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Territory, Terrain, and Human Rights: Jurisdiction and Border Control Under the European Convention on Human Rights

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Abstract

In recent years, European states have become creative in developing strategies to curtail international migration while escaping their obligations under human rights law. These strategies aim at stopping migrants before they can enter a state's jurisdiction, under the argument that states are not bound to their obligations while operating outside their jurisdictional boundaries. This article adopts a geographic perspective to examine the concept of jurisdiction under the European Court of Human Rights (ECtHR), and particularly its nexus with territory. During the last decade, the ECtHR has interpreted jurisdiction to encompass situations where states apprehend migrants outside their borders, thus extending jurisdiction to extraterritorial operations. However, states can circumvent this by manipulating the territorial organizations of their borders to prevent migrants from reaching their territory without directly apprehending them. These strategies include agreements with countries of transit along with other, specific interventions. I take the case of *N.D. and N.T. v. Spain* as an example of this trend, and of the ECtHR's failure to make European states accountable. As a solution, I argue that jurisdiction should be interpreted to encompass territoriality as one of its normative components, and under a definition of territory informed by geographic research, and distinct from its conventional definition under international law.

Introduction

Cross disciplinary exchanges between geography and law are fruitful and promising, although challenging. Geographers focusing on law, however, often do so while remaining entrenched in their own discipline, thus avoiding those ‘legal technicalities’ (Valverde, 2009) that are so crucial for jurists. Conversely, jurists make large use of spatial concepts in their own work, but they rarely dwell on their complexity, often taking their meaning as self-explanatory. Over the last two decades, however, legal-geographic investigations have progressed toward a greater exchange between the two disciplines and epistemologies (for example Benson, 2014; Coleman, 2012; Gorman, 2017; Nicolini, 2022; also Kahn, 2017; Kendall, 2017). This article moves in the same direction.

Here, I examine the concept of state jurisdiction under the jurisprudence of the European Court of Human Rights (ECtHR). Two reasons explain this choice. First, as a normative concept jurisdiction is crucial to policies of border control across the European region, as it establishes where and how migrants can access their rights under the European Convention on Human Rights (ECHR). Thus, its definition has enormous political and legal implications. Second, because of its nexus with territory, jurisdiction stands as an ideal candidate for legal-geographic analysis, as its definition entangles crucial questions concerning law, space, and their relation (Valverde, 2009). In analyzing this nexus, I show how the meaning of jurisdiction largely depends on our interpretation of territory as a legal-geographic concept. For this reason, geographic research can contribute to formulate jurisdictional models that strengthen the legal protections of migrants directed to Europe.

States across the European region have historically interpreted jurisdiction to coincide with their territory, as that would prevent migrants outside European borders to access their

human rights under the ECHR. Such a jurisdictional model supports policies of border control to “return” migrants intercepted across their routes before having reached Europe (FitzGerald, 2020; Gammeltoft-Hansen and Hathaway, 2015; Maillet et al. 2018; Marin, 2014; Mountz, 2020; Trevisanut, 2014). However, with time the ECtHR has eventually transitioned toward a different, “personal” model of jurisdiction, where jurisdiction is linked to the relation of power subjecting an individual to a state (Costa, 2012; Besson, 2012). Under this model, state jurisdiction could be triggered whenever a state exerts its power over a person, and regardless of whether the person is located inside the state’s territory (Milanovic, 2011).

I find that while the personal model strengthens the legal protection of migrants directed to Europe, it also risks overlooking the spatial components of state power. States do not just govern individuals by physically apprehending them, but also by intervening spatially across the areas that they transit or reside in. This dimension of state power unfolds as a form of territorial control, and it should be conceptualized as a normative component of jurisdiction itself, meaning an essential component of the relation subjecting an individual to the authority of the state.

This problem was particularly evident in the 2020 case of *N.D. and N.T. v. Spain*. *N.D.* concerned the expulsion of two migrants, who had attempted to enter the Spanish enclave of Melilla in Morocco by running with a crowd toward the border in the hope that the confusion would allow them to make it through undetected. The Court ruled in Spain’s favor by classifying the entry as a deliberate attempt to use force that made the migrants responsible for their subsequent expulsion. With this decision, *N.D.* ignored that the migrants’ attempt to entering Melilla was a direct result of the lack of alternative options, which is the deliberate outcome of Spanish territorial interventions onto the EU external border in Morocco.

This article provides a geographic analysis of a problem that is generally interpreted as the exclusive purview of legal scholars. I argue that jurisdiction should be linked to territory and territoriality as geographic concepts, as this would result in a greater accountability of European states that could become liable for the territorial organizations that they pursue. Thus, I develop a jurisdictional model where “territory” stands a normative component of jurisdiction, but with a different meaning than its conventional definition under international law.

The article is organized as follows. In the next section I discuss a common trajectory across political geography and human rights law, which is exemplified by the various meanings associated to territory and jurisdiction in the two disciplines. The second section examines jurisdiction under human rights law and the ECtHR, and it concludes by demonstrating how territoriality could be added as a normative component to the concept. In the third section, I discuss pushback operations and collective expulsions at European borders, and I conclude with the analysis of the case of *N.D.*, which shows how a territorially focused approach to jurisdiction leads to a stronger applicability of human rights to border expulsions.

Human rights law and political geography: convergences in meaning and scope.

In the current century, political geography and human rights law confront common problems that explain a convergence in their trajectory. Both are concerned with accounting for the contemporary geographies of state power, and the coexistence of their transnational dimension with a traditional territorial structure. The concepts of territory and jurisdiction, which are the topic of this article, exemplify this problem and trajectory across the two disciplines.

Beginning with territory, its conventional definition coincides with the historic meaning as a modern political concept, and it identifies a bounded, homogenous area that corresponds to

the spatial extent of a nation state and its sovereignty (Elden, 2013). Territory operates as an ideal, transcendental quality that is bestowed upon an extension of land to provide a container for a community, a people, and a state (Gottman, 1973; Taylor, 1994). As such, it is rooted in an abstract conception of space, which disregards its material component and characteristics. A political geography that takes territory for granted, without questioning the implications and pillars that underpin its spatial gaze, is destined to fall into the ‘territorial trap’ (Agnew, 1994), and to conceptualize space as a homogenous extension partitioned by ideal boundaries. This perspective is inadequate to investigate the concrete, material geographies of state power, which unfold through and beyond territorial partitions (Nicolini, 2022).

Stuart Elden has argued that until recently geographers have devoted remarkably little attention to the investigation of territory as a politico-juridical concept (2013, 3). However, geographers have been historically prolific in studying territoriality, which stands as a distinct concept from territory, but one that can be adopted to investigate the former (Johnston, 2001; Murphy, 2013). As a concept, territoriality originates in ecology and biology, and was eventually adopted by critical geographers in the late 20th century, primarily through the pioneering works of Robert Sack (1986) and Claude Raffestin (1980). Unlike a conventional definition of territory, territoriality does not identify an object but a process: it encompasses those strategies of spatial production that bound a space to exert control across its surface (Brighenti, 2010). From a territorial perspective, territory constitutes an outcome, the effect of practices of territorialization that must be reproduced to guarantee the stability of the territorial partition that they support (Painter, 2010).

This approach to territoriality has informed the recent surge of geographic efforts to confront territory and borders, thus leading to a territorially focused study of territory (Paasi et

al. 2022; also see Ochoa Espejo, 2020). From this perspective, territory is interpreted less as a container and more as an outcome of processes of territorialization, which bound a space and render it meaningful under a political goal (Nicolini, 2022). The same approach exists across critical border studies, where the border is interpreted as a practice and an assemblage of spaces, discourses, and actors, instead of a ‘line in the sand’ (Parker and Vaughan Williams, 2009; also see Rigo, 2008). Through this process, territory is turned into a relational concept: what constitutes a “territory” is the specific, contingent relation that is established between humans and space through a specific territorial organization, and not an abstract quality bestowed upon an area by law (see Brighenti, 2006; dell’Agnese, 2017; also Elden, 2009).

The same turn toward relationality grounds jurisdiction under human rights law. In this case as well, the recent decades saw a diffuse discontent toward the classic territorial model of state jurisdiction because of its inability to prevent abuses occurring abroad (Mallory, 2020). If states are only burdened by their human rights obligation while inside their own territory, the individuals who suffer from their conduct abroad are left without protection. That is why human rights law has progressively transitioned toward a jurisdictional model that ensures the “extraterritorial” applicability of human rights. Under this model, jurisdiction should be linked to the relation of power subjecting an individual to a state, regardless of its location (Milanovic, 2011).

This is a *personal* model of jurisdiction, in the sense that jurisdiction is linked to the personal relation linking a state to an individual, and not to a territorial location. It is also referred to as a *functional* model because designed according to the function of human rights law, which is to protect individuals from state abuses, and not to defend a state’s territorial boundaries (Giuffré, 2021; Shany, 2013). Finally, it is a *relational* concept (Besson, 2012): it

attains the specific, personal relation linking the individual to the state, and thus, it avoids a formal, territorial understanding of jurisdiction to focus on the concrete circumstances of a specific situation.

In other words, human rights law and political geography share a parallel trajectory. Both must account for contemporary geographies of state power, and they experience the need to abandon a conventional definition of territory to do so. Consequently, human rights law reformulates jurisdiction as a relational concept, just like geographers switch toward a relational concept of territory within their discipline.

I take the next section to closely examine this transition. First, I examine the debate and complexities surrounding the concept of jurisdiction in human rights law and under the ECHR. Next, I discuss the advantages in linking a relational concept of jurisdiction with a relational concept of territory. Such a territorially focused approach to jurisdiction can better account for the spatial components of state power, and it can be effective when confronting illegal expulsions at European borders, as I demonstrate in the third section of the article.

Territory and Jurisdiction

Jurisdiction in human rights law

The ECtHR is an international court that draws its authority from the European Convention on Human Rights (ECHR). Under Article 1 of the ECHR, the Contracting Parties are bound to secure the rights of the Convention for everyone ‘within their jurisdiction’, thus establishing state’s jurisdiction as the fundamental threshold of applicability of the Convention itself. Under this article, states are only burdened by their human rights obligations within their

own jurisdiction, and nowhere else. Consequently, state jurisdiction is a necessary condition for the judicial jurisdiction of the ECtHR, because the Court can only scrutinize the actions of a state that happened within the latter's jurisdiction, or else the case should be rejected as inadmissible (Milanovic, 2008). However, while this mechanism is clear the meaning of the term is not. Art. 1 does not clarify what jurisdiction stands for or how a state can trigger it, thus creating considerable confusion.

It is unclear what concept of jurisdiction the Contracting Parties had in mind when the ECHR was originally drafted (Mallory, 2020, 19-23). It is possible that they interpreted jurisdiction territorially, but this does not explain why references to territory are missing from the clause. Whatever the answer may be, the ECtHR eventually reached an internal consensus that national boundaries do not always restrict jurisdiction under Art. 1, thus opening the application of the ECHR to cases involving states operating outside their territorial borders. The concept of “extraterritorial jurisdiction” first appeared in the 1960s, and slowly but steadily expanded in the rest of the century, most notably with a series of cases concerning the interstate disputes between Cyprus and Turkey, and another string of cases concerning the arrest or extradition of individuals located outside of Europe (Mallory, 2021). Through this process, the ECtHR eventually constructed jurisdiction in human rights law under different terms than those characterizing its conventional and primarily territorial definition in general international law (Milanovic, 2011; Ryngaert, 2015).

The distinction between the two concepts of jurisdiction is linked to the peculiar function of human rights law. This specific field of international law regulates the relation linking a state to an individual subject, thus establishing certain obligations onto the state which correspond to the human rights of the individuals under its control. Conversely, public international law

generally and primarily regulates interstate relations, and thus, relations between equal subjects, where jurisdiction ‘is geared toward delimiting competences and preventing sovereignties from clashing with each other’ (Ryngaert, 2015, 22). Here, jurisdiction designates a state’s prerogative and capacity to lawfully exercise its authority (Shaw, 2003, 572), and it is further broken down into the state’s ability to pass, enforce, and arbitrate its own laws, each corresponding to a different aspect of jurisdiction (Crawford, 2012, 440-69). While a state may possess extraterritorial jurisdiction in certain specific circumstances (Milanovic, 2011, 24-25), a state’s own territory is usually the only place where the three functions may be exercised together, under the so-called “territorial principle” (Aust, 2010, 43).

For this reason, while territory and jurisdiction identify two different concepts in general international law, they also overlap in practice and are connected by their common function. Both identify an exclusive sphere of authority, which is limited by the authority of other actors. A state’s jurisdiction is limited by the jurisdiction of other states, while territory is limited by borders that mark the separations among states, each being a subject of international law (Shaw, 2003, 189-93). Both regulate interstate relations in the same fashion that property regulates relations between individuals in private law, by assigning to each subject its own exclusive sphere of autonomy, which is bounded by the borders and fences that are erected to protect it (Blomley, 2016; also Moore, 2015, 17-21). Thus, jurisdiction identifies a state’s lawful prerogative to exercise its power, and to exclude others from exercising theirs within the same enclave.

However, this definition is inadequate for human rights law, which does not regulate relations between equal subjects, but rather the unequal relation linking a state to an individual. Here, jurisdiction corresponds not to a right but to a burden. It identifies a normative relation

between the state as a duty bearer and the individual as a right holder, thus imposing specific obligations on the state which correspond to the human rights of the individual under its control (Besson, 2012). It follows that human rights law does not link jurisdiction to a state's *lawful* claim to exercise its power, but to power itself (Milanovic, 2011, 26-30). What is relevant is whether a state *factually* controls the life or liberty of an individual, and not whether the state has a lawful claim to exercise its authority under public international law. Here, jurisdiction works as a normative threshold for the applicability of the law, so that when the threshold is met, states become liable for their human rights violations.

Clearly, a theory of jurisdiction linking it to its function, as in the above, encourages the extraterritorial application of human rights law. In fact, progressive interpretations of Art. 1 defend a functional model of jurisdiction precisely because extraterritorial situations are where human rights law is most needed, as states often operate abroad under lesser scrutiny from their domestic courts (Mallory, 2020). For this reason, the interpretation of Art. 1 affects the very nature of the Convention, as either a regional agreement or a universal document protecting individuals from European states regardless of their location. From this founding premise, progressive interpreters elaborate separate functional models that link jurisdiction to different grounds, for example: the exercise of factual power (Milanovic, 2011); the capacity to prescribe a person's conduct (Duttwiler, 2012); or the exercise of public powers (Besson, 2012). These differences notwithstanding, all the separate models conceptualize jurisdiction under relational terms, and as the relation linking a state to a person (*ratione personae*) instead of a territorial location (*ratione loci*).

However, despite a scholarly agreement on the need to develop a clear theory of jurisdiction, the ECtHR has generally failed to provide a comprehensive model throughout its

jurisprudence, and its case law over the topic has been quite contradictory.¹ At times, the Court has seemed to embrace a relational paradigm but, at others, jurisdiction appears to be triggered by mechanisms resembling those happening in a state's own territory (Altıparmak, 2004; Miller, 2009; Shany, 2013, 54-56). The reason for this confusion is rooted in the sensitivity of the topic. Member States are especially vocal against an excessive expansion of Art. 1, under the argument that it could cripple their ability to operate abroad in pursuance of national or international interests (Mallory, 2020). Thus, the Court suffers from considerable political pressure when deciding extraterritorial cases, and this has resulted in contradictory decisions that complicate the development of a general theory.² In 2011, the Court used the case of *Al Skeini and Others v. The United Kingdom* as an opportunity to reorder the existing case law, but while partly successful in this regard the decisions that followed have often been inconsistent (Giuffré, 2021).³

In this context, scholarly attempts to delineate a functional model of jurisdiction aim to overcome the current confusion in favor of a comprehensive doctrine, which could provide

¹ See the dissenting opinion of Judge Paulo Pinto de Albuquerque in the 2019 case of *Georgia v. Russia II*.

² On this note, see the dissenting opinion of Judge Paulo Pinto de Albuquerque in the 2019 case of *Georgia v. Russia II*.

³ Notably, in *Carter v. Russia* the ECtHR extended jurisdiction to a case concerning an extraterritorial killing by state forces, shrinking the distance between jurisdiction and causation that was previously established by *Banković v. Belgium and Sixteen Other Contracting States* (see Tzevelekos and Berkes, 2021). However, in *Georgia v. Russia II* the Court did not extend jurisdiction under the bizarre logic that the moment of chaos that accompanies active military combat cannot coincide with the “effective control” that is required by Art. 1. Finally, the Court has recently relied on the concept of “special features” to extend jurisdiction under narrow grounds specific to the case at hand. For a criticism of this latter trend see the Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni, and Eicke in *Hanan v. Germany*.

clarity while also extending jurisdiction to a vast range of situations that the Court has rejected or is yet to consider. In the next section, I examine this topic while directing attention to the advantages of linking a functional model of jurisdiction with the concepts of territory and territoriality as they have been developed in geographic research.

Jurisdiction as a territorial relation

As mentioned, the trajectory leading legal scholars to propose a functional model runs parallel to geographers' attempts to reconceptualize territory in a globalized world (Antonsich, 2009; also Kuijer and Werner, 2017). However, legal scholars approach this problem very differently. Instead of examining alternative definitions of territory to support a functional model of jurisdiction, they cut off the relation between jurisdiction and territory entirely, thus linking jurisdiction to a personal relation subjecting the individual to the state. In this process, territory continues to identify a bounded container where states exercise their sovereignty, but it ceases to be an essential condition for establishing the jurisdiction of a state.

More specifically, because the functional model links jurisdiction to a relation of power, from a normative perspective it becomes irrelevant whether said relation takes place in a state's territory or not. At the same time, *where* said relation takes place remains relevant to the extent that a state's ability to control an individual is often contingent on its ability to control the area where the individual is located. In this sense, a focus on jurisdiction as a personal relation should not lead to separating state power from its spatial conditions of possibility, or to treat space 'as inert and pre-political in ways that geographers would find objectionable' (Blomley, 2016, 595). Geographic research is useful in this context precisely because it directs attention to how the liberty and mobility of people are often governed through strategic spatial interventions, and

thus, how the personal relation linking a state to its subject comprehends these interventions as well. A relational concept of territory is suited to account for this structure, which, as I discuss below, can offer support to a functional model of jurisdiction by directing attention to the territorial dimension of state power.

A starting point is to examine the factual situations that activate jurisdiction under a functional model. Even if we were to link jurisdiction solely to the individual relation between a state and its subject, we would quickly find that this relation can never be possible if the state does not control the space of the individual as well. This is well exemplified by the ECtHR's inconsistency in its distinction between spatial and personal jurisdiction. The two terms do not identify different types of jurisdictions, but they refer to the basis on which jurisdiction is established. They were distinguished in the 2011 case of *Al-Skeini*, which ruled that a state could establish jurisdiction either on spatial grounds through the 'effective control over an area' (§138-140), or by exercising its power and control over an individual, generally through its state agents (§133-137).⁴ In other words, the ECtHR characterized personal jurisdiction as consisting in the control over people, and not the spaces surrounding them (*Al-Skeini*, 2011, §136). The Court cited three extraterritorial cases concerning the detention of individuals, where jurisdiction was triggered by the control over individuals themselves, and not the prisons or vessels where they were detained. However, and as noticed by Mallory (2020, 177-78), in each of those cases the

⁴ *Al-Skeini* established three instances of jurisdiction triggered by the actions of state agents. These are: the acts of consular agents who bring an individual under their state's jurisdiction when operating within their functions abroad; the exercise of public powers in another state's territory; and finally, the use of force against an individual by a state agent.

Court had originally found jurisdiction to be also triggered by the possession, seizure, and control of the facilities where people were kept or otherwise prevented from departing. More than a lack of consistency, this confusion points to the practical impossibility of controlling people without controlling their spaces. Personal jurisdiction involves the control of bodies, but also walls, buildings, and routes.

In fact, and as argued by Besson (2012, 875), the very distinction between personal and spatial jurisdiction leads to confusion, because jurisdiction is always personal given that its function is precisely that of regulating the relation linking a state to a person. According to Besson, spatial jurisdiction merely identifies a specific instance where jurisdiction is inferred from the ‘effective control over an area’. Similarly, Milanovic (2011, 129-135) approaches spatial jurisdiction as a problem of scale, in the sense that the issue is to determine the boundaries of what constitutes an “area” under the ECHR. From this perspective, “area” certainly includes territory, but possibly also narrower enclaves, and even “places” (Milanovic, 2011, 130). Control over an area, however, is only meaningful to the extent that it allows and acknowledges the existence of a personal control that is exerted over people within the enclave.

These authors thus conceptualize spatial control as separate from the normative, personal relation constituting jurisdiction, but they also acknowledge how the same relation can often only exist *because* of the control over space. In other words, and precisely because jurisdiction is triggered by a relation of power, certain specific spatial organizations will have to be present for the relation to be effective and factual. We can describe these in reference to their function, which corresponds to the definition of territoriality by Robert Sack, who described it as ‘the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships, by delimiting and asserting control over a geographic area’ (1986, 19). While

research on territory and territoriality has moved beyond Sack's initial reflections (Brighenti, 2010; Elden, 2010), this general description remains valid to examine the territorial aspects of state power that are of interest here.

From a geographic standpoint, territory does not coincide with a bounded container that is conceptually separated from the relations happening on its surface. Instead, it is practiced, reproduced, and continuously re-territorialized through the efforts of actors who aim to enact a specific territorial regime (Painter, 2010). Thus, territory constitutes the *effect* of specific practices linking space to power, just like jurisdiction identifies the relation linking power to human life (see Brighenti, 2006). The two concepts can be linked together by interpreting jurisdiction as a *territorial* relation.

To further clarify what I mean by "territory" here, I now discuss the case of *Jaloud v. The Netherlands*, which was decided by the ECtHR in 2014. The case concerned a deadly incident at a military checkpoint in south-eastern Iraq, which was jointly managed by Iraqi and Dutch forces during the country's occupation. The victim was a passenger in a car that did not stop after the soldiers' halt, and which appeared to be speeding toward the checkpoint instead. The soldiers shot the car, killing the victim and injuring the other occupants. The victim's father complained that the homicide had not been properly investigated, thus claiming a violation of Art. 2.

Jaloud is of interest here because, and as argued by Raible (2016), the case apparently confuses the difference between spatial and personal jurisdiction. In this case, The Netherlands neither apprehended the victim nor was exercising control over a portion of Iraqi territory, as its troops were merely participating in the management of the checkpoint. However, the Court found that it was the checkpoint itself that triggered jurisdiction, because every person driving through it was being brought under the control of the soldiers for the time that it took them to

cross it. Thus, this appears to be an instance of jurisdiction that is linked not to a physical apprehension, but to the very ability of controlling traffic through a physical infrastructure. In this sense, it cannot be classified as neither personal nor spatial, as it presents characteristics of both.

I interpret this decision as an example of jurisdiction triggered by territoriality as a form of spatial control. First, the checkpoint permits to control traffic across specific routes by providing the soldiers with an infrastructure to do so. But furthermore, the checkpoint permits to territorialize the larger area, and it can be grouped together with other sites or strategies sharing this function. While the checkpoint can hardly be analogized to a territory under international law, as it constitutes a mobile technology without stable boundaries, it participates in a broader archipelago of military installations that control and surveil human mobility over the occupied region. Certainly, the checkpoint does not have borders, but any area where the occupying forces wish to hold sway must be supported by similar technologies that altogether territorialize it. In this sense, checkpoints are vital for establishing boundaries, no matter how stable, just like other technologies of surveillance that states adopt either within their territory or elsewhere. Whether the control over people is exerted across a large area, a prison, a vessel, or a checkpoint, it is always dependent on systems of control that are coterminous with the territorialization of the space over which they operate. I argue that this exact mechanism should be sufficient to trigger jurisdiction, thus reaching a functional model that does not stand in opposition with territory.

In other words, territory should not be regarded as an object of power, meaning a bounded enclave that is governed as if it were external to the power that is exerted across it. Instead, the focus should attend to those spatial mechanisms that regulate the exercise of power itself, and which constitute its conditions of possibility (Nicolini, 2022). This is not to say that

whatever is spatial is territorial. Instead, territorial organizations correspond to practices of containment (Tazzioli and Garelli, 2020), surveillance (Amoore, 2006), detention (Conlon et al. 2017), and enclosure that are *functional* to exert control over human mobility across various scales (Tazzioli, 2020). Most extraterritorial operations undertaken by the Member States will share these goals and features, precisely because they aim for the same goal.

Importantly, this approach territory does not stand in opposition to a functional model of jurisdiction. While the “functional” model is generally defined in contrast to its “territorial” version, this is only valid when adopting a conventional definition of territory. Conversely, here territory identifies a relational concept, which classifies an operation as “territorial” according to its function. Thus, jurisdiction and territory are both defined in relational *and* functional terms, so that we may conceptualize the relation linking a state to its subject as both a personal *and* territorial relation. This model is not designed as an alternative to functional models of jurisdiction as they have been proposed by jurists. On the contrary, it supports the same functional approach while also highlighting the spatial components of state power, so as to treat them as a normatively meaningful component of jurisdiction.

In the next and final section, I examine the applicability of this model to cases concerning border expulsions, and specifically the case of *N.D. and N.T. v. Spain*.

Collective expulsions and the problem of terrain

Jurisdiction and pushback operations

As discussed, the advantage of linking jurisdiction to a relational concept of territory is that of highlighting how state power always unfolds through specific spatial interventions. This

is not only relevant for discussing the admissibility of a case under jurisdictional grounds, but also for the phase of the merits, where the Court examines whether the ECHR has been violated or not. In this section, I focus on this problem in reference to the jurisprudence concerning Article 4 of Protocol nr. 4 (Art. 4 P4), meaning the prohibition of collective expulsions, and specifically its application to pushback operations and expulsion happening at states' borders.

The problem of territory has become central to the application of Art. 4 P4 since the 2020 case of *N.D. and N.T. v. Spain*. There, the Court inaugurated a new line of reasoning, which focuses on human mobility as a significant factor for determining whether a border expulsion violates the ECHR. Specifically, the Court concluded that a State does not commit collective expulsion if the migrants who are being expelled had previously attempted to cross the border by moving in manners that endanger public security. This logic, however, blatantly ignores how the mobilities that are available to immigrants are directly related to the physical characteristics of the borders that they wish to cross, and that states may further restrict them by intervening on the specific border sectors.

Therefore, *N.D.* allows states to territorialize their borders in manners that could elicit favorable rulings from the ECtHR, thus escaping their human rights obligations through this process. This would not be the case if the ECtHR could recognize that states exercise their power not only by physically apprehending individuals, but also by strategically altering the physical characteristics of borders to elicit specific reactions on their part. In this sense, a territorial focus is beneficial to render states accountable for the territorial organization that they choose to pursue, and which should be interpreted as part of the normative, personal relation triggering jurisdiction. In what follows, I examine the judicial history of Art. 4 P4 and its application to pushback operations using the case of *N.D.* to demonstrate my argument.

The ECtHR first examined pushback operations in the 2012 case of *Hirsi Jammah v. Italy*. There, the Court confronted the interception by the Italian Coast Guard of a group of boats carrying asylum seekers across the Mediterranean. The authorities had seized the boats and moved the occupants onto Italian ships before forcibly returning them to Libya, from which they had sailed. The government argued that the applicants never entered Italian jurisdiction because this was a “rescue” operation outside Italy’s territorial borders. For this reason, Italy had no obligation to examine the travelers’ requests to asylum, as they did not possess any rights under the ECHR while remaining at high sea.

The ECtHR ruled against the Italian government in a landmark decision that deeply affected border control across the entire region (Den Heijer, 2013). The Court established that Italy had assumed control of the applicants by moving them onto its vessels to transport them, and this was sufficient to meet the jurisdictional threshold. Consequently, the Court also decided that Italy had violated Art. 3 of the ECHR by returning the migrants to Libya, because it exposed them to the risk of torture. Furthermore, the Court found that this was a collective expulsion under Art. 4 P4, which constituted a separate violation of the ECHR.

Art. 4 P4 prevents Member States from expelling noncitizens ‘as a group’, meaning without first examining the presence of individual obstructive factors to the removal. Crucially, Art. 4 P4 does not prohibit an expulsion *because* an obstructive factor is present. For example, if a Member State unduly repatriates an asylum seeker who is at risk of persecution, this does not constitute a collective expulsion, but only a violation of Art. 3. Instead, Art. 4 P4 is violated when a State does not check whether the removal *could* violate a separate provision of the ECHR.

However, it appears that the Court is divided on the correct interpretation of this article. This is exemplified by the contrast between Judge Albuquerque's concurrence in *M.A. and Others v. Lithuania* and Judge Koskelo's dissent in *N.D. and N.T. v. Spain*. According to Albuquerque, Art. 4 P4 grants a procedural right to every immigrant coming to Europe. Its function is to deter states from conducting summary expulsions that could potentially affect asylum seekers, and it achieves it by forcing states to examine the individual claims of each person before expelling them. But according to this logic, Art. 4 P4 could be violated by the collective expulsion of immigrants who lack any legitimate claim to stay. Judge Koskelo considers this a paradox, and an unacceptable limitation of a state's sovereign prerogative to govern its borders. According to her, asylum seekers are already protected by Art. 3, and Art. 4 P4 should be reduced to an ancillary protection that could not be triggered independently. Thus, just like jurisdiction, collective expulsion is a heated terrain of debate due to its political implications. While *Hirsi* appeared to defend a progressive interpretation, the subsequent case law has narrowed the applicability of Art. 4 P4 to reduce the Member States' burden.⁵

Migrants' mobilities and the question of terrain

In 2020, the case of *N.D. and N.T. v. Spain* signaled a new trajectory in the interpretation of Art. 4 P4. The case involved the summary expulsion of the two applicants who had attempted to cross the border separating the Spanish enclave of Melilla from Morocco. Along with the city

⁵ See especially *Khlaifia and Others v. Italy*, where the Court decided that a failure to provide migrants with individual interviews before expelling them does not necessarily violate Art. 4 P4.

of Ceuta, Melilla possesses one of the most fortified sectors of the entire European borderland, comprising three fences reaching heights of 6 meters which are constantly patrolled by the Spanish *Guardia Civil* (see Johnson and Jones, 2018). The two applicants were part of a larger group of hundreds of individuals who ran together toward the fence in the hope that the resulting confusion would allow them to make it through. N.D. and N.T. failed, and they remained on top of the fence for hours, before finally climbing down and being immediately returned by the Spanish police.

Apparently, the expulsion in *N.D.* fits the parameters of a collective expulsion, as the applicants were expelled as a group, and without a review of their individual cases. This was the initial conclusion of the Third Section of the Court in 2017. There, the Court simply took notice that the applicants had been immediately expelled after climbing down the fences, and that no legal procedure was initiated before removing them. Thus, the Third Section concluded that Art. 4 P4 had been violated. However, Spain was unhappy with this result and requested a referral to the Grand Chamber of the ECtHR. In 2020, the Grand Chamber ruled in Spain's favor, thus finding that the removal did not violate the ECHR.

When examining the legality of the expulsion, the Grand Chamber invented a new test for determining a violation of Art. 4 P4, which establishes that a violation is not committed if the Member State provides a legal pathway to asylum that the migrant *chooses* not to take (Ciliberto, 2021). This legal pathway does not necessarily need to be effective. The ECtHR accepted the government's claim that its border crossing point was receiving asylum applications, and that the applicants did not lodge one there before attempting to enter Melilla. However, the Court was also made aware that the Moroccan police would contain African immigrants within their makeshift camps and did not allow them to reach the crossing point. Nevertheless, the Court

ruled that Spain could not be blamed for the fault of Moroccan authorities (§218), even though the two governments have bilateral agreements in place for curtailing immigration (see Sundberg Diez, 2020).

Having established that the applicants “chose” not to take the “legal” pathway to asylum, the Court resolved the case by deciding that it was their conduct that put them at risk, and not the actions of Spanish state agents. They had attempted to cross the border illegally, ‘by taking advantage of their large numbers and using force’ (*N.D.*, §210). This is the difference between *N.D.* and *Hirsi*. In *Hirsi*, the applicants were drifting at sea, and they did not appear to pose a threat; they were deemed to be lacking in agency and were constructed as passive subjects at the mercy of the Italian Coast Guard, and possibly the Mediterranean itself. Conversely, the applicants in *N.D.* had their feet on the ground and were able to run along with hundreds of others. The act of running is interpreted as the expression of an unbound agency, which shows a deliberateness that is inconsistent with the passivity and vulnerability that should characterize a legitimate asylum seeker (Fassin, 2012, 109-129). In his aggressive concurring opinion, Judge Pejchal twice referred to the applicants as ‘young men’, so as to underline that they are far from qualifying as vulnerable subjects under the Court’s case law. Their vitality and strength are also visible in their ability to climb the fence of Melilla, a decision they made without outside pressure, and quite deliberately (at least from the Court’s perspective).

But the possibility of expressing the strength of a young man is only made possible by the flat surface of the terrain around Melilla. Conversely, the vulnerability that legitimizes one as a refugee is most visible at sea, where migrants become helpless after losing control of their boats and their fate. One place creates an obligation to rescue, while another deprives individuals from the protection of the ECHR. Here, mobility is treated as an epistemic object to which meanings

may be ascribed (see Tazzioli, 2020). The speed and synchrony of the bodies running together is interpreted as an act of force that is threatening, and which, from the court's perspective, justifies the state's violent reaction. Mobility functions as an instrument to measure the legality of different responses, and how people move determines whether their treatment must reflect humanitarian principles or security concerns (Tazzioli and Garelli, 2020; Walters, 2010; Williams, 2015).

This representation of human mobility replicates the same problem that I discussed in the previous section, when I highlighted how personal jurisdiction should not be conceptualized in opposition to its spatial version, because the possibility of controlling a person is always contingent on the capacity to controlling its space. In this case, the ECtHR relies on a fictitious representation of mobility that ignores how the "choice" of whether to move and how is largely determined by the physical conformation of the surface that is to be crossed, and furthermore by how states organize their territory to force specific forms of human mobility. This scenario presents us with two distinct, yet connected, geographic concepts.

First, the Melilla border constitutes a *territory* that is enclosed by both Spain and Morocco, and which relies on Spanish and Moroccan agents to control people's mobility. It is crucial to stress that Morocco participates in this assemblage because of its agreement with Spain, so that the behavior of Moroccan agents should fall under Spanish jurisdiction as well (see Gammeltoft-Hansen and Hathaway, 2015; Kim, 2017). Second, the effectiveness of this territorial organization is contingent on the physical characteristics of this border, and thus, its *terrain*.

Terrain is conceptually distinct from territory, while remaining fundamental for any discussion of the latter. In the words of Stuart Elden, terrain is 'land that has a strategic, political,

military sense’ (2010, 86), and which ‘makes possible, or constrains, various military-strategic projects’ (2017, 202). Terrain does not identify an enumerated set of characteristics, but a gaze over land which classifies those characteristics that are relevant to a specific territorial project. In this sense, the same land can possess multiple terrains that are distinguishable based on the strategies that they allow to pursue. In reference to border control, this includes those spatial features that a state can exploit to curtail immigration, but also to support legal arguments that diminish its culpability under human rights law. Spain is not just using the terrain to stop the migrants; it is also using it to evade its obligations under human rights law.

The problem with *N.D.* is precisely the depiction of the events outside their territorial context. For this reason, the criticism must be extended not only to the ECtHR decision on the merits, but also to the specific concept of jurisdiction that is adopted by the Court, and which is similarly detached from its territorial components. Notably, in 2017 the Third Section of the Court had originally found jurisdiction on non-territorial grounds, because the applicants had been apprehended by the Spanish police, and that was sufficient to trigger jurisdiction regardless of their territorial location. Conversely, the Grand Chamber extended jurisdiction based on the applicants’ location, given that the applicants had made it inside Spanish territory before being expelled. This hints at the lesser sympathy for the functional model by the sitting court. However, both disregarded the territory and terrain of the Melilla border, which spans more than the three fences separating Morocco from Spain. The Third Chamber did so by linking jurisdiction to the applicants’ apprehension, thus relying on jurisdiction *ratione personae*. Conversely, the Grand Chamber relied on a conventional definition of territory, thus disregarding the extraterritorial effects of Spanish policies.

This flawed depiction of the relation between Spain and the applicants supports the construction of their mobility as a choice. In reality, both the choice and the subsequent apprehension are inextricably linked to the territorial interventions that preceded them, and which deeply limited the migrants' ability to move in ways other than the one they "chose." At this border, Spanish power is not only expressed by the actions of its police force, but furthermore by the work of containment operated by Moroccan agents, and by the three high fences that slow down the migrants' attempts at climbing them. If jurisdiction could be linked to this specific territorial organization, the restriction of the applicants' mobility would be treated as a meaningful factor as well. The failure to do so frustrates the apparently progressive step of extending jurisdiction, thus leading to the absurd conclusion that makes Spain the victim of an attack.

Thus, and finally, I argue that jurisdiction should be presumed to exist across the larger area around the fence, which includes: the international crossing point; the makeshift camps where migrants wait for an opportunity to cross; and the Moroccan police who are acting under directives that are partly coming from Spain. Importantly, this does not signify that jurisdiction should be identified with a static, bounded area where all these events are unfolding, or else we would be moving backwards toward a conventional territorial model. Instead, jurisdiction is linked to the *territorial* relation linking individuals to the state, and which includes all those geographic features that participate in it. The threshold stands at that point in space and time where Spain restricts the applicants' ability to move, by exploiting the terrain to prevent alternative mobilities on their part. A failure to acknowledge this mechanism is a failure of acknowledging the material components of power itself.

Conclusion: Jurisdiction, territory, and life

This article examined the intersections between human rights law and political geography as separate disciplines and epistemological organization. Here, I “translated” geographic research in legal terms to reach a cross-disciplinary understanding, in the spirit of fostering exchange under a legal geographic framework. I have uncovered an opening to bring geographic thought into legal scholarship by examining the implications of adopting a relational definition of territory in human rights law.

Geographic conceptualizations of territory have the benefit of paying attention to the spatial and material components of state power. For this reason, they can be adopted to support the extraterritorial application of human rights law, and particularly to move beyond the dichotomy between personal and spatial models of jurisdiction under the jurisprudence of the ECtHR. In this sense, my geographic contribution does not constitute a break from functional interpretations of jurisdiction advanced by jurists. Instead, it integrates them with a geographic perspective that could make states accountable for the consequences of the territorial organizations that they choose to pursue.

The second section of the article exemplified the advantages of this perspective when examining border expulsions under the ECtHR. The case of *N.D.* shows how states can restrict human mobility by operating spatially through strategic interventions onto their borders, and that jurisdiction must be interpreted to encompass these interventions in order to prevent states from escaping their human rights obligations. In *N.D.*, this is evident when the Court holds the applicants responsible for the way they crossed the Spanish border, while also ignoring Spain’s factual hegemony over the territory in question.

Finally, and to conclude, I now direct attention to the political implications of the concept of jurisdiction as it has been discussed here. As mentioned, how jurisdiction is interpreted has immediate effects on the universalistic principles underpinning human rights law. Jurisdiction corresponds to the *political* relation that renders an individual a subject of law, and thus, a human being under human rights law. In this sense, the interpretive debates over jurisdiction concern the boundaries of humanity as a legal and political status. The purpose of a functional model is precisely to prevent states from governing individuals without acknowledging their human rights, and thus, without treating them as humans, meaning as rights holders under human rights law. Accordingly, the model links jurisdiction to the very moment that an individual is brought under the state's authority. In other words, one is not born a human, but states make people human by subjecting them to their will (see Besson, 2012, 859). Conversely, an absence of jurisdiction leads to a fracture between one's legal and biological status, with people being reduced to objects, meaning bodies lacking a legal persona under the law (see Agamben, 1998; Esposito, 2012). Nothing less is at stake in the interpretive debates concerning jurisdiction (also Arendt, 1973, 265-302).

But why focus on territory? Because without attention to space, the apparently progressive step of extending jurisdiction is frustrated, as shown by *N.D.* Whatever relation is established between the authority and its subject, this is a spatial relation as well. A gaze where life is never placeless, and space never empty, supports a jurisdictional threshold that states will find more difficult to escape. This would include all those territorial operations where states purposefully avoid contact with the people who they want to control, for example by failing to rescue the victims of shipwrecks, or by redirecting migratory flows into terrains that are likely to stop them (De León, 2015; Slack et al. 2016). From this perspective, space is never a container,

but always a relation which affects law and is affected by it (Braverman et al. 2014; Valverde, 2015). Just like humanity is ultimately the relation between authority and life, territory is the symmetrical relation linking authority and space (Brighenti, 2006; Elden, 2009), and to improve the status of the former requires attention to the latter.

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