Revisiting Extraterritoriality: the ECHR and its Lessons

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Abstract
The extraterritorial scope of international human rights treaties has prompted vigorous debate in recent years. Much of this debate has focused on earlier developments in the European Court of Human Rights as well as the comparative jurisprudence of other international human rights treaties, with a particular focus on the concept of jurisdiction. This article refocuses the inquiry from a broad-spectrum comparative approach to an in-depth case study examining the complex interplay of factors influencing the extraterritorial application of the European Convention on Human Rights. While prior articles have focused nearly exclusively on its general jurisdiction clause, this paper recognises the equally significant contribution of a second, poorly understood treaty provision about which very little has been written. It goes on to examine the historical context and drafting history of these two key provisions prior to tracing what can be termed their irreconcilable jurisprudential evolution. What it reveals is a complex interaction between two provisions that defies facile characterisation and militates against a one-size-fits all approach across human rights treaties.

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1. Introduction

The extraterritorial scope of international human rights treaties has prompted vigorous debate in recent years, first spawned by the early case law of human rights treaty bodies, and most recently re-ignited by recent controversies over the legal framework governing the treatment of U.S. detainees in Guantanamo Bay, Cuba and elsewhere. Much of the early debate focused on jurisprudential developments in the European Court of Human Rights and the meaning of jurisdiction in the ECHR context due to its Article 1 jurisdiction clause. As a consequence, commentators began to examine the meaning of jurisdiction in the context of other international human rights treaties, including those silent as to scope or lacking a general jurisdiction clause. This singular focus on jurisdiction and its bearing on extraterritorial application has also led to the suggestion of a nascent convergence in extraterritoriality across international human rights treaties.1


This article refocuses the inquiry from one of a broad-spectrum comparative approach to an in-depth case study examining the complex interplay of factors contributing to extraterritoriality. While prior articles have focused nearly exclusively on the nature of the European Convention’s Article 1 jurisdiction clause, this paper recognises the equally significant contribution of a second treaty provision to the question of extraterritoriality, a colonial clause, about which very little has been written. Additionally, this article goes beyond the typically piecemeal treatment of certain principal cases to examine the historical context and drafting history of its key treaty provisions prior to tracing the evolution of the Commission and the Court’s jurisprudence on each. What it reveals is a complex interplay between two provisions whose case law is as difficult to reconcile as it is to coherently apply. These findings suggest that a treaty’s unique drafting history, text, and the interplay among its treaty provisions may have greater bearing and relevance upon determinations of its geographic scope of application than the mere existence of a similarly framed clauses found in other instruments.

The European Convention of Human Rights is particularly suited for detailed study given its highly developed jurisprudence as well as its influence beyond the European region. Its tribunals have generated the most prolific case-law on the subject of extraterritorial application, and its output has not only influenced other treaty bodies and international tribunals but has spawned a body of literature on the subject. These features have contributed to it being considered by some “the pre-eminent system of international human rights protection … anywhere in the world”. This is certainly true as concerns the Convention’s contribution to the international law of extraterritorial treaty application. Part 2 of this article introduces the language and content of the two provisions governing the ECHR’s geographic scope of application, while Part 3 assesses their historical context and drafting history. In part 4, an examination of the jurisprudential developments of these two provisions is undertaken and trends over time are identified and discussed. In the final part of section 4, the interaction between these two provisions is assessed prior to a concluding discussion of the ramifications of this complex interaction. The final conclusion challenges the feasibility of sweeping comparative approaches in favour of a more particularised approach to assessing the extraterritorial application of treaties.

2. Relevant Convention Provisions

2.1 Article 56 ECHR


4 One notable example can be found in L. Moor & A.W. B. Simpson, Ghosts of Colonialism in the European Convention on Human Rights, British Yearbook of International Law 121, (2005).

Any examination of the Convention’s extraterritorial application is complicated by the fact that it is governed by at least two provisions. The first, Article 56 (former art 63) is a territorial application provision governing the extension of the Convention to the dependent territories of the Contracting Parties. Admittedly anachronistic, 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’.

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

ECHR Article 56 – Territorial application

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.

Of the four subsections, Article 56(1) constitutes a classic example of a negative colonial clause, permitting State parties to extend the Convention to “all or any of the territories for whose international relations it is responsible” if it so chooses. As some commentators have noted, this power to extend Convention protection also constitutes by default the power to withhold it, and though this type of colonial clause was not uncommon in international instruments of that era, it was, even at the time, a feature

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6 Several of the Convention Protocols contain separate colonial or territorial clauses that will not be examined here. See fn 16 p. 4 below.

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, 3 Sept 1953. (Formerly Article 63, this provision was renumbered and amended by Protocol 11, ETS 155.)

8 As amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, (11 May 1994).

“strangely out of place… in a Convention of this kind.” As a result, this provision proved controversial during the Convention’s drafting stage, discussed in greater detail below. Article 56(2) concerns the procedural 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 sub-provisions (2) and (3) do not directly concern territorial treaty application as such they will not be examined in detail in this article. The final provision, however, is relevant, 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 paragraph 1.

As noted above, Article 56 was amended by Protocol 11, which renumbered the provision and also amended the texts of sub-provisions 1 and 4 concerning declarations of extension for the Convention and the right of individual application. 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”, no such right is recognized in the ‘territories’ unless a valid declaration of extension has been made under both Article 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. Similarly phrased colonial clauses found in other Convention Protocols will not be examined. 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.

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11 Article 2(1), Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.
12 Article 2(3), Id. “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’.”
13 Article 1, Id.
14 Colonial clauses similar to Art. 56(4) can be found in the 4th, 6th, 7th, 12th and 13th Protocols 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’, a deviation that renders their construction both more complex and more dependent upon the parent instrument. In addition, several of the Protocols also permit a sliding scale of application in which parties may communicate a declaration “stating the extent to which it undertakes” to apply the provisions of a given 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.
Since its first examination by a Convention body, the phrase ‘territories for whose international relations [a Contracting 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 interchangeable but without assigning a final degree of importance to any one such status.”\(^\text{15}\) Although termed a ‘colonial clause’, Article 56 remains applicable to dependent territories irrespective of domestic legal status.\(^\text{16}\)

Article 56 relates to territorial application in the sense that it dictates the circumstances under which the Convention will apply to certain territories. More importantly, 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. Thus an application brought by two Belgian nationals residing in the Congo and alleging violations under the First Protocol was found not to establish the Convention’s jurisdiction \textit{ratione loci} due to the absence of a valid declaration as required by Article 4 Prot. 1, notwithstanding that at the relevant time Belgium’s domestic law treated the Congo as part of its metropolitan territory.\(^\text{17}\) This was later explicitly confirmed when the Commission observed that Article 56 territories “do not form an integral and territorial part” of the Contracting Parties.\(^\text{18}\) When viewed in this manner, Article 56 not only has relevance to the territorial application of the Convention as a general matter, it directly governs an aspect of the \textit{extraterritorial} application of the Convention \textit{vis-à-vis} the parties’ non-metropolitan 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. Moreover, the jurisprudential development of this Article will eventually produce a problematic inconsistency involving its interplay with a related provision.\(^\text{19}\)

### 2.2 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.\(^\text{20}\)

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\(^{\text{16}}\) Whether this extends to trust territories and condominiums is perhaps a more debateable and complex issue. Moor & Simpson, \textit{Ghosts of Colonialism in the European Convention on Human Rights}, 129-130.


\(^{\text{18}}\) See section 4.5 below.

\(^{\text{20}}\) Article 1, \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms},
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. As such, Article 1 has immediate bearing and relevance to Convention’s scope of application ratione loci, ratione materiae, and ratione personae. Perhaps because of its breadth, Article 1 has generated not only a large body of case law, but has shown itself capable of an evolving and dynamic jurisprudence consistent with the Court’s ‘living instrument’ approach to interpretation, notwithstanding Bankovic’s suggestion that Article 1 is somehow uniquely exempt therefrom.

The co-existence 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, 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. In some instances, the examination of extraterritorial application has focused on trends across multiple human rights instruments, or in regard to the intersection of extraterritorial application of human rights instruments with international humanitarian

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24 Bankovic and Others v. Belgium and 16 Other Contracting States, (paras 64-65).
law in times of armed conflict. 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. 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. Having briefly introduced each of the provisions and their relevance to the Convention’s extraterritorial application, the following section examines the historical context forming the backdrop to the Convention negotiations, and provides a detailed drafting history of the two provisions. This analysis gives rise to certain conclusions about the interaction and relationship between Articles 1 and 56, which is then examined in light of the body of jurisprudence that has developed in relation to them over time.


3.1 Article 56: British Colonial Influence

The text of Article 56 makes clear that its origins are colonial in nature. In terms of its drafting history, a colonial clause granting discretionary authority to extend or withhold the Convention from the colonies was sought almost unilaterally by the United Kingdom. Britain actively pursued such a clause in order to give effect to a constitutional convention of local consultation, according to which it was precluded from enacting treaties in its colonies prior to undertaking a consultation process in each dependency. To critics, Britain’s consultation argument was seen as a thinly disguised veil of colonial subjugation and oppression, and an attempt to withhold the Convention from its dependencies. According to Simpson, it was never Britain’s intention to exclude its territories from the Convention simply because “it was politically out of the question

29 Moor & Simpson, Ghosts of Colonialism in the European Convention on Human Rights. See also Simpson, End of Empire 773. (Observing that “…throughout 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.”)
30 “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.” Simpson, End of Empire 290. See also Ch. 9.
32 See, as one example of this, comments by the UN delegate from Saudi Arabia at the UN Third Committee (Fifth Session) and Plenary Session on colonial clauses condemning false ‘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 law and public order. Draft Convention Relating to the Status of Refugees. Federal and Territorial Application Clause Memorandum Prepared by the Legal Department., § A/CONF.21 (1951).
for Britain or its Colonial Office to oppose the idea that protection must extend to colonial territories.” 33 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. 34

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 its exclusion was 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. 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 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. 35

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, Netherlands and Denmark. 36 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, possibly in part due to its lack of need for one: of its two territories, the Faroe Islands enjoyed legal autonomy and had been self-governing since 1948. Greenland briefly enjoyed a declaration of extension under Article 63 on 13 April 1953, though this quickly ceased to be of relevance when it was made part of Danish metropolitan territory less than 2 months later, on 5 June 1953. 37

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33 Simpson, End of Empire 305.
34 Id. 825.
36 Spain and Portugal were not yet members of the Council of Europe. (Simpson Ch. 6 at 283-288).
The Netherlands similarly had little need for a colonial clause. It too had only two colonial territories at the time, Surinam and the Dutch West Indies, both of which became self-governing in 1954.\textsuperscript{38} Although the Netherlands ultimately extended the Convention to these territories by a declaration of 1 December 1955,\textsuperscript{39} 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.”\textsuperscript{40} The Netherlands did, however, eventually support Britain’s version of the colonial clause, though this may have been more in the spirit of compromise or in response to British threats that it would be unable to ratify the Convention without one.\textsuperscript{41}

The constitutional treatment of colonial territories by France and Belgium was also markedly different from Britain’s convention of local 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 centralised in the French Parliament in Paris.\textsuperscript{42} This created the effect of granting “the same rights and freedoms to all citizens of the French Union”\textsuperscript{43} and explains why, from France’s perspective, it anticipated that the Convention would inevitably apply throughout its territories, and why it viewed such a clause as unnecessary. Although France would not ratify the Convention until 1974,\textsuperscript{44} its representatives in the Consultative Assembly expressed vocal criticism of the colonial clause,\textsuperscript{45} and even succeeded in securing approval in the Assembly for its deletion,\textsuperscript{46} 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.\textsuperscript{47} 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.\textsuperscript{48} 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. France’s declaration reflects the

\textsuperscript{38} Simpson, End of Empire 283.
\textsuperscript{39} Vasak, \textit{The European Convention on Human Rights Beyond the Frontiers of Europe}, 1210. Contradicting this view, see Simpson, End of Empire 283.
\textsuperscript{40} Simpson, End of Empire 284.
\textsuperscript{41} Council of Europe, ECHR Travaux, Vol. V at 118. (Fifth Session Committee of Ministers, 7 Aug 1950.)
\textsuperscript{42} Simpson, End of Empire 284-286.
\textsuperscript{43} Council of Europe, ECHR Travaux, Vol. V at 280. (First part of Second Session of Consultative Assembly, 16 August 1950, M. Silvandre [France]).
\textsuperscript{44} 3 May 1974. See Council of Europe’s chart of signatures and ratifications of the Convention found online at: http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=22/04/2010&CL=ENG last accessed 22 April 2010.
\textsuperscript{46} Id. at 182.
\textsuperscript{48} Vasak, \textit{The European Convention on Human Rights Beyond the Frontiers of Europe}, 1211.
tension between the requirements of Article 56 and its own constitutional treatment of overseas territories as an integral part of its metropolitan territory. 49

3.2 Article 56 (formerly 63) Drafting History 50

It was not always clear that the Convention would contain a colonial clause. The earliest drafts of the Convention, both prior to 51 and within the Council of Europe 52 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. 53

Once out of the Consultative Assembly, however, the Committee of Experts 54 immediately began to restrict the automatic application of a ‘universal’ 55 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. 56 (These rights would eventually be excised entirely from the Convention and later renegotiated to become the basis for the First Protocol, 57 which contains its own colonial clause.) The second constraint on the Convention’s application to the colonies was a general limitations clause for the overseas territories, proposed by Belgium:

49 “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 the Protocol No 11].” Declaration by France contained in the instrument of ratification, deposited 3 May 1974. Online at the Council of Europe website: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=08/02/2011&CL=ENG&VL=1 [last accessed 8 February 2011].

50 For a highly detailed and exhaustively researched account of the drafting of the European Convention, see Simpson, End of Empire.


54 Appointed by the Committee of Ministers

55 The term ‘universal’ is used in this context to denote the Convention’s application throughout both metropolitan and dependent territories.


57 Simpson, End of Empire Ch. 15.
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 to reach the conditions necessary for the practice of democratic freedom.58

This clause was designed 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”. 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 reflects a willingness to leave unaltered the scope of the Convention ratione loci by presuming its automatic extension to both metropolitan territories and dependencies. Moreover it preserves 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 proposed to alter was the extent of the Convention’s application ratione materiae in the colonies. As an amendment, it sought to permit, on an ad hoc basis, a mitigation or weakening of the Convention provisions as applied to the dependencies. This proposal quickly evolved into shorter forms:

The rules stated above shall be applied in overseas territories in the light of local exigencies.59

And a new euphemistic standard:

In the overseas territories the provisions of this Convention shall be applicable with due regard, however, to local necessities.60

This latter formulation of the provision would endure throughout the negotiations and eventually become the basis for Art 56(3). Although Britain never actively sought this provision, it came over time to consider it as a useful backdoor reservation.61 After the Convention came into effect, Britain relied on the ‘local necessities’ clause on several

59 Id. 224. (Draft text of first section of draft Convention based on work of Consultative Assembly, 7 Feb 1950: Meeting of Committee of Experts, Unknown author proposal to Consultative Assembly.)
60 Id. 238. Art 7(d), Preliminary Draft Convention dated 15 Feb 1950, Meetings of the Committee of Experts.
61 Simpson, End of Empire 827.
occasions without success. To date, the provision has only been successfully invoked once, by France with regard to its overseas territory, New Caledonia.

The third restriction imposed on the Assembly’s Draft Convention was a requirement that Parties obtain consent from semi-autonomous 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:

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.

This article represents the first articulation of a colonial clause in the Convention. In contrast to other colonial clauses of the time, 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. Its effect was to require consent from territories whose legislative subject matter competence had devolved locally. Given the tendency of both Belgium and France to retain centralised legislative jurisdiction in their national parliaments, 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.

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62 Tyrer v. United Kingdom, App. No. No. 5856/72 2 EHRR 1, (ECtHR 25 April 1978); Wiggins v. United Kingdom, 13 Decisions & Reports 40, (ECommHR 8 Feb 1978); Matthews v. United Kingdom, 28 EHRR 361, (ECtHR 18 February 1999). (Examining and rejecting the applicability of former Art 63(3) even where not raised by Contracting Party).

63 Py v. France, App. No. 66289/01 42 EHRR 26, (ECtHR (Second Section) 11 Jan. 2005). (Perhaps tellingly, this case involved the only instance of a Convention right being limited in order to confer a benefit on a native population, under circumstances of the territory’s transition to full sovereignty.)


65 Id. 276. Preliminary Draft of the Report to the Committee of Ministers by the Committee of Experts, 24 February 1950: “Article 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.”

66 See Art XII of the 1948 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 the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, 12 January 1951. See also Art. 28(1) Convention on Road Traffic, 19 September 1949, 125 UNTS 3, 26 March 1952. Even the colonial clauses being considered for insertion in to the UN 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.” (1947 YBHR at 554, cited Simpson, 477.)

67 Simpson, End of Empire 721.
The formulation of this early colonial clause also mirrors that of the federal clause which frequently appeared as a companion provision in multilateral treaties of the time. The federal clause first emerged to accommodate the constitutional challenges facing federal states with regard to the shared legislative competence between national governments and their constituent units. It developed in order to sidestep certain States’ constitutional barriers to uniform treaty implementation throughout the metropolitan territory. In the case of the instant colonial clause, it represents an attempt to transplant the device into a new context: accommodating certain States’ constitutional barriers to treaty implementation throughout its dependent territories. Ultimately, this ‘colonial variant’ of the federal legislative jurisdiction clause would succumb to the same fate as that of its federal clause counterpart—obsolescence due to an inability to adequately accommodate the varied array of constitutional systems. As with the federal clause over time, the colonial clause in the Convention would also eventually evolve away from a ‘legislative competence’ formulation to embrace one framed in territorial terms instead.

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. 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. Unlike the existing draft that contained enumerated rights, the British draft sought to articulate comprehensive definitions.68 Faced with two alternative drafts, the Committee of Experts declined to choose between them, instead submitting both versions for the Ministers’ consideration.69 Alternative A comprised the original working draft containing enumerated rights, while Alternative B contained the United Kingdom’s submission favouring a detailed definition of rights. Reflecting these differences, Alternative A retained the Belgian-inspired general limitations clause70, while Alternative B did not. Both versions, however, contained the colonial clause framed in terms of legislative competence quoted above.71

68 Gordon L. Weil, The Evolution of the European Convention on Human Rights, 57 Am. J. Int'l L. 804, 807 (1963). (Describing Britain as “especially anxious” to limit the extent of their commitment under the Convention and observing that the practice mirrored the policy it adopted toward the colonies.)


70 “The provisions of this Convention shall be applied in the overseas territories with due regard, however, to local requirements.” Art 7(d), Alternative B of the Preliminary Draft Convention. Council of Europe, ECHR Travaux, Vol. III 324. Mtgs of Committee of Experts.

71 Id. 334. Art 52/48 Preliminary Draft Convention, Meetings of the Committee of Experts.
To assist in deciding between the two alternative drafts, the Ministers convened a Conference of Senior Officials, which 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” among which the colonial clause figured prominently. At this Conference, the United Kingdom proposed its own colonial clause permitting discretionary declarations of extension to dependent territories:

Art. 60A
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.

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

Art. 60B
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.

The net effect of the UK proposal was dramatic in what it left unstated. In effect, it wrought a fundamental change in the default geographic 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 state may declare that the Convention shall extend’), it operated to reverse the previously expansive territorial application inclusive of dependencies. That expansive interpretation is still evident in version 60B, which takes for granted that the provisions shall be applied in the overseas territories, providing only the caveat that they shall apply, ‘however’, with possible limitations.

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72 Council of Europe, ECHR Travaux, Vol. IV 246.
73 Id. 182. (Conference of Senior Officials).
74 Id. 270. Report of the Conference of Senior Officials submitted to the Committee of Ministers, June 1950, Commentary: “The United Kingdom declared that for constitutional reasons his Government could not accept Alternative B.”
75 Id. 238.
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 59B as ‘the more liberal solution’. It sought to resolve the situation by asking the Ministers to “find a way of overcoming the constitutional objections raised by certain Members”. At that time, Belgium proposed a compromise solution of adopting British version 59A but adding into it the ‘local requirements’ as an additional sub-provision. No solution was forthcoming.

By this stage, a Sub-Committee 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”, 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 30-day effect, and the Belgian ‘local requirements’ clause. Ultimately, the Committee of Ministers unanimously accepted a variant of this compromise on 7 August 1950 that would closely resemble the final version:

Art. 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 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 ratification 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 as 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.

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, 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 its territories. M. Senghor, a Senegalese anti-colonialist and delegate of France, articulated the fundamental problem:

77 Id. 100.
78 Id. 166-68.
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.\textsuperscript{79}

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, \textit{as also to Article 1 which states that ‘the High Contracting Parties shall secure to each person within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.}\textsuperscript{80}

M. Senghor went on to criticise the colonial clause on both legal and moral grounds, emphasising the absence of such a clause from the UN Declaration and the Declaration of American States signed in Bogotá. 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.”\textsuperscript{81}

The combined effect of these comments produced a majority opposition to the clause in the Assembly, which voted by 63 to 37 to delete the provision.\textsuperscript{82} It is not known which aspects of the clause proved most objectionable, but M. Senghor’s comment about its irreconcilability with Article 1 represents the only mention of this conflict that I have come across in the Travaux Préparatoires, and therefore whether it was received as an obscure technical point of minor importance or as a compelling insight only just discerned is impossible to determine. In any event, such criticisms carried more weight in the Assembly than for 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.\textsuperscript{83} Today, despite M. 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. It has been the respective jurisprudential developments of these two provisions that has drawn attention to an incompatibility first noticed nearly 60 years ago.

\textsuperscript{80} Id. 174.
\textsuperscript{81} Id. 176.
\textsuperscript{82} Id. 180.
\textsuperscript{83} European Convention for the Protection of Human Rights and Fundamental Freedoms,
3.3 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.

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”. \(^{84}\) 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” \(^{85}\).

The draft article was then reviewed by the Committee of Experts \(^{86}\) 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 UN human rights covenant \(^{87}\):

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’. \(^{88}\)

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… \(^{89}\)

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\(^{84}\) Council of Europe, ECHR Travaux, Vol. I 296-97.


\(^{86}\) The Committee of Experts was appointed by the Committee of Ministers.

\(^{87}\) One of the documents reviewed by the Committee of Experts was a Preparatory report by the Secretariat-General concerning a preliminary draft convention to provide a collective guarantee of human rights, undated, comparing the draft international covenant on Human Rights and the Consultative Assembly draft. With regard to Article 2, it observed: “This [UN 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.” Council of Europe, ECHR Travaux, Vol. III 26-27.

\(^{88}\) Id. 200. (Meetings of the Committee of Experts, First Part of the Report of the Sub-Committee, 5 February 1950).

\(^{89}\) Id. 222. (Meetings of the Committee of Experts, Draft text of the first section of a Draft Convention based on the work of the Consultative Assembly, 7 February 1950).
This was subsequently slightly modified to replace the ‘guarantee’ with: “…accord to any person within their jurisdiction…”\textsuperscript{90}

The language was again modified so that ‘any person’ became ‘everyone’ and the current language of Article 1 was eventually adopted. The 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 word ‘within their jurisdiction’, which are also contained in Article 2 of the Draft Covenant of the United Nations Commission.\textsuperscript{91}

Taken together, these comments highlight a critical premise of 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,\textsuperscript{92} 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. Rather, the preoccupation lay with expanding its coverage in order to guarantee its application to all persons within the territory. 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, whether they permanently lived there, technically resided there, or were merely temporarily visiting without any permanency. This drafting distinction between persons within the territory and persons within the jurisdiction was therefore the result of an attempt to broaden the scope of the Convention ratione personae; it was not an attempt (and indeed the drafting history offers no support for the argument that it sought) to broaden the scope of the Convention ratione loci. What this suggests is that the drafters apparently viewed the phrases ‘within the territory’ and ‘within the jurisdiction’ as more or less synonymous with one another, and the term ‘jurisdiction’ was adopted to match the language in the U.N. human rights covenant. What the drafting history of Article 1 reveals to us is that it was firmly conceived of as relating to the territory of the member States.\textsuperscript{93} In this sense, the very existence of Article 56, which impliedly excludes the dependent territories, militates against an interpretation that its geographic scope was originally intended to be expansive. On the contrary, taken together, the presence of Article 56 suggests that

\textsuperscript{90} Id. 236-37. (Preliminary Draft Convention, Committee of Experts, 15 February 1950).
\textsuperscript{91} Id. 260. (Preliminary Draft of the Report to the Committee of Ministers submitted by the Committee of Experts, 24 February 1950).
\textsuperscript{92} See sections 4.2- 4.5 below.
\textsuperscript{93} Bankovic and Others v. Belgium and 16 Other Contracting States, (para 21).
Article 1 jurisdiction was intended to have a restrictive territorial application, largely limited to the metropolitan territories except where expressly extended to dependencies.

3.4 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 56(1) Parties “…may…declare…that the present Convention…shall… extend…to all or any of the territories for whose international relations it is responsible.” Such a provision exemplifies the exception to the rule in Article 29 VCLT that, “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” 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 for western criticism constituted a further basis for opposition to the colonial clause. Pure anti-colonial 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 anti-colonialist M. Senghor who raised what has today become its overriding defect: its glaring incompatibility with Article 1. 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 do Articles 1 and 56 interact? Today, commentators have examined three possible relationships: that it operates to restrict Article 1 jurisdiction; that it operates to broaden Article 1 jurisdiction; or that it performs a combination of these two functions. 94

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 therefore be construed as confined to the Parties’ metropolitan territory only. 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 M. 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

94 Moor & Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*. (Concluding that it likely embraces both a restrictive and expansive function.)
that it would restrict Article 1 ‘jurisdiction’ to metropolitan territory 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.

This leaves us with the 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 territory 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. 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 below.

It is more likely that the source of M. Senghor’s unease originated in his understanding of the term ‘jurisdiction’, taken as it was directly from the draft UN Covenant on human rights at the time. But regardless of what meaning the Covenant’s ‘jurisdiction’ clause may have had in 1950, it would be of little assistance – or relevance – in reconciling the Convention’s Article 1 scope with former Article 63. Already the controversy surrounding colonial clauses had taken hold in the UN and had become a source of bitter debate with regard to that draft instrument. Within just four months of M. Senghor’s eloquent plea to delete former Article 63 from the European Convention, the UN 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.” Ultimately, the UN covenants to emerge from that process would be stripped of

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96 General Assembly Resolution, Fifth Session, Third Committee, 317th Plenary Meeting, 4 December 1950.
colonial clauses, suggesting that at least with regard to the jurisdiction clause in Article 2(1) ICCPR, it would not be similarly construed to Article 1 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 governed by two provisions whose interaction would ultimately be a matter for judicial determination.

4. Jurisprudence

4.1 Early Caselaw on Article 56

Article 56 governs the extension of the Convention to ‘territories whose international relations a Contracting Party is responsible’, but the phrase is not defined, leaving the task to the judicial bodies of the Convention. 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 catch-all term designed to accommodate all dependencies regardless of specific legal status or designation. 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 interchangeable but without assigning a final degree of importance to any one such status.” 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 a closer reading, however, the comment is absurdly noncommittal; it merely asserts that such ‘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 wholly 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 would become more difficult as the decolonization process accelerated and the prevalence of colonies declined.

4.1.1 Article 56 (1): ‘territories for whose international relations the State is responsible’

Rather unsurprisingly, the determination as to whether a particular territory was ‘one whose international relations a State party was 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. Thus in the case of X v. Belgium, the

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97 The UN 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 endorsing communism, and was ultimately deleted 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 (1967).
98 X and Others v. Belgium, ()
99 Id. , (}
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.

In more modern post-colonial times, however, the inquiry became more difficult, and the status of certain territories left room for ambiguity: how, for example, were non-colonial dependencies to be treated? Or those in the European space? In such instances, the Commission has demonstrated greater flexibility and restraint than its unilateral determination of traditional colonial territories such as the Belgian Congo. In such cases, the Commission has shown itself more willing to defer to the Contracting Party in determining the 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 recognised 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 in the UK’s Channel Islands alleged a violation of Article 3 of the First Protocol based on an inability to vote in UK parliamentary elections (notwithstanding the UK’s parliamentary jurisdiction over Jersey), the Commission found that the existence of a former Article 63 declaration was conclusive proof of its status as a non-metropolitan territory, a finding which informed the merits of the case since it had bearing on whether or not the applicant was a UK resident or not. 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.”

Curiously, while emphasising the relevance of the UK’s declaration under former Article 63, the Commission failed to take the next step of assessing whether or not the UK had ever issued a declaration of extension under the First Protocol’s nearly identical colonial clause. When the same issue arose four years later with regard to Guernsey, the Court did not overlook this requirement.

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100 *X v. United Kingdom*, 28 Decisions & Reports 99, 104-105 (ECommHR 13 May 1982). See also *X v. United Kingdom*, 7 Decisions & Reports 102-103, (ECommHR 29 September 1976). (Allowing admissibility of an individual complaint nearly one year after Britain’s declaration under former Article 63(4), on grounds of an allegedly continuing violation.)

101 Article 4, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, CETS No. 009, 18 May 1954. It apparently had not. Although the UK ratified the First Protocol on 3 November 1952 (and it came into effect on 18 May 1954), (see Council of Europe website at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=7&DF=15/04/2010&CL=ENG> last accessed 14 April 2010), Britain’s first declaration of extension to the Bailiwick of Jersey was not made until 22 February 1988, several years after the complaint at issue here. See Council of Europe website at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=009&CM=7&DF=15/04/2010&CL=ENG&VL=1>. 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 in the Directorate of Legal Advice and Public International Law (Jurisconsult), dated
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*, the European Court relied on a statement by the United Kingdom as to the status of Guernsey with regard to the First Protocol:

... the 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 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).*

In the above case, 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 the case inadmissible where it was lacking. That the Court chose emphasise this general UK 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, non-colonial territories are concerned.

It is through such deferential judicial practices that Art. 56 has come to have broad application even within the European sphere. As a result, the Convention has been applied, by operation of Art. 56, to the territories of the Isle of Man, Guernsey, Jersey and Gibraltar notwithstanding their European locale and non-colonial status.

### 4.1.2 Article 56 (1) and 56(4): the Declaration Requirements

15/04/2010. 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. 


103 Ironically, the absence of such a declaration and the claims it barred under *Gillow* and *X v. United Kingdom* (13 May 1982) may have been unintentional. It has been suggested that the UK’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. Simpson, End of Empire 842 n.107.

104 *Tyrer v. United Kingdom*, (Imply assuming application of the Convention via former Art. 63);

105 *Wiggins v. United Kingdom*, (Imply assuming application of the Convention via former Art. 63);

106 *X v. United Kingdom*, (29 September 1976); *X v. United Kingdom*, (13 May 1982), (Imply assuming application of the Convention via former Art. 63);

107 *Matthews v. United Kingdom*, (at 19).
Perhaps the clearest rule to emerge from Article 56 jurisprudence pertains to the declaration requirements found under Articles 56(1) and (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 treatment of it as metropolitan territory are insufficient;\textsuperscript{108} 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 applicant’s claim from Dominica non-justiciable on grounds that the UK’s Art. 63(4) declaration granting a right of individual application had expired a mere two months prior to the application’s submission.\textsuperscript{109} 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. 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.\textsuperscript{110} This case marks an atypical accommodation of Article 56 which is, for the most part, strictly applied.

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.”\textsuperscript{111} As a result, although the British-held Chagos Islands had once enjoyed a declaration of extension under Art. 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. According to a majority of the Law Lords, the Convention no longer applied following its re-incarnation in 1965 into “a new political entity”.\textsuperscript{112} If the House of Lords’ interpretation on the matter is correct, then the Convention’s application is not only limited to territories benefiting from an express Art. 56 declaration, but is further limited to exclude any territories that have undergone a transformation into a new, albeit still dependent, political entity. (As of Feb 2011 this case is still pending before ECtHR.)

4.2 Early Caselaw on Article 1


\textsuperscript{109} X v. United Kingdom, (4 October 1977), (para 44).

\textsuperscript{110} X v. United Kingdom, (29 September 1976), (para 64).

\textsuperscript{111} Ibid., Lord Hoffmann, para 64, R (on the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) [2008] UKHL 61, (22 October 2008).

\textsuperscript{112} Id.
From a relatively early stage, Convention jurisprudence began to indicate that Article 1 had some bearing on the Convention’s extraterritorial scope. These instances involve 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. In that case, an individual alleged that German consular officials undertook to have the Moroccan officials secure his deportation from that country. Although the complaint was ultimately determined to be inadmissible as manifestly ill-founded, the Commission commented *obiter* that:

> Whereas it 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...

This decision represents the first recognition by the Commission that the Convention may ‘in certain respects’ be capable of extraterritorial application. 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 cautionary caveats: “certain duties… which may… in certain circumstances” trigger Convention obligations.

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 U.K. seeking his release from life imprisonment in the Allied Military prison in Berlin-Spandau, located in the British sector of Berlin. Citing its 1965 Moroccan consular precedent, the Commission recognised that although the case involved territory outside UK, “a State is under certain circumstances responsible under the Convention for actions of its authorities outside its territory.”

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,” the Commission proceeded to examine whether Britain was...

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115 Id at 73.
constrained by Convention obligations in its role in the prison operations. What it came to conclude 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. On this ground, it 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 Article 1 of the Convention.”

The Commission therefore found that Hess was not within Britain’s Article 1 jurisdiction. There was a further reason given, however, which compounded the inadmissibility finding, and which related to admissibility ratione tempore. 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 “[c]ould raise an issue under the Convention if it were entered into when the Convention was already in force for the respondent Government.”

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 the commencement of military occupation there. In a decision that would fundamentally broaden the Convention’s extraterritorial application beyond traditionally recognised instances 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. Instead, the Commission articulated a general rule governing extraterritorial bases for Convention application:

…the 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.

This decision represents a shift from the Commission’s previously circumscribed attempts to narrowly frame the grounds for extraterritorial application.

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116 Id at 74.
117 Id at 74.
118 Id at 74.
120 Id., (133)
121 Id., (136).
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 general rule is largely drawn from generally accepted grounds on which a State may exercise jurisdiction over its nationals beyond the frontiers of its own territory: nationals of a state including aircraft or vessels, and authorised agents, whether diplomatic or military. Yet it also articulates a new ground, with slightly more attenuated jurisdictional links to the member State: persons or property over whom authorised agents exercise authority. While the decision avoided any findings on the merits, it concluded that the armed forces were authorised agents of Turkey, which was sufficient to establish admissibility.

_Cyprus v. Turkey_ thus represents the first instance in which the extraterritorial application of the Convention was affirmatively recognised in the factual circumstances of a given case. As such, the unusually expansive nature of the ruling makes it that much more unusual. 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 non-exclusive 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. 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. 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.122 With this case, Article 1 jurisdiction was expanded for the first time beyond the confines of the metropolitan territory not to a traditional basis such as a flag ship, an embassy, or one of its nationals abroad, but to “all persons under [a member State’s] actual authority and responsibility, whether that

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122 _Id._, (136-37) The Commission’s reasons, however, amounted to semantic hair-splitting: it argued that former Article 63 stood for more than mere extension to the dependencies because Art. 63(3) also provided for the Convention’s adaptation to local conditions. It further argued that Article 1 scope could not be limited to the metropolitan territory only because it was capable, in certain instances, of extraterritorial application along the lines of _Hess_ or _X and Y v. Switzerland_. 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.
authority is exercised within the territory or abroad.” Ultimately, however, the
basis for Article 1 jurisdiction in Cyprus v. Turkey would prove to be a difficult
ground to confine. 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, and acts of nationals of a State, including registered vessels.

Another line of cases involving the extraterritorial application of the
Convention would establish 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. This line of cases has since been distinguished
from other types of extraterritorial application and will not be discussed here.

This doctrine has been limited to indirect instances of prospective extraterritorial harm
resulting from a domestic expulsion or extradition decision usually arising under
Article 3.

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123 Id. (136)
124 X v. United Kingdom, 12 Decisions & Reports 73, (ECommHR 15 December 1977); W.M. v. Denmark,
126 Medvedyev and Others v. France, App. No. 3394/03, (ECtHR [GC] 29 March 2010); Xhavara and
extraterritorial scope of Art 3 to substantial grounds for a real risk of harm having a direct causal
connection to the expulsion).
128 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." See Lawson, Life After Bankovic: On the Extraterritorial Application of the European
Convention of Human Rights, 97. Similarly, cases involving state immunity or the granting of exequatur
to foreign judgments may also have an 'extraterritorial' element but are also not relevant to Article 1
jurisdiction. See O'Boyle, The European Convention on Human Rights and Extraterritorial Jurisdiction: A
Comment on 'Life After Bankovic'. However, other commentators continue to treat extradition and
expulsion cases without distinction. See Berry, The Extraterritorial Reach of the European Convention on
Human Rights; Miller, Revisiting extraterritorial jurisdiction: a territorial justification for extraterritorial
jurisdiction under the European Convention 1242.
129 X and Y v. Switzerland, App. Nos. 7289/75 and 7349/76 9 Decisions and Reports 57, (ECommHR 14
July 1977). (Recognising the Commission’s competence ratione loci to examine the matter but finding the
complaint inadmissible on other grounds.) Al-Adsani v. United Kingdom, App. No. 35763/97 97 34 EHR 11,
38703/06 ; 40123/06 ; 43301/06 ; 43302/06 ; 2131/07 ; 2141/07, (ECtHR (Fourth Section) 18 November
2008). See also Concurring Opinion of Judge Matscher, Drozd and Janousek v. France and Spain, 14
EHRR 745, (ECtHR 26 June 1992). (Arguing the applicability of the Soering ‘indirect effects’ doctrine to
the instant case.)
4.3 From Expansion to Bankovic: Two Steps Forward, One Step Back?

The extension of Article 1 ‘jurisdiction’ to state agent authority and control 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 would affirm and expand the Convention’s extraterritorial application through a progressively expansive construction of Article 1 jurisdiction. State agent control or authority over persons as a basis for Article 1 jurisdiction would not only be affirmed,130 but incrementally enlarged to encompass specific factual circumstances where the existing articulation of Article 1 would be otherwise inadequate. In this way, state agent control or authority over persons has expanded to accommodate control or authority by *private individuals* where State acquiescence or connivance could be established,131 and where authorized state agents could be shown to prevent a third State from exercising jurisdiction in its own territory.132 These highly attenuated causal relationships between the State and the harm complained of would eventually give rise to a significantly new basis for establishing extraterritorial jurisdiction of the Convention.

Article 1 jurisdiction was eventually expanded to include instances where, as a consequence of military action—whether lawful or unlawful—a State exercises of ‘effective overall control’ over part of a *territory* beyond its frontiers even where state agent authority over persons cannot be established.133 This broadening of the doctrine of extraterritorial application of the Convention was not without controversy. One dissenting judge, for example, criticised 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 personae* it applies the criteria for determining whether there was jurisdiction *ratione loci*, although

131 *Cyprus v. Turkey*, App. No. 25781/94 Reports of Judgments and Decisions 2001-IV 10, (ECHR [GC]-Merits 10 May 2001); *Ilascu and Others v. Moldova and Russia*, 40 EHR 46, (ECHR [GC]-Merits 8 July 2004); *Isaak v. Turkey*, App. No. 44587/98, (ECHR [adm] 28 September 2006). 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 into one of ‘effective control over territory’, see generally, Miltner, *Case Comment: Broadening the Scope of Extraterritorial Application of the European Convention on Human Rights*?
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.\footnote{Dissenting Opinion of Judge Gölcüklü, Loizidou v. Turkey [ECtHR Merits] 18 December 1996. (Behrami and Behrami v. France and Saramati v. France, Germany and Norway, App. No. 71412/01 ; 78166/01 45 EHRR 85, (ECtHR [GC]- Adm. Dec. 2 May 2007). (Observing with regard to Article 1: “This jurisdictional competence is primarily territorial and, while the notion of compatibility ratione personae of complaints is distinct, the two concepts can be inter-dependent.” Para 68, internal citations omitted.)}

This dissent suggests that Article 1 jurisdiction encompasses separate tests for Article 1 jurisdiction \textit{ratione loci} and \textit{personae}. However, if the “previous case law in dealing with the question whether there was jurisdiction \textit{ratione personae}” was in fact the line of cases recognising state agent control 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. The dissent’s observation is useful in that both concepts remain distinct components of Article 1 jurisdiction, but its assertion that they require recourse to separate jurisdictional tests may be mistaken. A more likely explanation is that these concepts may be co-extensive when addressing a Convention claim inside a State party’s territory. More importantly, their inter-relationship in the extraterritorial context has already been definitely established.\footnote{Drozd and Janousek v. France and Spain, (Id., para 89.}

It would indeed appear 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 lay remains a matter of jurisprudential evolution.

**4.3.1 Retrenchment of Extraterritorial Application under Drozd and Bankovic**

Article 1 nonetheless has its limits, and even in compelling cases, it has not been able to accommodate every instance of alleged human rights abuses in the European sphere. The case of \textit{Drozd and Janusek} involves claimants convicted by a court in Andorra and serving prison sentences in France.\footnote{Drozd and Janousek v. France and Spain, (Id., para 89.} Alleging violations of Article 6 by Spain and France, and of Article 5 by France, the applicants’ claims were nonetheless deemed inadmissible given the \textit{sui generis} status and characteristics of the Andorran state, over which neither Spain nor France exercised exclusive jurisdiction in any official capacity. At the outset, the Court held that there was no jurisdiction \textit{ratione loci} because Andorra was not a party to the Convention in its own right, nor was it a Franco-Spanish condominium.\footnote{Id., para 89.} It observed, however, that “[t]his finding does not dispense the Court from examining whether the applicants came under the ‘jurisdiction’ of France or Spain within the meaning of Article 1 of the
Convention because of their conviction by an Andorran court.”

In this way, the Court conducted a separate examination to determine whether France or Spain exercised jurisdiction *ratione personae* over the claimants. In this regard, the Article 6 claims against Spain were rejected for lack of Article 1 jurisdiction over the proceedings that took place in Andorran courts, since even 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. Similarly, 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, and that the French courts were not required to verify the proceedings exercised in Andorra. However, the court made clear that France’s territorial obligations under the Convention did extend to assessing the Andorran trial for flagrant error before agreeing to take prisoners on its behalf. 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.

The Court’s most significant attempt to restrict Article 1 jurisdiction to date has appeared in *Bankovic*, which involved claims arising from NATO air strikes in the former Yugoslavia, at that time not yet a member of the Council of Europe. A Grand Chamber of the Court attempted to equate the meaning of Article 1 ‘jurisdiction’ to the term as it is understood in public international law more generally. This has raised problems of coherence, since Article 1 jurisdiction determines the existence of Convention obligations, while its meaning in international law is more generally concerned with a State’s competence to act as a manifestation of its sovereignty. While the former is concerned with establishing the existence of Convention obligations, the latter is more concerned with the entire realm of sovereign exercises of State power, regardless of legality or of international legal obligations attaching to such exercises. In *Bankovic*, the Court emphasised that “its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional” and subsequently sought to minimise the grounds elucidated in the *Cyprus* line of cases relating to state agent control over persons and effective control over territory. It conceded that “other recognised instances of the extra-territorial exercise of jurisdiction by a State” are those established by customary international law or treaty provisions, and “include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.”

138 Id., para 90.
139 Id., para 96
140 *Drozd and Janousek v. France and Spain*, (paras 107, 110).
141 Id., (para 110).
143 *Bankovic and Others v. Belgium and 16 Other Contracting States*, (para 71).
144 Id., (para 73).

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“subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States.”\textsuperscript{146}

The Court’s approach in \textit{Bankovic} appears to emphasise a State’s jurisdictional links \textit{ratione loci} by focusing on the predominantly metropolitan territorial paradigm of the Convention. It has been proposed that the effect of \textit{Bankovic} has been to create a presumption \textit{against} extraterritorial jurisdiction under Article 1.\textsuperscript{147} By de-emphasising and even contesting Article 1 relevance to State extraterritorial actions with very attenuated links \textit{ratione personae}, the \textit{Bankovic} decision constitutes an attempt by the Court to retrench the extraterritorial jurisprudence of Article 1. Thus, direct control over persons by the armed forces or other agents of the State were conceded to qualify as recognised grounds for jurisdiction, while air strikes producing extraterritorial harm constituted too indirect a causal relationship \textit{ratione personae} between the States and the victims. In effect, it may stand for the proposition that a State’s extraterritorial act might produce harm falling within the Convention’s subject matter scope, but 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 is precluded.

In this way, extraterritorial jurisdiction may be seen to relate not to Convention’s scope \textit{ratione loci} but to a nearly exclusive focus on its scope \textit{ratione personae} in order for Article 1 jurisdiction to be triggered. In domestic territorial matters, jurisdiction \textit{ratione loci} has meaning and relevance, as evidenced by the drafting history and its emphasis on making co-extensive the Convention’s limited territorial scope to the metropolitan areas and persons within those territories. Similarly, in the traditional international legal context, the concept of jurisdiction has enabled some recognition of extraterritorial application of the Convention where the scope of State action \textit{ratione personae} is particularly compelling—such has been the case with instances of flag state aircraft or ships, diplomatic or consular personnel, or state military on foreign soil. What has been troubling and challenging for the \textit{Bankovic} Court in respect of Article 1 has been isolating a consistent doctrinal core against a rapidly evolving body of jurisprudence arising from its ‘living instrument’ approach. One additional attempt in this regard can be seen in its suggestion that Article 1 may not be as susceptible to the same evolutive interpretations as the rest of the Convention. Ultimately, these attempts to halt the expansive extraterritorial trend in Convention jurisprudence would prove to be of limited influence. The Court’s attempt in \textit{Bankovic} to retrench Article 1 jurisprudence in a solidly territorial context has had little to no effect on its subsequent case law.

\textbf{4.4 Post-\textit{Bankovic} Rebound in Extraterritorial Application}

Despite \textit{Bankovic}’s attempts to limit instances of extraterritorial application of the Convention, the ground of ‘effective overall control of territory’ has continued to

\textsuperscript{146} Id. , (para 80).
widen to accommodate new instances of Convention application extraterritorially. This phenomenon tends to lend credibility to criticism of that case as inconsistent with the interpretive approaches generally adopted for human rights treaties, and at the margins of what is judicially acceptable. 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. The Court appears even to recognize overall control of an area without control over local authorities.

Similarly militating against Bankovic’s attempted extraterritorial retrenchment is the continued expansion of the ‘control over persons’ basis for extraterritorial application. In 2005, Turkey took custody of the alleged founder and leader of the PKK movement in Kenya with the cooperation and assistance of Kenyan authorities. The applicant Öcalan raised several claims, including one under Art. 5(1) alleging that his arrest and detention by Turkish authorities was unlawful because it took place on foreign soil and could therefore not be a legitimate exercise of Turkey’s authority. In examining this claim, the Grand Chamber held that whether an extraterritorial arrest is lawful for purposes of Art 5(1) involved a multi-pronged inquiry: the alleged acts must be within the State’s Article 1 jurisdiction; they must be conducted in conformity with that State’s laws; and must not infringe on the third State’s sovereignty or international laws. Although the events took place well outside the Convention’s espace juridique so heavily emphasized in Bankovic, 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 Bankovic. Today it is well established that the Convention is capable of extraterritorial application beyond the territory of a State party and outside the European legal space, where its agents exercise exclusive de facto or de jure control of the applicant(s).

The implication in Öcalan is that the direct causal links ratione personae— as demonstrated by the physical custody of Turkish agents on a Turkish plane—are capable of overriding even the greatest extraterritorial deficiencies: that of a non-State party not only outside the Convention’s espace juridique, but well beyond the European geographic sphere. The Court’s decision in this case offers further support

150 Issa v. Turkey, 41 EHRR 27, (App. No. 31821/96, ECtHR (2nd Section) 16 Nov 2004); Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08, (ECtHR (Fourth Section)-Merits 2 March 2010).
for the thesis that within a State party’s metropolitan territory, Article 1 jurisdiction *ratione loci* and *ratione personae* remain presumptively co-extensive, and a separate showing of control 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 Article 1 elements *ratione loci* and *personae* are presumed satisfied.\(^{153}\)

In the extraterritorial context, however, the test is entirely different. What Öcalan demonstrates is that the personal jurisdictional component becomes predominant in extraterritorial circumstances, capable of single-handedly establishing Article 1 jurisdiction where the causal link between the State and the applicants is sufficiently direct or proximate. The principle that appears to have emerged in extraterritorial circumstances is that the spatial element has taken on the character and function of a secondary *ratione personae* test. Accordingly, when Article 1 jurisdiction is established through ‘effective control over part of a territory as a consequence of military action’; or ‘effective control or decisive influence over a local authority’, such ‘spatial’ tests in fact operate to establish a nexus to territory as a more attenuated causal relationship to the persons therein. It is argued here that such tests have developed in order to establish what may be a more remote causal link between the State and the applicants. In such instances, tests establishing jurisdiction *ratione loci* do not operate in isolation from grounds *ratione personae*, they operate in conjunction with it, as a means of establishing jurisdiction *ratione personae* by proxy.

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 Bankovic, “[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.”\(^{154}\) It is thus precisely because each State’s sovereignty is limited by the sovereign territorial rights of others’ that the instances in which extraterritorial jurisdiction is recognised must be limited to a compelling jurisdictional link *ratione personae*.

The same is also true in the specific context of Convention case law. In the exceptional circumstances of the Convention’s extraterritorial application, Article 1 jurisdiction must be established predominantly via jurisdiction *ratione personae*; the relevance of *ratione loci* in the confined context of extraterritoriality becomes diminished to the point that it simply serves a secondary back-up function: to establish an alternate, indirect basis through which *ratione personae* links may be

\(^{153}\) Ilascu [GC Merits] 8 July 2004, para 312 (; Assanidze v. Georgia, 39 EHRR 32, para 139 (ECtHR 8 April 2004); Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland (Bosphorus Airways), para 137 (  

\(^{154}\) Bankovic and Others v. Belgium and 16 Other Contracting States, para 59 (.
construed/ inferred. In instances where the alleged extraterritorial act or omission has no direct links *ratione personae* or indirect links *ratione loci*, such as through the effective control of territory or the decisive influence of a State party, Article 1 jurisdiction cannot be established.\(^\text{155}\) Seen in this way, jurisdiction *ratione loci* has become a misnomer in the extraterritorial context, an element now entirely irrelevant. Stated differently, the only relevant element for Article 1 jurisdiction in the extraterritorial context is the State’s jurisdiction *ratione personae*, whether it is established directly or through attenuated links to the territory. But regardless of how it is established, *ratione personae* connections have become the necessary and sufficient means for establishing Article 1 jurisdiction.

The fundamental predominance of *ratione personae* links in extraterritorial instances of Article 1 jurisdiction is further supported by the Court’s recent decision in *Rantsev*.\(^\text{156}\) Ms. Rantsev was a Russian woman allegedly trafficked from Russia to Cyprus to work in forced prostitution, where, under ambiguous circumstances, she died in what appears to have been an attempt to escape from her Cypriot captors. The applicant, her father, alleged violations by both Cyprus and Russia which the Court examined with regard to Russia without first examining Russia’s Article 1 jurisdiction in the matter. Without explaining the basis for its jurisdiction, the Court held that Russia violated its Article 4 procedural obligation to investigate alleged trafficking in its territory. The basis for Russia’s jurisdiction is not made explicit, and deserves examination. How is it that the death of a Russian woman in Cyprus, at the hands of Cypriot civilians, can engage the Russian Federation’s Article 1 jurisdiction for a positive obligation to be conducted within its territory?

Such factual circumstances recall one of the earliest grounds mentioned *obiter* by the Commission whereby it observed that: “Whereas, in certain respects, the nationals of a Contracting State are within its 'jurisdiction' even when domiciled or resident abroad….”\(^\text{157}\) This ground was articulated more clearly in the general principle that “…the nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be..”\(^\text{158}\) It seems likely that the simple connection of nationality existing between the State party and one of its nationals abroad has finally been impliedly recognised as the basis for the Court’s judgment. The immediacy of the link *ratione personae*, in the form of nationality, remains an uncontested, if uncommon ground for establishing Article 1 jurisdiction. What is remarkable is the contrast between the immediacy of the nationality link when compared against the now absurdly attenuated jurisdictional relationships recognised in modern Article 1 jurisprudence. To what extent reliance on nationality may become an established basis for Article 1 jurisdiction is unknown, but the problematic policy implications inherent in universalising the obligations of what remains a

\(^{155}\) *Issa v. Turkey*, (; *Al-Adsani v. United Kingdom*, (Art. 1 jurisdiction is not established where there was insufficient evidence to link the presence of Turkish troops in Iraq to the applicants’ deaths.)

\(^{156}\) *Rantsev v. Cyprus and another* (

\(^{157}\) *X v. Federal Republic of Germany*, (\n
\(^{158}\) *Cyprus v. Turkey [ECommHR Adm.]* (1975), (\n
36
regional treaty suggest that confined limits for Article 1 jurisdiction must eventually be established.

4.5 Caselaw Governing the Interaction between Articles 1 and 56

4.5.1 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. 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, attempts to rely on Article 56 as a means of confirming the scope of Article 1 jurisdiction have persistently been raised by State parties.

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 legitimising declarations of restriction pertaining thereto. 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 and the Court.

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 legitimise territorial limitations under former Article 25 (and consequently limiting Article 1 jurisdiction in the process) garnered support from dissenting judges in both the Commission and the Court. In a separate dissenting opinion in Loizidou, 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 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.

And further:

It might be argued, therefore, that Article 63(4) has evolved into a clause conferring unfettered discretion on States concerning the territorial scope of

159 Id., (1975)
160 Chrysostomos, Papachrysostomou and Loizidou v. Turkey, paras 40-42 (
161 Loizidou v. Turkey [ECtHR Prelim Obj] (23 March 1995), (paras 80, 86).
162 See joint dissenting opinion in Chrysostomos
163 See joint dissenting opinion in Loizidou (prelim obj) and Individual Dissenting Opinion of Mr. Gölcüklü
164 Individual Dissenting Opinion of Mr. Gölcüklü, Loizidou v. Turkey [ECtHR Prelim Obj] (23 March 1995), (146).
their declarations under Article 25, whenever territories beyond the national boundaries are concerned.\textsuperscript{165}

This position has remained a minority view in 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. These comments presciently identified what would come to mark the paradoxical interplay between Articles 1 and 56.

Much more recently and in a different context, the Court held that Art 56 cannot be construed as permitting a declaration restricting the Convention to only part of its metropolitan territory,\textsuperscript{166} whether as a negative declaration under former Article 25 or on its own. 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. It stated:

\begin{quote}
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.\textsuperscript{167}
\end{quote}

The Court in \textit{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. What follows is an examination of the converse: attempts to rely on Article 1 ‘jurisdiction’ as a way of broadening the interpretation of Article 56.

\textbf{4.5.2 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. We have observed that the traditional jurisprudence has defined ‘Art 56 territories’ mostly by reliance upon or deference to state party designations for European territories and by unilateral declaration for traditionally colonial, non-European territories. Moreover, once recognised as an ‘Article 56’ territory, Convention application is never recognised without compliance with the requisite declarations of extension. This strict reliance on Article 56(1) and 56(4) declaration requirements has been a consistent feature of Article 56 jurisprudence.

\begin{flushright}
\textsuperscript{165} Id., (147).
\textsuperscript{166} \textit{Ilascu and Others v. Moldova and Russia}, No. 48787/99 Admissibility (Unreported), (ECtHR Grand Chamber 4 July 2001).
\textsuperscript{167} Id., (at 20).
\end{flushright}
However, the dynamism of Article 1 case law, beginning with the *Cyprus v. Turkey* line of cases, 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*, a 1990 Commission decision.\(^\text{168}\) 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. Prior to 1988, Hong Kong automatically accorded refugee status to such persons, but a change in Hong Kong policy gave rise to the present claim. At the time, Hong Kong was under British control, but the United Kingdom had never made a declaration of extension under former Article 63. Claimants argued that the absence of such a declaration was irrelevant. 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. Unable to construe its way out of the strictures of Article 63, the Commission came to the uncomfortable conclusion that although Article 1 may in certain circumstances extend outside a State party’s territory,

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 Convention 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 the 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.

In this statement, the Commission appears to confirm the inter-relationship of Article 1 and former Article 63 proposed here, whereby a declaration of extension under the latter operates to bring a territory within the purview of the former. This comment operates to refine the outright rejection made by the Commission in 1975 in *Cyprus v. Turkey* that if Article 63 governed dependent territories, and therefore Article 1 must consequently be limited to a State’s metropolitan territory. Instead, *Bui Van Thanh* confirms the highly interactive nature of the two provisions: an Article 63 declaration operates to bring a dependent territory from altogether *outside* the scope of the Convention to *within* Article 1 jurisdiction. 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. Thus 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 policy 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. This creates a direct relationship between the presumptive levels of a party’s extraterritorial control and influence over a territory, on the one hand, and its capacity to prevent Article 1 jurisdiction from being triggered. What it leaves unstated is that Article 56 can be a necessary and sufficient condition for establishing a State party’s jurisdiction under Article 1 of the Convention, a rule the Court would later make explicit. 169 What Bui Van Thanh confirmed was the fraught relationship between Article 1 and former Article 63, whereby Article 1 jurisdiction can be established involuntarily, by means of an objective test, when the territory is not a formal dependency, but can be shirked at will when a historical relationship and constitutional ties between the territory and the State party are present.

A similar situation arose in November 1999 in which a Taiwanese man arrested in Portuguese-controlled Macau sought to challenge China’s extradition request on grounds that it would result in violations of Articles 3 and 6. At the time the Chinese government sought his extradition from Portugal, the territory of Macau was a Chinese territory under Portuguese administration pending transfer of sovereignty back to China slated for 20 December 1999. 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 it was the governor of Macau, the Portuguese government's main representative there, whose discretion granted the Macanese courts leave to begin extradition hearings on the matter. As with the preceding case, the argument that Article 1 grounds for extraterritorial jurisdiction could supplant Article 56 requirements was rejected. 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. 170

169 Matthews v. United Kingdom, (s.30 p12)
This position has been reaffirmed as recently as 2006 in the context of an analogous ‘colonial clause’ provision in the First Protocol. Quark involved a First Protocol claim brought by the owner of a fishing vessel under a Falklands flag whose fishing licence was arbitrarily rejected in UK courts. Although the UK had made a declaration of extension under Article 56, it had not done so with regard to the First Protocol. 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.” Perhaps unsurprisingly, the Court rejected this argument in line with its established precedent on the matter. The claimant, however, had a second and more novel argument to raise. He argued alternatively that 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. 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 Article 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 Article 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 their decisions in that regard concerning their national jurisdictions. Still less can there be any such obligation as regards the territories falling under the scope of Article 56 of the Convention.

171 Article 4, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, (Stipulating 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.”)
172 Quark Fishing v. UK, 15305/06 44 EHRR SE4, (ECtHR (Fourth Section) Adm. Dec. 19 Sept. 2006).
173 Finding that Articles 56 and 1 constitute separate and distinct grounds for establishing Convention jurisdiction: Gillow v. United Kingdom, (; Bui Van Thanh and Others v. United Kingdom, (; Yonghong v. Portugal, (.
174 Quark Fishing v. UK, (
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.

5. Conclusion

It has been suggested by claimants and commentators alike that Article 56 is outdated, an obsolete relic. At the time of its drafting, it was clear that Britain, in particular, supported such a colonial provision in order to safeguard its international responsibility for such territories as part of its sovereign jurisdiction over them. During Britain’s participation in the drafting of the international human rights covenants, it insisted on a colonial clause, vehemently asserting its sovereign right to apply the covenant to such territories on its own terms as an exercise of sovereign jurisdiction. At the same time, there was apprehension that the terms of Article 2(7) of the UN Charter granting supervisory rights over trust territories could pry the door open to international scrutiny of its colonial territories as well, a position defended on grounds that such territories remained firmly within its domestic jurisdiction under UN statute 2(7). It is therefore ironic that while colonial clauses were thus premised on the right to keep such territories within a State party’s jurisdiction in the general international law sense, Article 56 has come to be construed in the Convention context as keeping such territories outside of a State party’s Article 1 ‘jurisdiction’.

At the very least, this paper contends that Article 1 ‘jurisdiction’ has a meaning unique to the Convention, for many reasons. At the outset, the drafting history indicates that the language of Article 1, and the replacement of the words ‘territory’ with ‘jurisdiction’ was intended not to create a wider ambit ratione loci, but to achieve the broadest possible scope within a State’s own territory. Additionally, the territorial and extraterritorial scope of the Convention is explicitly governed by two provisions that must be read together to effectively ascertain the territorial and extraterritorial scope of the Convention and “interpreted in such a way as to promote internal consistency and

176 “International supervision of human rights in Mandated and Trusteeship territories does not raise the bogey of intervention in a State's domestic jurisdiction. The status of the territories, the Court has expressly held ([1950] ICJ Reports 132-33), is inherently international in character, and there has never been any question of the administering Powers having exclusive jurisdiction over them. The case of colonies is much more delicate. Under customary law a State's government of its colonial territories was considered to be as much within its domestic jurisdiction as that of its metropolitan territories.” (8) Sir Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention,* The European Convention on Human Rights, International Law Series No. 5, 1965).
A reading of the two provisions that enables them to be interpreted in harmony with one another suggests a somewhat complex interaction.

Article 56, it can be seen, performs two functions. It operates to impliedly exclude such territories from the scope of Article 1 jurisdiction unless certain positive steps are taken to expressly include them. Where such positive steps are taken and the provisions of Article 56 are complied with, dependent territories then become drawn into the scope of the Convention under Article 1 ‘jurisdiction’. Article 1, it is argued, was originally drafted with a geographic scope largely limited to its State parties’ metropolitan territories, but simultaneously capable of expanding to accommodate qualifying Article 56 territories. It is thus argued that the drafters originally intended the Convention scope ratione loci to be largely limited to metropolitan territories, while permitting ad hoc extension to the dependencies under Article 56. In the metropolitan and [qualifying] dependent territories, it is argued that the Convention’s jurisdiction ratione loci and ratione personae are coextensive.

This rather simplified scheme became much more complicated as the jurisprudential gloss on Article 1 operated to expand the exceptional territorial bases of ‘jurisdiction’ into extraterritorial zones well beyond the dependencies (and likely never contemplated by Convention drafters). This article proposes that the link ratione personae becomes the pivotal component and the most strongly emphasised nexus in determining Article 1 jurisdiction extraterritorially. The very recognition of an extraterritorial setting implies that the Convention is outside its default zone of application ratione loci. In the extraterritorial context, policy considerations necessary to recognise the Convention’s application extraterritorially rely overarchingly on direct causal relationships ratione personae. In contrast, the significance of any nexus to territory becomes a secondary consideration. The case law demonstrates that the tests recognised by the Court to articulate territorial links serve in fact as indirect methods of establishing jurisdiction ratione personae by recognising more attenuated causal connections between the State and the victims through an implied territorial connection.

Article 1 jurisprudence now appears stretched to a breaking point. It has produced a paradoxical result whereby jurisdiction in the dependencies remains subject to State’s voluntary extension, while in all other territories it is capable of being forcibly judicially imposed.

What the Convention teaches us with regard to the international law of extraterritorial application is clear: extraterritorial application of the Convention is highly contextualised, bound up not only in the drafting history of its respective provisions and the particularised intentions of certain State parties, but in the complex interplay between the provisions bearing on its territorial application. Compounding these complexities is the contrasting case law of these two provisions, whereby one remains rigidly static while the other remains unconfined by the constraints of doctrinal coherence.

177 Rantsev v. Cyprus and another (para 274). [internal citations omitted].
This lesson has significant implications for international courts and scholars because it undermines 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. All of these approaches fail to accommodate the highly particularised nature of specific treaty provisions at issue, their textual and operational interplay, and the shifting, dynamic, and often times paradoxical jurisprudential developments that shape them. If the European Convention is indeed 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 contextualised, case-by-case basis.