DIRECTORATE OF LEGAL ADVICE
AND PUBLIC INTERNATIONAL LAW

THE DIRECTOR
Please quote: DLAPIL02/2021_JP/DG

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 18 February 2021

LEGAL OPINION

Subject: The interpretation of the notion of "jurisdiction" in relation to article 14 of Convention 108+

I. Introduction

1. On 11 January 2021, Mr. Péter Kimpian from the Data Protection Unit requested a legal opinion from the Directorate of Legal Advice and Public International Law (DLAPIL) on the interpretation of the notion of *"jurisdiction"* in relation to article 14 of Convention 108+. This question was raised when the Secretariat presented to the Committee of Convention 108 its draft on the *"Interpretation of Provisions"*, dated 24 November 2020 (T-PD(2020)06rev). With regard to the notion of *"jurisdiction*", the draft relied on the interpretation the European Court of European Rights (ECtHR) had given when interpreting the same term in article 1 of the European Convention on Human Rights (ECHR). This interpretation of *"jurisdiction"* in article 14 of Convention 108+ was challenged by one delegation, *inter alia* because Convention 108+ is not limited to member States of the Council of Europe.

2. The following legal opinion addresses the questions raised. The opinion can only provide the view of DLAPIL. It cannot give an authentic interpretation of the relevant treaties, as only their parties are in a position to do so.

II. History of article 14 of Convention 108+

3. The *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108) was opened for signature on 28 January 1981 and entered into force on 1 October 1985. It has been ratified by the Council of Europe's 47 member

States. In addition, 8 non-members of the Council of Europe have acceded to the Convention.

4. Since October 2018 Protocol CETS No. 223 is open for signature. This protocol amends Convention 108 in order to adapt the Convention to new challenges for privacy and to strengthen its follow-up mechanism. Pursuant to its article 37 (1), (2) the protocol will enter into force once it has been ratified by all parties to Convention 108, or on 11 October 2023 if there are 38 parties to the Protocol at this date.

5. Article 14 of the amended Convention 108 (Convention 108+) governs the transborder flow of data. According to the Explanatory Report to Convention 108+ its aim is *"to facilitate the free flow of information regardless of frontiers (recalled in the preamble), while ensuring an appropriate protection with regard to the processing of personal data"*.[1] It uses the notion of *"jurisdiction"* in both its article 14 (1), which concerns transborder data flows between parties and in its article 14 (2), which governs data flows towards non-parties.

6. With regard to data flows between parties, article 14 (1) of Convention 108+ will replace article 12 of Convention 108, which did not contain the notion of *"jurisdiction"*. Instead, article 12 (2) of Convention 108 stipulated:

> "*A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going <u>to the territory</u> of another Party*" (emphasis added).

According to the Explanatory Report to Convention 108 *"[t]he rationale for this provision is that all Contracting States, having subscribed to the common core of data protection provisions set out in Chapter II, offer a certain minimum level of protection"* (Explanatory Report to Convention 108, para. 67).

7. Initially, Convention 108 did not contain any rules for transborder data flows towards non-parties.[2] This changed in 2004, when the 2001 Additional Protocol (ETS No. 181) entered

[1] Explanatory Report to Convention 108+, para. 102

[2] See Explanatory Report to the Additional Protocol, para. 22

into force. Its article 2 (1), which also for the first time mentions the notion of *"jurisdiction"* in the context of transborder data flows, stipulates:

> *"Each Party shall provide for the transfer of personal data to a recipient that is subject to the jurisdiction of a State or organisation that is not Party to the Convention only if that State or organisation ensures an adequate level of protection for the intended data transfer."* (emphasis added)

8. Against this background, the use of the term *"jurisdiction"* is only a novelty in article 14 (1), but not in article 14 (2) of Convention 108+. Considering that for data flows directed towards non-parties article 14 (2) of Convention 108+ will replace Article 2 (1) of the Additional Protocol, the term *"jurisdiction"* in article 14 (2) merely takes up the wording of the provision's predecessor. In contrast, for data flows between parties – currently governed by article 12 (2) of Convention 108 – article 14 (1) of Convention 108+ will replace the term *"territory"* with the notion of *"jurisdiction"*.

9. Like the Explanatory Report to the Additional Protocol before it, the Explanatory Report to Convention 108+ does not explain why Convention 108+ uses the term *"jurisdiction"* instead of *"territory"*. However, it should be noted that the change in terminology corresponds to a change with regard to the Convention's scope, which in contrast is explained in the Explanatory Report. While the territorial scope of Convention 108 was not explicitly addressed in its article 3, its article 1 linked the Convention's purpose to protect the right to privacy to *"the territory of each Party"*. In contrast, article 3 of Convention 108+ explicitly stipulates that *"[e]ach Party undertakes to apply this Convention to data processing subject to its jurisdiction […]"*. According to the Explanatory Report to Convention 108+ the use of the term *"jurisdiction"* was motivated by the *"objective of better standing the test of time and accommodating continual technological developments.*"

III. The notion of "jurisdiction" in other international treaties

1. General international law

10. In general international law the term *"jurisdiction"* usually describes *"the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural*

and juridical persons."[3] In this context it is common to distinguish *inter alia* between the power to establish rules (prescriptive jurisdiction) and the power to enforce these rules (enforcement jurisdiction).

11. Traditionally, a State has jurisdiction over all persons, property, and activities in its territory as well as over its nationals, wherever they may be located.[4] However, even within a State's own territory there may be limitations to its jurisdiction, like for example the immunity enjoyed by other States or international organisations.

12. Since the two traditional bases for jurisdiction – territory and nationality – are not deemed sufficient in all circumstances, States sometimes also rely on other grounds. One example are internet activities, where some States rely on variations of the so-called effects doctrine. Under this doctrine a State also has jurisdiction when the injurious effect occurs on its territory although the act or omission itself took place outside its territory.[5]

2. Article 1 European Convention of Human Rights

13. Pursuant to article 1 of the European Convention of Human Rights

> *"[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*

14. According to the ECtHR's case-law

> *"A State's jurisdictional competence under Article 1 is primarily territorial (see Soering, cited above, § 86; Banković and Others, cited above, §§ 61 and 67; and Ilaşcu and Others, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (see Ilaşcu and Others, cited above, § 312, and Assanidze v. Georgia [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (see Banković and Others, cited above, § 67)".*[6]

---

[3] Oxman 'Jurisdiction of States' Max Planck Encyclopedia of Public International Law (2007), para. 3

[4] Oxman, Jurisdiction of States, Max Planck Encyclopedia of Public International Law (2007), para. 11.

[5] *Ibid*, paras. 23, 32.

[6] ECtHR, Al Skeini and Others v. the United Kingdom (2011), no. 55721/07, para. 131.

15. While it would go beyond the scope of the present legal opinion to reproduce the ECtHR's detailed case-law on situations giving rise to extraterritorial jurisdiction, the two most important exceptions to the principle of territoriality should be mentioned:

> *"The two main criteria established by the Court in this regard are that of 'effective control' by the State over an area (spatial concept of jurisdiction) and that of 'State agent authority and control' over individuals (personal concept of jurisdiction) (see Al-Skeini and Others, cited above, §§ 133-40)".*[7]

3. Article 2 (1) International Covenant on Civil and Political Rights

16. Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that

> *"[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

17. When interpreting this provision, the International Court of Justice stated that *"while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory"* (ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports 136, para. 109).

18. The Human Rights Committee as the ICCPR's treaty body, the views of which should be ascribed great weight (ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo, 2010 ICJ Reports 639, para. 66), has further clarified the meaning of *"jurisdiction"*. According to this Committee's General Comment No. 31, jurisdiction is exercised when States have *"power or effective control"* over the individual concerned.[8]

---

[7] ECtHR, Georgia v. Russia II (2021), no. 38263/08, para. 115.

[8] CCPR, General Comment No. 31, para. 10.

19. While this interpretation was not accepted by all parties, it should be noted that the United States for example justified their objection to the ICCPR's extraterritorial application with the precise wording of Art. 2 (1) ICCPR. Thus, their objection did not concern the interpretation of *"jurisdiction"* as such but relied, instead, on the fact that the wording of Art. 2 (1) ICCPR uses *"jurisdiction"* and *"territory"* in conjunction.[9]

4. Interim conclusions

20. Sections 1-3 show that there is not one universally accepted meaning of *"jurisdiction"* in international law. Instead, there are at least two different concepts. Under the first concept, jurisdiction delimits and coordinates the power of States to prescribe and enforce rules in order to protect the independence and sovereign equality of States (section 1.). In contrast, the second concept relates to human rights law and defines under what circumstances States must protect the rights of individuals affected by their conduct (sections 2 and 3).[10]

21. Moreover, as illustrated by sections 2 and 3, even within the context of human rights law there is no agreement about the meaning of *"jurisdiction"*. While under Art. 2 (1) ICCPR there seems to be a general power or effective control test, the ECtHR has developed a very detailed case-law distinguishing between various situations.

IV. Interpretation of the notion of "jurisdiction" in Convention 108+

1. Interpretation of the notion of "jurisdiction" in article 14

22. Pursuant to the general rule of interpretation, which is reflected in article 31 (1) of the 1969 Vienna Convention on the Law of Treaties (VCLT), a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 31 (3) (c) VCLT reflects that rules of international law applicable in the relation between the parties must be considered together with the context. In accordance with article 32 VCLT recourse may also be had to

[9] See Observations by the United States of America on Human Rights Committee General Comment 31 (27.12.2007), para. 4.

[10] See Wenzel, Human Rights Treaties: Extraterritorial Application and Effects, Max Planck Encyclopedia of Public International Law (2007), para. 12.

supplementary means of interpretation such as the treaties *travaux préparatoires* or the circumstances of its conclusion.

23. The subject of the present legal opinion is the notion of *"jurisdiction"* in article 14 of Convention 108+, where it is used both in paragraph 1 and 2:

> *"1. A Party shall not, for the sole purpose of the protection of personal data, prohibit or subject to special authorisation the transfer of such data to a recipient who is subject to the jurisdiction of another Party to the Convention. Such a Party may, however, do so if there is a real and serious risk that the transfer to another Party, or from that other Party to a non-Party, would lead to circumventing the provisions of the Convention. A Party may also do so, if bound by harmonised rules of protection shared by States belonging to a regional international organisation.*
>
> *2. When the recipient is subject to the jurisdiction of a State or international organisation which is not Party to this Convention, the transfer of personal data may only take place where an appropriate level of protection based on the provisions of this Convention is secured.*

24. However, since interpretation must consider the context of a provision, it is important to note that article 3 (1) of Convention 108+ likewise uses the term *"jurisdiction"*. Pursuant to this provision, which defines the scope of Convention 108+,

> *"[e]ach Party undertakes to apply this Convention to data processing subject to its jurisdiction in the public and private sectors, thereby securing every individual's right to protection of his or her personal data."*

Against this background the term *"subject to the jurisdiction"* in article 14 (1) and (2) must be seen together with the Convention's scope of application. Article 14 permits transborder flows of personal data, but only if there is an appropriate level of protection. The requirements for establishing such an appropriate level of protection differ depending on which of the following two situations is at hand: Pursuant to article 14 (1) it is in principle not allowed to *"prohibit or subject to special authorisation the transfer of such data to a recipient who is subject to the jurisdiction of another Party"*, unless *"there is a*

real and serious risk that the transfer […] would lead to circumventing the provisions of the Convention". By contrast, article 14 (2) stipulates that in cases where "*the recipient is subject to the jurisdiction of a State or international organisation which is not Party to his Convention, the transfer of personal data may only take place where an appropriate level of protection based on the provisions of this Convention is secured*." This means that, in one case there is a presumption for and in the other case there is a presumption against an appropriate level of protection. The decisive criterion for determining which presumption applies is whether the recipient is *"subject to the jurisdiction"* of a party to the Convention or not. Since the wording *"subject to the jurisdiction"* is also used in article 3(1) to describe the scope of Convention 108+, it is actually the scope of the Convention, which article 14 uses as an indicator for whether there is an appropriate level of protection.

25. Consequently, the term *"jurisdiction"* in article 14 (1) and (2) of Convention 108+ should be interpreted in the same way as the identical term in article 3 (1) of Convention 108+. This result is confirmed by the drafting history of Convention 108+. As previously mentioned, a comparison with Convention 108 shows that the change in terminology from *"territory"* to *"jurisdiction"* in article 14 (1) of Convention 108+ occurred at the same time as the identical terminological change with regard to the Convention's scope (see section II).

2. Interpretation of "jurisdiction" in article 3 (1)

26. Convention 108+ and its Explanatory Report do not provide a definition for the term *"jurisdiction"*. In international law this term is usually understood as *"the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons"*.[11]

27. In line with the interpretation of *"jurisdiction"* by both the ICJ and the ECtHR (see section III.), *"jurisdiction"* under Convention 108+ primarily exists with regard to a Party's territory but is not limited to it. That *"jurisdiction"* cannot be seen as exclusively territorial is illustrated by the fact that international organisations, which under article 27 of Convention 108+ can also become parties, do not have a territory. Moreover, the

[11] Oxman, supra note 4, para. 3.

comparison with Convention 108 shows that the term *"territory"* was deliberately replaced with *"jurisdiction"* which confirms that both notions cannot be identical.

28. This raises the question under what circumstances *"jurisdiction"* can be extraterritorial and whether it is possible to rely on the ECtHR's case-law regarding article 1 ECHR (see section III.2). It has for example been argued that the term *"jurisdiction"* would *"align the geographical scope of Convention 108 to that of the European Convention on Human Rights (more specifically its Article 8).*"[12] From the perspective of treaty law this position could be justified with the argument, that – as reflected in article 31 (3) (c) VCLT – the interpretation of the term *"jurisdiction"* must also take into account other rules of international law applicable in the relation between the parties. For the parties to the ECHR this could include the right to privacy under article 8 ECHR, whose scope is determined by article 1 ECHR.

29. However, upon closer inspection, article 8 ECHR will not be applicable in the relations between all parties. Unlike the ECHR, Convention 108+ is not only open to members of the Council of Europe but strives for accession by non-European States. This is demonstrated *inter alia* by its article 27, which stipulates the conditions for accession by non-member States of the Council of Europe and international organisations. In fact, already the Conventions preamble makes clear that it is not limited to the European region but intends *"to promote at the global level the fundamental values of respect for privacy and protection of personal data.*" Considering this global ambition, it would seem problematic to interpret *"jurisdiction"* in light of case-law relating to a treaty which not all parties to Convention 108+ have ratified.

30. Moreover, it should be noted that the ECtHR's interpretation of the term *"jurisdiction"* is not identical to that of other international bodies (see section III). Therefore, interpreting the term in line with the ECtHR's case-law would also be at odds with the drafters' intentions to avoid limiting the appeal of Convention 108+ outside the Council of Europe. These efforts were already reflected in the text of Convention 108. One example is the Convention's title, where the drafters deliberately avoided using the adjective "*European"*

[12] C. de Terwange 'The work of revision of the Council of Europe Convention 108 for the protection of individuals as regards the automatic processing of personal data' 28 International Review of Law, Computers & Technology (2014) 118, at 120.

with a view to emphasising that the Convention can also be acceded by non-European States.[13]

31. Tying the term *"jurisdiction"* to the ECtHR's case-law also seems inconsistent with the fact that – in line with the drafters' global ambitions – the object and purpose avoids direct references to the ECHR. Article 1 of Convention 108+ stipulates that "*[t]he purpose of this Convention is to protect every individual, whatever his or her nationality or residence, with regard to the processing of their personal data, thereby contributing to respect for his or her human rights and fundamental freedoms, and in particular the right to privacy.*" Thus, unlike for example the preamble of the European Convention on Nationality (ETS No. 166) the text refers to "*human rights and fundamental freedoms"* in general and not specifically to those of the ECHR.

32. The Convention's object and purpose further shows that the interpretation of the term "*jurisdiction"* does not necessarily have to be identical to that of the same notion in article 2 (1) ICCPR. After all, the Convention's primary objective is to *"protect every individual, whatever his or her nationality or residence, with regard to the processing of their personal data.*" While this objective contributes to respect for the right to privacy, it cannot simply be equated with it.

33. Considering the Convention's primary objective to provide for comprehensive data protection, the decisive criterion for *"jurisdiction"* under article 3 (1) of Convention 108+ is whether the party has effective jurisdiction in data protection matters. Under article 3 (1) of Convention 108+ each party undertakes to apply the Convention to data processing in the public and private sectors when it has the power to prescribe and enforce the relevant rules. Defining "*jurisdiction*" by reference to the power to prescribe and enforce is confirmed by the context of article 3 (1) of Convention 108+. Since article 4 (1) of Convention 108+ requires all parties to "*take the necessary measures in its law to give effect to the provisions of the Convention and secure their effective application*", it makes sense for article 3 (1) of Convention 108+ to limit the Convention's scope to situations where they actually have the power to do so.

[13] See Explanatory Report to Convention 108, para. 24.

34. As a rule, any such exercise of jurisdiction, be it the competence to prescribe or to enforce, should be lawful under public international law. This is in line with the ordinary meaning of "*jurisdiction"* as *"the lawful power of a State to define and enforce the rights and duties.*"[14] On the other hand, Convention 108 is not concerned with the question who exercises lawfully sovereignty over a certain territory, but with the effectiveness of the data protection regime applicable to the processing of personal data in a given context. The exercise of jurisdiction over data processing is in any case not always territorial, as the examples of international organisations or the extraterritorial application of domestic or EU law show. Territoriality is anyway a contested juridical concept when it comes to data regulation by law,[15] which is probably one of the reasons why its use was abandoned during the revision of Convention 108 (see paragraph 6 above).

35. Consequently, it must be concluded that the term *"jurisdiction"* in both articles 3 and 14 of Convention 108+ does not incorporate the ECtHR's case-law, but rather encompasses all situations in which a party has the lawful power to effectively legislate and enforce rules relating to the processing of personal data.

[14] Compare the usual meaning of 'jurisdiction' according to Oxman 'Jurisdiction of States' Max Planck Encyclopedias of International Law (2007), para. 3.

[15] See D.J.B. Svantesson *Solving the Internet Jurisdiction Puzzle* (Oxford University Press 2017) Chapter 2.