of Turkey, which was sufficient to establish admissibility.<sup>203</sup>

*Cyprus v. Turkey* thus represented the first instance in which the extraterritorial application of the Convention was affirmatively recognized in the factual circumstances of a given case. As such, the unusually expansive nature of the ruling made it that much more remarkable. But given the dicta of the earlier decisions laying the foundation for *Cyprus v. Turkey*, it was likely intended as a merely incremental broadening of the principles already established. If the actions of diplomatic personnel abroad could theoretically involve Article 1 jurisdiction, and nonexclusive control of an Allied military prison abroad could do the same, then how could the belligerent territorial occupation of another Council of Europe member state *not* give rise to Article 1 jurisdiction? The factual circumstances may have been too compelling to ignore.

Another issue that may have contributed to the Commission's decision was Turkey's reliance on former Article 63 to deny the presence of Article 1 jurisdiction. Turkey argued that because former Article 63 governed the dependent territories, Article 1 jurisdiction was by extension necessarily limited to metropolitan territory only.<sup>204</sup> Therefore, Turkey argued, it could not have possibly exercised Article 1 jurisdiction in Cyprus, since Cyprus did not constitute any part of its metropolitan territory.<sup>205</sup> As discussed above, this argument is, at least in theory, a rational one, permitting the two provisions to be read in harmony with one another. When used as a justification for preventing Convention obligations from applying to a situation of overt territorial aggression leading to human rights abuses, however, it was roundly rejected by the Commission.<sup>206</sup> With this case, Article 1 jurisdiction was expanded for the first time beyond the traditional bases for extraterritoriality such as flag vessels, embassies, or a country's nationals abroad; instead Article 1 jurisdiction extended "to all persons under . . . [a member state's]

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203. *Cyprus*, 2 Eur. Comm'n H.R. Dec. & Rep. at 136.

204. *Id.* at 130.

205. *Id.*

206. *Id.* at 136–37. The Commission's reasons, however, amounted to semantic hairsplitting: it argued that former Article 63 was not narrowly confined to the notion of Convention extension to dependencies because the provision in 63(3) also affected the material application of provisions in such territory. Further, the Commission argued that the Convention was also capable of extension beyond dependencies in situations of extraterritoriality along the lines of *Hess v. United Kingdom*, App. No. 6273/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975); see *X v. Switzerland*, App. Nos. 7289/75, 7349/76, 9 Eur. Comm'n H.R. Dec. & Rep. 57 (1977). See also *supra* notes 192–197 and accompanying text; *infra* note 214. However, the fact that Article 1 jurisdiction was predominantly limited to metropolitan territories and that Article 63 was predominantly concerned with the Convention's extension to the dependencies was not diminished by these minor exceptions. From a policy standpoint, it might have been more prudent for the Commission to concede the argument in theory but block its application by implementing the principle of estoppel.

actual authority and responsibility, whether that authority is exercised within their own territory or abroad.”<sup>207</sup> As will be discussed below, the basis for Article 1 jurisdiction in *Cyprus v. Turkey* would prove to be a difficult ground to confine.<sup>208</sup> It would also expose the poorly conceived relationship between Article 1 and Article 56.

The more conventional factual circumstances giving rise to the extraterritorial application of the Convention would not emerge until long after *Cyprus v. Turkey*. These include acts of diplomatic or consular agents exercising their authority in respect of persons<sup>209</sup> and acts of nationals of a state,<sup>210</sup> including registered vessels.<sup>211</sup> Many of these were later recategorized as examples of SAA over persons in *Al-Skeini*.<sup>212</sup>

Another line of cases involving the extraterritorial application of the Convention established the so-called *indirect effects* doctrine pertaining to extradition and expulsion decisions giving rise to extraterritorial Article 3 violations. Thus, the United Kingdom’s decision to extradite an applicant facing a possible risk of execution and exposure to the U.S. “death row phenomenon” was deemed to constitute an Article 3 violation.<sup>213</sup> This line of cases has since been distinguished from other types of extraterritorial application and will not be discussed here.<sup>214</sup>

207. *Cyprus*, 2 Eur. Comm’n H.R. Dec. & Rep. at 136.

208. *See infra* Part III.C.

209. *M. v. Denmark*, App. No. 17392/90, 73 Eur. Comm’n H.R. Dec. & Rep. 193, 196 (1992); *X v. United Kingdom*, App. No. 8081/77, 12 Eur. Comm’n H.R. Dec. & Rep. 207, 207–08 (1977).

210. *Rantsev v. Cyprus*, App. No. 25965/04, 51 Eur. H.R. Rep. 1, ¶ 208 (2010).

211. *See, e.g., Medvedyev v. France*, App. No. 3394/03, 51 Eur. H.R. Rep. 899, ¶ H7 (2010); *Khavara v. Italy*, App. No. 39473/98, at \*5 (Eur. Ct. H.R. 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-31884>.

212. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18, ¶¶ 133–137 (2011).

213. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 32, 35 (1989) (limiting extraterritorial scope of Article 3 to substantial grounds for a real risk of harm having a direct causal connection to the expulsion).

214. This line of extradition and expulsion cases does not entail Article 1 extraterritorial jurisdiction given that

the decision to extradite is normally taken in the territory of the extraditing state, at a moment when the person concerned is clearly within that state’s jurisdiction. . . . Accordingly *Soering* does not provide authority for the statement that the concept of “jurisdiction” is not restricted to the national territory of the contracting parties.

Lawson, *supra* note 21, at 97. Similarly, cases involving state immunity or the granting of *exequatur* to foreign judgments may also have an “extraterritorial element” but are not relevant to Article 1 jurisdiction. *See O’Boyle, supra* note 21, at 126–27. However, other case law and commentary continue to treat extradition and expulsion cases without distinction. *See, e.g., Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 68; Elspeth Berry, *The Extraterritorial Reach of the European Convention on Human Rights*, 12 EUR. PUB. L. 629, 632–33 (2006); Miller, *supra* note 69, at 1242.



### C. From Expansion to Banković: Two Steps Forward, One Step Back?

The extension of Article 1 jurisdiction to SAA over persons, established in *Cyprus v. Turkey*, would eventually give rise to a prolific line of cases nearly all involving Turkish occupation of northern Cyprus. These cases affirmed and expanded the Convention's extraterritorial application through a progressively expansive construction of Article 1 jurisdiction. SAA over persons as a basis for Article 1 jurisdiction was not only affirmed,<sup>215</sup> but also incrementally enlarged to encompass specific factual circumstances where the existing articulation of Article 1 would be otherwise inadequate. In this way, SAA over persons expanded to accommodate control or authority by *private individuals* where state "acquiescence or connivance" could be established<sup>216</sup> and where authorized state agents could be shown to have prevented a third state from exercising jurisdiction in its own territory.<sup>217</sup> These highly attenuated causal relationships between the state and the harm complained of eventually gave rise to a significantly new basis for establishing extraterritorial jurisdiction of the Convention.

Article 1 jurisdiction eventually expanded to include instances where, as a consequence of military action—whether lawful or unlawful—a state exercises "effective overall control" over part of a *territory* beyond its frontiers even where SAA over persons cannot be established.<sup>218</sup> This broadening of the doctrine of extraterritorial application of the Convention was not without controversy. One dissenting judge, for example, criticized the expansiveness of the rule on grounds that it conflated the Convention's jurisdiction *ratione personae* with its jurisdiction *ratione loci*:

The present judgment breaks with the previous case law since in dealing with the question whether there was jurisdiction *ratione*

215. See, e.g., *Chrysostomos v. Turkey*, App. Nos. 15299/89, 15300/89, 15318/89, 68 Eur. Comm'n H.R. Dec. & Rep. 216, 245 (1991); *Vearncombe v. United Kingdom*, App. No. 12816/87, 59 Eur. Comm'n H.R. Dec. & Rep. 186, 194 (1989).

216. *Isaak v. Turkey*, App. No. 44587/98, at \*14, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77533> (Eur. Ct. H.R. 2006); *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, ¶ 318; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 81. For the suggestion that the "acquiescence or connivance" test may be less a separate ground of Article 1 jurisdiction "than a device for significantly broadening the existing 'authority and control over persons' test" to include instances of indirect control, see Barbara Milner, Case Comment, *Broadening the Scope of Extraterritorial Application of the European Convention on Human Rights?*, 2007 EUR. HUM. RTS. L. REV. 172, 179, 184, 194 (2007).

217. *Cyprus v. Turkey*, App. No. 8007/77, 13 Eur. Comm'n H.R. Dec. & Rep. 85, 150 (1978).

218. *Djavit An v. Turkey*, 2003-III Eur. Ct. H.R. 231, ¶¶ 22–23; *Eugenia Michaelidou Dev. Ltd v. Turkey*, App. No. 16163/90, at \*5 (Eur. Ct. H.R. 2003), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61271>; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. ¶¶ 76–77; *Loizidou v. Turkey (Loizidou II)*, App. No. 15318/89, 23 Eur. H.R. Rep. 513, ¶ 56 (1996); *Loizidou v. Turkey (Loizidou I)*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 101 (1995).

*personae* it applies the criteria for determining whether there was jurisdiction *ratione loci*, although the conditions for doing so have not been met. Thus, for the first time, the Court is passing judgment on an international law situation which lies outside the ambit of the powers conferred on it under the Convention's supervision machinery. In this judgment the Court projects Turkey's legal system onto northern Cyprus without concerning itself with the political and legal consequences of such an approach.<sup>219</sup>

This dissent suggests that Article 1 jurisdiction encompasses separate tests for Article 1 jurisdiction *ratione loci* and *personae*. However, if the previous case law, "in dealing with the question whether there was jurisdiction *ratione personae*,"<sup>220</sup> was in fact the line of cases recognizing SAA over persons, and these cases also involved extraterritorial application of the Convention, then it is difficult to see how such a test does not also implicitly accommodate spatial jurisdiction.<sup>221</sup> The dissent's observation remains useful in that both concepts remain distinct components of Article 1 jurisdiction, though its assertion that they require recourse to separate jurisdictional tests may be mistaken.<sup>222</sup> More importantly, their interrelationship in the extraterritorial context has already been definitively established.<sup>223</sup> It appears that the constantly evolving jurisprudence of Article 1 seeks to establish a balance in which the causal relationship between the state party and the affected persons is neither too attenuated nor too proximate to justify its application beyond a state's territory. Where this balance will ultimately lie remains a matter of evolving doctrine.

### 1. Retrenchment of Extraterritorial Application Under *Drozd* and *Banković*

Article 1 nonetheless has its limits, and even in compelling cases, it is unable to accommodate every instance of alleged human rights abuses in the European sphere. The case of *Drozd v. France*, involving claimants convicted

219. *Loizidou II*, 23 Eur. H.R. Rep. at 549 (Gölcüklü, J., dissenting).

220. *Id.*

221. See *supra* notes 17–35 and accompanying text.

222. While the establishment of personal and territorial jurisdiction under Article 1 may be coextensive when addressing a Convention claim within a state party's own territory, the dissent's specific contention is more likely aimed at the Court's practice of merging these two concepts in the extraterritorial context. Certainly the *Cyprus v. Turkey* line of cases establishing Article 1 jurisdiction on the basis of SAA over persons clearly indicates that a nexus between state conduct and individuals is not only necessary to establish state jurisdiction over persons, but also sufficient to establish jurisdiction even over territory, including foreign territory. See sources cited *supra* notes 216–218.

223. *Behrami v. France*, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. SE10 85, ¶ 69 (2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830> ("[Article 1] jurisdictional competence is primarily territorial and, while the notion of compatibility *ratione personae* of complaints is distinct, the two concepts can be inter-dependent." (citations omitted)).

by a court in Andorra and serving prison sentences in France, is one such example.<sup>224</sup> Alleging violations of Article 6 by Spain and France and of Article 5 by France, the applicants' claims were nonetheless deemed inadmissible given the *sui generis* status and characteristics of the Andorran state, over which neither Spain nor France exercised exclusive jurisdiction in any official capacity.<sup>225</sup> At the outset, the Court held that with regard to the Article 6 claim, there was no jurisdiction *ratione loci* given that Andorra was not "a party to the Convention in its own right," nor was it a Franco-Spanish condominium.<sup>226</sup> As a separate matter, it examined whether France or Spain exercised Article 1 jurisdiction over the claimants *ratione personae* with regard to the Article 6 claims. It found that neither France nor Spain exercised Article 1 jurisdiction over the proceedings in Andorran courts, and though the judges were appointed by the Co-Princes acting jointly, they did not act in their national capacity as French or Spanish judges and were not "subject to supervision by the authorities of France or Spain."<sup>227</sup> The Article 5 claims against France (alleging the absence of a legal basis in its national laws for applicants' imprisonment) were rejected on grounds that the ancient tradition, whereby longer Andorran prison terms could be served in France, constituted a sufficient legal basis for the arrangement,<sup>228</sup> and that the French courts exercised control by assessing Andorran trials for flagrant error before agreeing to take prisoners on its behalf.<sup>229</sup> Although a joint dissent registered its displeasure with the situation, it ultimately conceded that the problem lay outside the scope of the authority of the Commission and required a political solution.<sup>230</sup>

As noted at the outset of this Article, the Court's most significant attempt to restrict Article 1 jurisdiction prior to 2011 occurred in *Banković*, a landmark Grand Chamber decision involving claims arising from NATO air strikes in the former Republic of Yugoslavia,<sup>231</sup> at that time not yet a member of the Council of Europe.<sup>232</sup> The Court stressed the territorial bases of Article 1 jurisdiction while emphasizing that "its recognition of the

224. *Drozd v. France*, 240 Eur. Ct. H.R. (ser. A) ¶ 11 (1992).

225. *Id.* ¶¶ 67–70, 77–78.

226. *Id.* ¶ 89.

227. *Id.* ¶ 96.

228. *Id.* ¶¶ 107, 110.

229. *Id.* ¶ 110.

230. See *id.* at 35 (Pettiti et al., JJ., dissenting). ("It seems difficult to accept that there is a watertight partition between the entity of Andorra and the States to which the two Co-Princes belong, when in so many respects . . . those States participate in its administration. It must thus be considered that the Co-Princes should even now use their authority and influence in order to give effect in Andorra to the fundamental principles of the European Convention on Human Rights . . .").

231. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶¶ 7–11.

232. *Id.* ¶ 42. ("In the present case, the Governments note that the FRY was not and is not a party to the Convention and its inhabitants had no existing rights under the Convention.").

exercise of extra-territorial jurisdiction by a Contracting State is exceptional.”<sup>233</sup> The Court’s approach in *Banković* can be characterized as stressing jurisdictional links *ratione loci* by focusing on the predominantly metropolitan territorial paradigm of the Convention. One commentator has proposed that the effect of *Banković* was to create a presumption *against* extraterritorial jurisdiction under Article 1.<sup>234</sup> By deemphasizing and even contesting Article 1 relevance to state extraterritorial actions with very attenuated links *ratione personae*, the *Banković* decision undoubtedly attempted to rein in the extraterritorial jurisprudence of Article 1. Accordingly, direct control over persons by the armed forces or other agents of the state were conceded to qualify as recognized grounds for jurisdiction, while air strikes producing extraterritorial harm constituted too indirect a causal relationship between the states and the victims.<sup>235</sup> In effect, *Banković* may stand for the proposition that although a state’s extraterritorial act might produce harm falling within the Convention’s subject-matter scope, if the state’s *personal* jurisdiction is too attenuated to constitute a sufficiently direct causal relationship between the state and the victims, Article 1 jurisdiction will be precluded.

Both the *Drozd* and *Banković* decisions stand out for the way in which they treat Article 1 as comprising two distinct elements: personal scope and territorial scope. In *Drozd*, the bifurcated analysis under the Article 6 claim made this distinction explicit;<sup>236</sup> in *Banković*, the separate consideration of jurisdiction over persons and places was more tacit.<sup>237</sup> The distinction between these two different kinds of jurisdiction, and the acknowledgment of their coexistence within Article 1, nonetheless remains an important contribution to the issue. Accordingly, extraterritorial jurisdiction under Article 1 may be grounded in the Convention’s scope of application over places, persons, or both.

By contrast, in cases involving the Convention’s domestic, or territorial, application, the double-barreled character of jurisdiction is less obvious. This is because in domestic territorial matters, Article 1 jurisdiction is primarily determined through recourse to the *ratione loci* element.<sup>238</sup> The primacy of jurisdiction over a *place* is evidenced by the Convention’s drafting history

233. *Id.* ¶¶ 59, 71.

234. O’Boyle, *supra* note 21, at 136.

235. *Banković*, 2001-XII Eur. Ct. H.R. ¶¶ 71, 73.

236. *Drozd v. France*, 240 Eur. Ct. H.R. (ser. A) ¶¶ 89, 96 (1992) (finding (1) that jurisdiction *ratione loci* was not established since Andorra was not a party to the Convention, and (2) that jurisdiction *ratione personae* was not established through the participation of France and Spain in the Andorran court proceedings).

237. *See Banković*, 2001-XII Eur. Ct. H.R. ¶¶ 71, 74–82.

238. *See Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 262 ¶ 312 (“From the standpoint of public international law, the words ‘within their jurisdiction’ in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial . . . but also that jurisdiction is presumed to be exercised normally throughout the State’s territory.”).

and its emphasis on making the Convention's limited territorial application coextensive with a party's territory and persons within it.<sup>239</sup> Moreover, the idea that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" has long been an accepted international legal principle.<sup>240</sup> It is therefore likely that within a state party's metropolitan territory, Article 1 jurisdiction *ratione loci* and *ratione personae* remain presumptively coextensive; a separate showing of SAA over persons is not required because it is presumed to exist. Today, Convention jurisprudence confirms that to the extent that the relevant acts occur within a state's own metropolitan territory, the twin Article 1 elements *ratione loci* and *personae* are presumed satisfied.<sup>241</sup>

It is only in the extraterritorial context that the *ratione personae* component has become particularly critical to the jurisdiction analysis—enabling recognition, for example, of the nexus between a sovereign and its flag vessels or aircraft, diplomatic or consular personnel, or military forces on foreign soil.<sup>242</sup> In all such instances, what is asserted is certainly not jurisdiction over a place, but a fictional jurisdiction *ratione personae*. As the next Section illustrates, *Banković's* attempts to isolate a consistent doctrinal core against a rapidly evolving body of jurisprudence have proven to be of limited influence.

#### D. *Post-Banković Rebound in Extraterritorial Application*

Despite *Banković's* attempts to limit instances of extraterritorial application of the Convention, the ECA basis for jurisdiction continued to widen to accommodate new instances of extraterritorial applicability. Extraterritorial jurisdiction can now be established where a state exercises either effective authority or a "decisive influence" over a local authority in foreign territory by means of military, economic, financial, and political support, *even where no effective overall control of the territory can be shown*.<sup>243</sup> The Court appears even to recognize ECA without control over local authorities.<sup>244</sup> Since *Al-Skeini*, however, the Court has conveniently consolidated many recognized bases for extraterritorial jurisdiction under fewer heads.<sup>245</sup>

Another factor militating against *Banković's* retrenchment has been the continued expansion of the SAA basis for extraterritorial application. For example, Turkey took custody of the alleged founder and leader of the

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239. See *supra* Part II.C.

240. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812).

241. See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 107, ¶ 137; *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221, ¶¶ 137, 139 (2004); *Ilascu*, 2004-VII Eur. Ct. H.R. ¶ 312.

242. See *supra* notes 201–202 and accompanying text.

243. *Ilascu*, 2004-VII Eur. Ct. H.R. ¶¶ 392–394.

244. See *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 27, ¶¶ 70, 74 (2004).

245. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. Ct. H.R. 18, ¶¶ 131–140 (characterizing the grounds for extraterritorial jurisdiction as comprising either SAA or ECA).

Workers' Party of Kurdistan movement in Kenya with the cooperation and assistance of Kenyan authorities. The applicant, Öcalan, raised several claims, including one under Article 5(1) alleging that his arrest and detention by Turkish authorities was unlawful because it took place on foreign soil and therefore could not be a legitimate exercise of Turkey's authority.<sup>246</sup> The Court used a multipronged inquiry to decide whether an extraterritorial arrest is lawful for purposes of Article 5(1): whether the alleged acts were within the state's Article 1 jurisdiction, whether they were conducted in conformity with that state's laws, and whether they infringed on the third state's sovereignty or international laws.<sup>247</sup> Although the events took place well outside the Convention's *espace juridique* so heavily emphasized in *Banković*, the Court nonetheless held that Turkey's Article 1 jurisdiction was engaged when its agents took custody of Öcalan and arrested him in the international zone of the Nairobi airport and that this direct physical control was distinguishable from the factual circumstances of the air strike deemed inadmissible under *Banković*.<sup>248</sup> While both pre- and post-*Banković* jurisprudence confirms the existence of SAA over persons as a legitimate basis for establishing extraterritorial jurisdiction both within and beyond European legal space,<sup>249</sup> it has only been formally recognized as such since *Al-Skeini*.

The decision in *Öcalan* goes some way toward promoting the thesis that extraterritorial jurisdiction can be entirely bootstrapped by jurisdiction *ratione personae*—as demonstrated by the physical custody of Turkish agents on a Turkish plane.<sup>250</sup> Moreover, it demonstrates that the personal jurisdiction component of Article 1 is capable of overriding even the greatest deficiencies in jurisdiction *ratione loci*: absence of territorial control over a nonstate party not only beyond the Convention's *espace juridique*, but also well outside the European geographic sphere.

In the extraterritorial context, then, the jurisdiction analysis necessarily relies on the personal component. What *Öcalan* demonstrates is that *personal* jurisdiction may have such primacy in extraterritorial circumstances as to single-handedly establish Article 1 jurisdiction where the causal link between the state and applicants is sufficiently direct or proximate.

The persistent emphasis on the *ratione personae* element in extraterritorial instances of Article 1 jurisdiction is also consistent with the limited instances in which extraterritorial jurisdiction is recognized in customary international law. As the Court observed in *Banković*,

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246. *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 131, ¶¶ 73–74.

247. *Id.* ¶¶ 91–99; *Öcalan v. Turkey*, App. No. 46221/99, 37 Eur. H.R. Rep. 238, ¶¶ 93–103 (2003).

248. *Öcalan*, 2005-IV Eur. Ct. H.R. ¶ 91.

249. *Al-Saadoon v. United Kingdom*, App. No. 61498/08, 49 Eur. H.R. Rep. 95, ¶¶ 86–88 (2009); *Sánchez-Ramirez v. France*, 86 Eur. Comm'n H.R. Dec. & Rep. 155, 161–62 (1996).

250. *Öcalan*, 2005-IV Eur. Ct. H.R. ¶ 91.

[w]hile international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, *defined and limited by the sovereign territorial rights of the other relevant States*.<sup>251</sup>

It is arguably precisely *because* each state's sovereignty is limited by the sovereign *territorial* rights of others that extraterritorial jurisdiction may favor a jurisdictional nexus to persons.

If the *personal* jurisdiction component becomes the overriding factor in evaluating extraterritorial jurisdiction, what role is played by the territorial component? The relevance of jurisdiction *ratione loci* in the confined context of extraterritoriality becomes diminished to the point of serving only as a backup function: to establish an alternate, indirect basis through which *personal* jurisdictional links can be construed or inferred. In this way, ECA creates circumstances in which SAA over persons can be presumptively established.<sup>252</sup> Stated differently, in the extraterritorial context, it is the state's nexus to *persons* that becomes the pivotal element of Article 1 jurisdiction, whether established directly through some form of SAA over persons, or indirectly through attenuated links to foreign territory. Ultimately, jurisdictional connections *ratione personae* have become the necessary and sufficient means for establishing Article 1 jurisdiction. This outcome is arguably confirmed by the Court's decision in *Al-Skeini*, recognizing the victims' deaths as collectively resulting from the United Kingdom's exercise of jurisdiction over *persons* rather than territory—a surprising determination given not only the lack of physical custody of some of the victims, but the formal acknowledgment of the United Kingdom's presence in Iraq as one of formal military occupation potentially able to facilitate establishment of a territorial (ECA) basis for jurisdiction.<sup>253</sup>

This Section sought to emphasize the rapid and ad hoc development of Article 1 jurisprudence and the difficulty with which it can be confined to the articulation of clear principles. The next Section examines ECHR juris-

251. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 59 (emphasis added) (citations omitted).

252. *See Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 27, ¶ 74 (2004) (concluding that Article 1 jurisdiction was not established where there was insufficient evidence to link the presence of Turkish troops in Iraq to the applicants' deaths).

253. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18, ¶ 149 (2011) (finding that "the United Kingdom . . . assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government," including "authority and responsibility for the maintenance of security in South East Iraq," and accordingly determining that "[i]n these exceptional circumstances . . . the United Kingdom . . . exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention").

prudence pertaining to the dual application of Articles 1 and 56 in order to better understand the interrelationship between these two provisions.

### E. Case Law Governing the Interaction Between Articles 1 and 56

#### 1. Article 56 Attempts to Limit Article 1

We have observed above that Turkey first raised the argument that Article 56 could be read so as to restrictively interpret Article 1 jurisdiction as applying to metropolitan territory only.<sup>254</sup> According to this argument, since Article 56 governs the dependent territories, then Article 1 jurisdiction must accordingly be limited to the metropolitan territories. Although the Commission first rejected this argument in 1975,<sup>255</sup> attempts to rely on Article 56 as a means of confirming the scope of Article 1 jurisdiction have persistently been raised by state parties.<sup>256</sup>

Subsequent to the Commission's rejection of this argument in 1975, Turkey argued that the territorial restrictions provided for under former Article 63 could be read to permit similar territorial restrictions of former Article 25, thus legitimizing declarations of restriction pertaining thereto.<sup>257</sup> In this way, Turkey could legitimately limit the Commission's competence to matters concerning the metropolitan territory only, preventing it from examining claims brought by Cyprus. Predictably, this argument was rejected by both the Commission<sup>258</sup> and the Court.<sup>259</sup>

The basic idea that Article 56 may have bearing on the meaning and interpretation of Article 1 jurisdiction is a theoretically sound one. Moreover, the idea that former Article 63 could legitimize territorial limitations under former Article 25 (and consequently limit Article 1 jurisdiction in the process) garnered support from dissenting judges in both the Commission<sup>260</sup> and the Court.<sup>261</sup> In a separate dissenting opinion in *Loizidou v. Turkey*, Mr. Gölcüklü observed:

“If a State may exclude the application of Article 25 to a territory referred to in Article 63, there would seem to be no specific reason

254. *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125 (1975).

255. *Id.* at 136–37.

256. *Loizidou II*, App. No. 15318/89, 23 Eur. H.R. Rep. 513, ¶ 56 (1996); *Loizidou I*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 135 ¶ 80, 136 ¶ 86 (1995); *Chrysostomos v. Turkey*, App. Nos. 15299/89, 15300/89, 15318/89, 68 Eur. Comm'n H.R. Dec. & Rep. 216 (1991).

257. *See Chrysostomos*, 68 Eur. Comm'n H.R. Dec. & Rep. at 238, ¶ 3, 248 ¶¶ 40–42; *Loizidou I*, 20 Eur. H.R. Rep. at 135 ¶ 80, 136 ¶ 86 (1995).

258. *Chrysostomos*, 68 Eur. Comm'n H.R. Dec. & Rep. at 248 ¶¶ 40–42.

259. *Loizidou I*, 20 Eur. H.R. Rep. at 135 ¶ 80, 136 ¶ 86.

260. *Id.* at 121 (Norgaard et al., JJ., partly concurring, partly dissenting) (Commission decision reprinted in full within Court's judgment).

261. *See id.* at 141, 142 (Gölcüklü & Pettiti, JJ., dissenting); *id.* at 147 (Gölcüklü, J., dissenting).



why it should not be allowed to exclude the application of the right of individual petition to a territory having even looser constitutional ties with the State's main territory."<sup>262</sup>

Mr. Gölcüklü further observed that:

"It might be argued, therefore, that Article 63(4) has evolved into a clause conferring unfettered discretion on States concerning the territorial scope of their declarations under Article 25, whenever territories beyond the national boundaries are concerned."<sup>263</sup>

This position has remained a minority view on the Court, yet it makes a compelling point that if territorial restrictions are permitted under former Article 63 with regard to dependencies, there is little sense, from a policy standpoint, in not allowing the same for territories "having even looser constitutional ties" with the state's metropolitan territory.<sup>264</sup> These comments neatly encapsulate the paradoxical interplay between Articles 1 and 56.

In *Ilascu v. Moldova*, the Court held that Article 56 cannot be construed as permitting a declaration restricting the Convention to only *part* of its metropolitan territory, whether as a negative declaration under former Article 25 or on its own.<sup>265</sup> Fifteen years after Turkey first attempted to rely on former Article 63 to restrict the meaning of Article 1 jurisdiction, a Grand Chamber of the Court finally articulated a broad rejection of the argument that is likely to settle the matter once and for all, stating that

neither the spirit nor the terms of Article 56, which provides for extending the Convention's application to territories other than the metropolitan territories of the High Contracting Parties, could permit of a negative interpretation in the sense of restricting the scope of the term "jurisdiction" within the meaning of Article 1 to only part of the territory.<sup>266</sup>

The Court in *Ilascu* left no doubt that Article 56 cannot be used to interpret Article 1 in a territorially restrictive manner. Naturally, given the functional relationship between Articles 1 and 56 regarding the extraterritorial scope of the Convention, interpretive attempts relying on the interplay of the two provisions could not be expected to be exclusively one-sided.

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262. *Id.* at 146 (Gölcüklü, J., dissenting) (quoting *id.* at 121–22 (Norgaard et al., JJ., partly concurring, partly dissenting) (Commission decision)).

263. *Id.* at 147 (quoting Christian Tomuschat, *Turkey's Declaration Under Article 25 of the European Convention on Human Rights*, in FORTSCHRITT IM BEWUSSTEIN DER GRUND- UND MENSCHENRECHTE: FESTSCHRIFT FÜR FELIX ERMACORA [PROGRESS IN THE SPIRIT OF HUMAN RIGHTS] 128–29 (Nowak et al. eds., 1988)).

264. *Id.* at 146 (quoting *id.* at 121–22 (Norgaard et al., JJ., partly concurring, partly dissenting) (Commission decision)).

265. *Ilascu v. Moldova*, App. No. 48787/99, at \*16 (Eur. Ct. H.R. 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5948>.

266. *Id.*

What follows is an examination of the converse: attempts to rely on Article 1 jurisdiction as a means of broadening the interpretation of Article 56.

## 2. Article 1 Attempts to Broaden Article 56: The Extraterritorial Absurdity Revealed

It is only with the benefit of hindsight that one can appreciate how the jurisprudential developments under Article 1 have come to influence the tactical approaches subsequently taken in parties' Article 56 claims. As observed above, Article 56 territories have been defined mostly by reliance upon or deference to state-party designations for European territories<sup>267</sup> and by unilateral declarations for traditionally colonial, non-European territories. In this way, once a dependency is identified as an Article 56 territory, the Court tends to require strict compliance with declaration requirements. This strict reliance on Articles 56(1) and 56(4) declaration requirements has been a consistent feature of Article 56 jurisprudence.<sup>268</sup> However, the dynamism of Article 1 case law, beginning with the *Cyprus v. Turkey* line of cases,<sup>269</sup> has provided applicants with new strategic approaches with regard to the unyielding requirements of Article 56.

The first instance in which an applicant sought to sidestep Article 56 deficiencies with Article 1 arguments can be found in *Bui Van Thanh v. United Kingdom*, a 1990 Commission decision.<sup>270</sup> Claimants were Vietnamese boat people in British-controlled Hong Kong, where they were denied refugee status and detained pending deportation to Vietnam, which they alleged would result in an Article 3 violation.<sup>271</sup> Prior to 1988, Hong Kong automatically accorded refugee status to such persons, but a change in Hong Kong policy gave rise to the claim.<sup>272</sup> At the time, Hong Kong was under British control, but the United Kingdom had never made a declaration of extension under former Article 63.<sup>273</sup> Claimants argued that the absence of such a declaration was irrelevant.<sup>274</sup> Instead, citing both *Hess* and *Cyprus v. Turkey*, they argued that Britain's de facto control of Hong Kong's deportation policy operated to bring the territory under Article 1 jurisdiction.<sup>275</sup> Unable to construe its way out of the strictures of former Article 63, the Commission came to the uncomfortable conclusion that although Article 1 *may* in certain circumstances extend outside a state party's territory,<sup>276</sup>

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267. See *supra* notes 170–179 and accompanying text.

268. See *supra* Part III.A.2.

269. See sources cited *supra* notes 216–218.

270. *Bui Van Thanh v. United Kingdom*, App. No. 16137/90, 65 Eur. Comm'n H.R. Dec. & Rep. 330 (1990).

271. *Id.* at 331.

272. *Id.*

273. *Id.*

274. See *id.*

275. *Id.* at 331–32.

276. *Id.* at 332.

the Convention system also provides the State with the option of extending the Convention to territories for whose international relations it is responsible by lodging a declaration under Article 63 para. 1 of the Convention, with the result that matters relating to such territories fall within the jurisdiction of the High Contracting Party within the meaning of Article 1 of the Convention. It is an essential part of the scheme of Article 63 that a declaration extending the Convention to such a territory be made before the Convention applies either to acts of the dependent Government or to policies formulated by the Government of a Contracting Party in the exercise of its responsibilities in relation to such territory. Accordingly, in the present case, even if the Commission were to accept that the acts of the Hong Kong authorities were based on United Kingdom policy, it must find that it has no competence to examine the application since no declaration under Article 63 para. 1 has been made in respect of Hong Kong.<sup>277</sup>

In this statement, the Commission appears to confirm the relationship of Article 1 to former Article 63 proposed here, whereby a declaration of extension under the latter brings a territory within the purview of the former. This comment refines the outright rejection made by the Commission in 1975 in *Cyprus v. Turkey* of the argument that if Article 63 governed dependent territories, then Article 1 must consequently be limited to a state's metropolitan territory.<sup>278</sup> Instead, *Bui Van Thanh* confirms the highly interactive nature of the two provisions: an Article 63 declaration brings a dependent territory from altogether *outside* the scope of the Convention to *within* Article 1 jurisdiction.<sup>279</sup> Seen in this way, Article 63 presumptively excludes such territories until they are explicitly included, at which time they fall under Article 1 jurisdiction.

This rule creates a paradoxical outcome whereby Article 1 jurisdiction is bifurcated, requiring one set of elements for dependent territories and another set of elements for all others. Accordingly, an explicit voluntary declaration remains necessary in order to establish Article 1 jurisdiction for a party's dependent territories, but judicially established extraterritorial bases remain sufficient to establish it for any other territory. The effective result is one that allows states with dependent territories to voluntarily limit their Convention responsibility despite extensive constitutional ties and lasting control and influence in such territories but not in regard to any other territories. As a result, Article 1 jurisdiction can be established involuntarily, by means of an objective test when the territory is not a formal dependency,

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277. *Id.* at 333.

278. *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, ¶¶ 7–10 (1975).

279. *See Bui Van Thanh*, 65 Eur. Comm'n H.R. Dec. & Rep. at 333.

but can be shirked at will when a historical relationship and constitutional ties between the territory and the state party are present.<sup>280</sup>

In *Yonghong v. Portugal*, a similar situation arose in which a Taiwanese man arrested in formerly Portuguese-controlled Macau sought to challenge China's extradition request on grounds that it would result in violations of Articles 3 and 6 of the Convention.<sup>281</sup> At the time that the Chinese government sought the applicant's extradition from Portugal, the territory of Macau was a Chinese territory under Portuguese administration pending transfer of sovereignty back to China on December 20, 1999.<sup>282</sup> The applicant argued that Portugal's failure to make an Article 56 declaration extending the Convention to Macau was not fatal to his claim since Portugal exercised its Article 1 jurisdiction in Macau and the governor of Macau, the Portuguese government's main representative there, had granted the Macanese courts leave to begin extradition hearings on the matter.<sup>283</sup> As with the preceding case, the argument that Article 1 grounds for extraterritorial jurisdiction could supplant Article 56 requirements was rejected.<sup>284</sup> The Court confirmed the independent and inflexible operation of Article 56:

An essential feature of the system established by Article 56 is that the Convention cannot apply to acts of the authorities of such territories, nor to the policies implemented by the government of the Contracting Party concerned in the exercise of their responsibilities for those territories, unless a declaration extending the ambit of the Convention has been made.<sup>285</sup>

This position has been reaffirmed as recently as 2006 in the context of an analogous "colonial clause" provision in the First Protocol.<sup>286</sup> *Quark Fishing Ltd. v. United Kingdom* involved a First Protocol claim brought by the owner of a fishing vessel under a Falklands flag whose fishing license was arbitrarily rejected in U.K. courts.<sup>287</sup> Although the United Kingdom had made a declaration of extension under Article 56, it had not done so with

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280. *See id.* at 332–33.

281. *Yonghong v. Portugal*, 1999-IX Eur. Ct. H.R. 385, 389–90.

282. *Id.*

283. *Id.* at 391.

284. *Id.* at 392; *Bui Van Thanh*, 65 Eur. Comm'n H.R. Dec. & Rep. at 333.

285. *Yonghong*, 1999-IX Eur. Ct. H.R. at 392.

286. ECHR Protocol, *supra* note 54, art. 4. This Protocol stipulated in part:

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

*Id.*

287. *Quark Fishing Ltd. v. United Kingdom*, App. No. 15305/06, 44 Eur. H.R. Rep. SE4 70, 70–71 (2006).

regard to the First Protocol.<sup>288</sup> The claimant argued that the Article 56 defect was not fatal, since the relevant officials “were either directly controlled or could be overruled by the Contracting State, and persons within a territory can rely on the full range of Convention rights if a Contracting State exercised effective overall control over that territory.”<sup>289</sup> Unsurprisingly, the Court rejected this argument in line with its established precedent on the matter.<sup>290</sup> The claimant, however, raised a second and more novel claim: even without the declaration extending the First Protocol to the Falklands, Article 56 was outdated—the Convention rights had already been extended to the territory under that provision, and the Court should construe the existence of the Protocol’s extension to the territory in order to avoid any gaps in coverage.<sup>291</sup> In response, the Court offered a surprisingly sympathetic reply in which it conceded the antiquated nature of the provision but observed its duty to enforce it nonetheless:

The Court can only agree that the situation has changed considerably since the time that the contracting parties drafted the Convention, including former Art. 63. Interpretation, albeit a necessary tool to render the protection of Convention rights practical and effective, can only go so far. It cannot unwrite provisions contained in the Convention. If the contracting states wish to bring the declarations system to an end, this can only be possible through an amendment to the Convention to which those states agree and give evidence of their agreement through signature and ratification. Since there is no dispute as to the status of the SGSSI as a territory for whose international relations the United Kingdom is responsible within the meaning of Art. 56, the Court finds that the Convention and Protocols cannot apply unless expressly extended by declaration. The fact that the United Kingdom has extended the Convention itself to the territory gives no ground for finding that Protocol No. 1 must also apply or for the Court to require the United Kingdom somehow to justify its failure to extend that Protocol. There is no obligation under the Convention for any contracting state to ratify any particular Protocol or to give reasons for its decisions in that regard concerning its national jurisdictions. Still less can there be any such obligation as regards the territories falling under the scope of Art. 56 of the Convention.<sup>292</sup>

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288. *Id.* at 72.

289. *Id.* at 71–72.

290. For findings that Articles 56 and 1 constitute separate and distinct grounds for establishing Convention jurisdiction, see, for example, *Yonghong*, 1999-IX Eur. Ct. H.R. at 385; *Bui Van Thanh v. United Kingdom*, App. No. 16137/90, 64 Eur. Comm’n H.R. Dec. & Rep. 330, 330 (1990); *Gillow v. United Kingdom*, 109 Eur. Ct. H.R. (ser. A) ¶ 62 (1986).

291. *Quark Fishing Ltd.*, 44 Eur. H.R. Rep. at 72.

292. *Id.* at 72–73.

The Article 56 cases examined here evince multiple attempts to sidestep formal compliance with that provision's declaration requirements. In every instance, such arguments rely upon the expansive bases for the Convention's extraterritorial application under Article 1. This trend demonstrates not only an implicit recognition of the intransigence of Article 56 jurisprudence, but also an attempt to harness the greater flexibility found in Article 1 case law. While judicial responses have been exceptionally uniform in their rejection of these arguments, they nonetheless have produced a problematic inconsistency in the extraterritorial application of the Convention whereby Article 1 jurisdiction can be forcibly imposed on a state party with regard to all territories *except* dependencies, where jurisdiction remains expressly voluntary.

### CONCLUSION

This Article opened with *Al-Skeini* in order to illustrate the dilemmas of extraterritorial treaty application. When should a state's treaty obligations apply to its foreign conduct? How should such extraterritorial obligations be determined? And most importantly, can they be distilled into a coherent set of principles? The Court's response to this issue clearly remains under development.

As long-awaited clarifications on the Convention's extraterritoriality, *Al-Skeini* and its paired decision in *Al-Jedda* have produced disappointing results. Though they will surely be heralded for disowning certain *Banković* features—such as the implied regional restriction on Convention application or the nondivisibility of Convention rights—the lasting impression remains one of continued confusion.<sup>293</sup> In the end, these judgments perpetuate the sense that Convention jurisprudence on extraterritoriality remains “bedeviled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies.”<sup>294</sup>

Article 1 jurisdiction reveals itself to be highly complex, operating differently in territorial contexts than it does extraterritorially. This Article proposes that jurisdiction *ratione personae* constitutes the pivotal component and the most compelling element in determining Article 1 jurisdiction extraterritorially. In contrast, the significance of a state's nexus to territory becomes a secondary consideration at best. Moreover, the coherence of today's Article 1 jurisprudence, in which Convention rights can be “divided and tailored” under certain jurisdictional circumstances (SAA over persons)<sup>295</sup> but not others (ECA)<sup>296</sup> remains questionable. Finally, the tenuous

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293. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶¶ 80–81.

294. *Al-Skeini v. United Kingdom*, App. 55721/07, 53 Eur. H.R. Rep. 18, 78 (2011) (Bonello, J., concurring).

295. *Id.* ¶ 137 (majority opinion).

296. *See Banković*, 2001-XII Eur. Ct. H.R. ¶¶ 70, 75.

interaction between Article 1 and Article 56 has produced paradoxical results whereby extraterritorial jurisdiction may be forcibly judicially recognized in ad hoc situations, yet is subject to a state's *discretionary* extension in its own dependencies where the jurisdictional relationship is most highly developed.

Amid these myriad complexities, one aspect of Convention jurisprudence on extraterritorial application is clear: it is highly contextualized, bound up not only in the drafting history of its respective provisions, but also in the complex interplay between Articles 1 and 56. Compounding these complexities is the contrasting case law of both provisions, whereby one remains rigidly static while the other continues to develop unfettered by the constraints of doctrinal coherence.

These observations have significant implications for international courts and scholars. Most importantly, they undermine the feasibility of sweeping "convergence theory" approaches that examine the extraterritorial scope of treaties on the basis of common threads such as a shared human rights context, common treaty obligations at issue, or even similarly framed "jurisdiction" clauses across such instruments.<sup>297</sup> Such approaches fail to accommodate the highly particularized nature of specific treaty provisions at issue, their textual and operational interplay, and the shifting, dynamic, and oftentimes paradoxical jurisprudential developments that shape them. If the

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297. Cerone has observed that "cross fertilization is a common phenomenon among regional [human rights] institutions." John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and U.S. Activities in Iraq*, AM. SOC'Y INT'L L. INSIGHTS (Oct. 25, 2005), <http://www.asil.org/insights051025.cfm>. Similarly, Coomans and Kamminga assert that, as between the U.N. Covenants and the American and European human rights instruments, there exists "general agreement between supervisory bodies" as to the general framework for determining their extraterritorial application for states exercising effective control over a territory or over persons. Fons Coomans & Menno T. Kamminga, *Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 21, at 1, 3–4. A more implicit approach to cross-fertilization in the context of the extraterritorial application of human rights treaties first emerged among commentators. Theodor Meron, *Agora: The 1994 U.S. Action in Haiti, Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 58, 80–81 (1995); Kelvin Widdows, *Shorter Article, The Application of Treaties to Nationals of a Party Outside Its Territory*, 35 INT'L & COMP. L.Q. 724, 728 (1986). Today the convergence approach is particularly on display in the refugee law context, by the U.N. High Commissioner for Refugees and among commentators. U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, ¶42 (Jan. 26, 2007), available at <http://www.unhcr.org/refworld/docid/45f17a1a4.html> ("In [the U.N. High Commissioner for Refugee]'s view, the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is relevant also to the prohibition of *refoulement* under international refugee law, given the similar nature of the obligations and the object and purpose of the treaties which form their legal basis."); JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 159–71 (2005); Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 110–14 (Erika Feller et al. eds., 2003).

European Convention indeed offers a representative example of the factors that shape a treaty's extraterritorial application, its lesson must surely be that it cannot be distilled into a sweeping general principle but must instead be determined on a highly contextualized, case-by-case basis.



