Opinion

The "Legal Space" or *"Espace Juridique"* of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?

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This opinion considers the idea that although the ECHR applies to a Contracting State extratewitorially, this is only if the State is acting in the "legal space" or "espace juridique" of *the Convention,* i.e. *within the territoy of another Contracting State. It is argued that such an idea is not supported* by *Strasbourg case law and the extraterritorial applicability of the ECHR does not differ according to whether or not the territorial* locus *concerned forms part of the territory of a Contracting State to the Convention.*

Obligations under the European Convention on Human Rights ("ECHR") do not operate in a free-standing sense, simply in relation to the acts or omissions of states parties wherever they occur. Rather, state responsibility is engaged only if the situation in question falls within the state's "jurisdiction".[1] It is clear that "jurisdiction" covers the state's own territory; less clear are the precise circumstances in which it subsists extraterritorially. No definition of the term is given in the ECHR, and the extraterritorial meaning of the term has been discussed in relatively few cases.[2] Nonetheless, from these cases it is possible to discern the broad contours of a definition. Extraterritorial

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[1] Art.1 ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950, ETS No.5, entered into force September 3, 1953).

[2] See *e.g. Cyprus v Turkey* (2002) 35 E.H.R.R. 30 (hereinafter *"Cyprus v Turkey"*); *Loizidou v Turkey (Preliminary Objections)* A/310: (1995) 20 E.H.R.R. 99 (hereinafter *"Loizidou (Preliminary Objections)"*); *Loizidou v Turkey (Merits)* (1997) 23 E.H.R.R. 513 (hereinafter *"Loizidou (Merits)"*); *Banković v Belgium and 16 Other Contracting States* (2001) 11 B.H.R.C. 435 (hereinafter *"Banković"*); *Ocalan v Turkey* (2000) 30 E.H.R.R. CD231; *Ocalan v Turkey (Merits)* (2003) 37 E.H.R.R. 10 (hereinafter *"Ocalan (Merits)"*); *Ilascu v Moldova and Russia* (2004) 17 B.H.R.C. 141; *Issa v Turkey (Merits)* (App. No.31821/96), judgment of November 16, 2004, available at *www.echr.coe.int* (hereinafter *"Issa (Merits)"*); *WM v Denmark* (1992) 15 E.H.R.R. CD28 (hereinafter *"WM"*).

jurisdiction subsists when the state exercises control or authority over either territory —what might be termed the *spatial* basis for jurisdiction-or individuals—what might be termed the *personal* basis for jurisdiction.

Even when such control exists, however, it is suggested by some that the Convention itself may not apply at all if the territorial *locus* at issue does not fall within the overall territory of ECHR contracting states. In a letter written in response to a parliamentary question submitted by a UK Parliamentarian, UK Armed Forces Minister, Adam Ingram stated that:

> "[Tlhe European Convention on Human Rights is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces."[3]

Assuming that Minister Ingram is using the term "signatory" to refer to a state that has signed and ratified the Convention, this passage suggests that a particular action taken by one contracting state in the territory of another state would not be governed by the Convention obligations of the first state, if the second state is not also a party to the Convention. Under this view, although the concept of "jurisdiction" under the ECHR is not limited to a state's own territory, the very applicability of the treaty itself is limited to the overall territory of contracting states. So states acting outside the territorial space of the ECHR are not bound by their obligations in that instrument, even if they are exercising effective control over territory and/or individuals. This would be a severe limitation as far as the ECHR is concerned, since most of the worlds states, including some of the key sites of extraterritorial action by Western European states—most notably the UK military presence in Iraq—fall outside the "legal space" of the ECHR.

Is the Armed Forces Minister right? Is the ECHR inapplicable to states parties' acts or omissions outside the territory of Convention parties?

The possibility of making such an argument exists because of a dictum by the European Court of Human Rights in the *Banković* case concerning the NATO bombing of what was then called the Federal Republic of Yugoslavia (FRY) in 1999. In that case, the Court stated that the ECHR applies:

> "... in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States... The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[4]

It is clear that this dictum does not support some of the assertions made by the Minister. Although his remark about the "design" of the Convention echoes the phrase used by the Court, his remark that the Convention was not "intended" to cover the activities of a contracting party in the territory of a non-contracting party

[3] Rt Hon. Adam Ingram M.P., Ministry of Defence, Letter to Adam Price M.P., April 7, 2004.
[4] *Banković*, n.2 above, at [80].

finds no counterpart. The Court states that the Convention operates "essentially in a regional context"—the word "context" hardly a clear reference to a territorial area (it could equally refer to a regional grouping of states, irrespective of where they act)—and "notably in the legal space *(espace juridique)* of the Contracting states"—a clear reference to a territorial area, but not one, because of the word "notably", that necessarily means that the Convention applies *only* in this area. Despite the Minister's unequivocal assertion, then, neither of these particular remarks in *Banković* necessarily excludes the application of the Convention to the activities of Member States outside the territory of the Council of Europe.

But what of the Court's comment that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States"? Even if the other remarks in that passage are not helpful either way, does this not suggest a general approach in favour of the Minister's assertion? Such a comment could indeed mean that in all circumstances, the Convention does not apply to the actions of contracting parties outside the legal space of the Council of Europe.

In the first place, it is notable that the Court refers to what the Convention "was not designed" for. This is necessarily a historical comment; certainly, it is concerned with the original wishes of the framers—though, it must be said, without any supporting evidence—but by itself it says nothing about whether this supposed intent is determinative more than 50 years after the Convention was enacted. The Strasbourg organs have been consistently willing to interpret the Convention as a "living instrument"; creating the possibility that obligations can be understood in a manner not necessarily foreseen by the drafters.

In order to consider whether this supposed original intent is relevant now, we need to clarify how exactly the Court applied it to the facts in *Banković,* the extent to which that application was determinative of the outcome in the case, and more broadly whether the existence of a current limitation along these lines is compatible with other Strasbourg cases.

As for *Banković,* the case concerned the "spatial" basis for extraterritorial jurisdiction: whether the NATO bombing campaign constituted an exercise of effective control over FRY territory so as to bring it within the "jurisdiction" of the respondent states. One of the applicants' submissions invoked the earlier *Cyprus v Turkey* case concerning the exercise of control over northern Cyprus (part of Cyprus, a contracting state) by Turkey (another contracting state). In that case, the Court held that it:

> " . . . must have regard to the special character of the Convention as an instrument of European public order (*ordre public)* for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, 'to ensure the observance of the engagements undertaken by the High Contracting Parties' . . . having regard to the applicant Government's continuing inability to exercise their Convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's

[5] *Tyrer v United Kingdom* (1979–80) *2* E.H.R.R. 1 at [31]; *Loizidou (Preliminary Objections),* n.2 above, at [71]; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at [101]. ***See*** also D.J. Harris, Michael O'Boyle & Colin Warbrick, *Law* of *the European Convention* of *Human Rights* (Butterworths, London, 1995), pp.7–9.

> fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court."[6]

As one part of their argument that the NATO bombing constituted the exercise of effective territorial control, the applicants in *Banković* suggested that if the Court concluded in the negative on this point, this would "leave a regrettable vacuum in the Convention system of human rights protection", and would therefore raise the same concern highlighted by the Court in *Cyprus v Turkey*. The Court responded by emphasising that in *Cyprus v Turkey* it was concerned with the specific type of vacuum created where a population resides in a state that is a party to the Convention—and has therefore already been granted rights under it—but the state is unable to secure those rights because the territory is occupied by another Convention state. The Court asserted that this type of vacuum was "entirely different" to the vacuum being suggested by the applicants in *Banković*,[7] presumably because the FRY was not a Convention state. It then made its "legal space" remark

> "In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space *(espacejuridique)* of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."[8]

This consideration of the "vacuum" submission and invocation of the "legal space" doctrine came *after* the Court had already reached a conclusion rendering the case inadmissible, having earlier concluded that the nature of the air strikes by NATO states in the then FRY did not render this territory under the jurisdiction of the states concerned as far as the exercise of effective control was concerned. In principle, the nature of the submission was such that it had the potential to affect all other findings, something perhaps reflected in the way the Court designated it as a distinct argument and one that operated "more generally". However, the fact that the Court only addressed such a general consideration after already disposing of the earlier submissions without considering it, suggests that it did not play a key part of the outcome of the case.[9]

Of course, even if the Court's observations here can be considered in some sense *obiter*, they are an indication of the Court's views on the issue, and we must therefore consider what exactly they amount to even if they do not have strict precedential value.

The first point to make is that the Court's consideration of the original "design" of the Convention, although reading like a general doctrine, is invoked in the specific context of a submission concerned with an underlying reason for applying the

[6] *Cyprus v Turkey*, n.2 above, at [78].
[7] *Banković*, n.2 above, at [80].
[8] *Banković*, n.2 above, at [80] (footnote omitted).
[9] See *Banković*, n.2 above, at [75].

Convention extraterritorially—the avoidance of a vacuum in protection. Moreover, its application in the case is only by way of explaining why, so *far,* this particular underlying reason has been relied upon in the case law in favour of establishing jurisdiction only in relation to actions within the Council of Europe. This is not quite the same thing as saying that the "legal space" idea *prevented* this particular vacuum concern from being capable of establishing jurisdiction in relation to actions outside the Council of Europe. Given the use of the word "accordingly", the most one can conclude is that the Court is pointing out that the current circumstances in which the vacuum concern has been invoked are on all fours with an idea of the original intent of the Convention.

The comment is limited to a historical analysis of the Court's case law, and does not by itself rule out the possibility of a different finding in future cases. To be sure, the Court decided not to take such a step in *Banković,* but in failing to do so having simply explained that it has not done so in the past, in a manner in accordance with some idea of the original design of the Convention, it is hardly giving a clear indication that it is *prevented* from doing *so.*

Moreover, the Court is invoking the "legal space" idea only in relation to the possibility of being able to *rely on one particular underlying reason* for establishing extraterritorial jurisdiction. This is not the same thing as being able to found extraterritorial jurisdiction itself. This reflects the way in which the legal space concern was treated by the Court in *Cyprus v Turkey.* In that case, the Court affirmed its earlier finding in the *Loizidou* case on the same issue—whether Turkey's presence in Northern Cyprus constituted an exercise of jurisdiction for the purposes of the Convention. In *Loizidou,* the Court held that the:

> " . . . responsibility of a Contracting Party could also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. . ."[10]

Crucially, nothing in *this* finding of extraterritorial jurisdiction based on effective control hinges on the presence or absence of a vacuum in protection within the Council of Europe; obligation derives simply from the "fact" of "control". In *Cyprus v Turkey,* the Court affirmed this determination" and *then* turned to the particular vacuum issue, holding that "any other finding" would give rise to this vacuum. Here, then, the Court is giving a reason why a finding *it has already made* serves an important policy objective. This is *not* the same as suggesting that the necessity of realising such a policy objective *has* to be present before such a finding can be made. In other words, the Court is remarking that in the particular facts of this case, founding jurisdiction on the basis of effective control over territory serves a particular policy objective; it is not asserting that this particular policy need has to be an issue before the exercise of jurisdiction can be found.

[10] *Loizidou (Merits),* n.2 above, at [52].
[11] *Cyprus v Turkey,* n.2 above, at [76].

However, in December 2004, the English High Court concluded in the Al Skeini case that it *was* necessary to establish this particular underlying reason—avoiding a vacuum in protection within the Council of Europe when one contracting state acts in another—in order for extraterritorial jurisdiction to exist on the basis of effective control over territory.[12] The High Court acknowledged the findings in *Loizidou* and Cyprus v Turkey, observing that in the light of these cases:

> "...it might have been possible to say that, because Turkey's same argument had been dealt with in... Loizidou ... without the benefit of the additional reasoning found in... Cyprus *v* Turkey..., therefore one could pick and choose between the two analyses."[13]

The first thing to say about this is that, as mentioned earlier, there are not two "analyses" here in the sense of two alternative legal tests—the additional factor was discussed in Cyprus v Turkey only in terms of a good reason for a decision it has already come to; the cases are identical in terms of the actual test they adopt for jurisdiction on the basis of effective control, viz. simply the fact of such control.

Be that as it may, for the High Court what is "critical" was how the additional factor considered in Cyprus v Turkey was then treated the later case of *Banković*.[14] This treatment changed everything: although in Bankovic' the vacuum consideration was "raised by the applicants... in a form designed to assist themselves"—i.e. as a good policy reason for finding the exercise of jurisdiction—it was "turned against them by the [European] Court for its true *import*",[15] the true import being that actually it was a *requirement* for jurisdiction to subsist. What explanation does the High Court give for this assertion of a "true import"? It simply invokes the "legal space" comment from the Bankovic' case mentioned earlier.

However, as I have suggested, the passage from *Banković* does not actually support this conclusion. The European Court's comments, which did not seem to be determinative of the outcome of the case, concern an idea—the "legal space"—conceived only in terms of the original "design" of the Convention, invoked only by way of explaining how a certain line of cases have come about, without clearly stating that it would prevent other cases that did not fit with the idea, and only discussed in relation to one particular good reason for a finding of extraterritorial jurisdiction, not whether extraterritorial jurisdiction itself exists, either generally or on the basis of effective control.

In sum, a careful consideration of the Court's *dictum* in *Bankovic'* leads to the conclusion that the Court did not hold that the European Convention does not apply to Member States outside the Council of Europe, either generally or, as the High Court held in *Al* Skeini, in cases involving effective control over territory.

This conclusion is reinforced by other Strasbourg jurisprudence. The WM case decided before Bankovié found the exercise of jurisdiction by Denmark acting in what was then East Berlin, at that stage outside the legal space of the Convention,[16] and as

[12] *R. (on the application of Ai-Chini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); *The Times*, December *20*, 2004 (hereinafter *"Al Skeini")*, at [276]–[277].
[13] *ibid.* at [276].
[14] *ibid.*
[15] *ibid.*, emphasis added.
[16] WM, n.2 above.

we have seen in *Loizidou* and *Cyprus and Turkey,* in cases where the exercise of jurisdiction was found by states acting *within* other contracting states, the fact that the action took place within the territory of a contracting state was never invoked by the Court as a prerequisite for the exercise of jurisdiction.

Moreover, cases since *Banković* have also found the exercise of jurisdiction by states acting outside the Council of Europe. A case involving jurisdiction conceived in a "personal" sense would be *Ocalan,* where Court held that the actions of Turkish agents in relation to the alleged abduction of Abdullah Ocalan in Kenya—not a Convention state—took place within Turkish "jurisdiction".[17] A case affirming the possibility of jurisdiction conceived in a "spatial" sense operating outside ECHR contracting states is that of *Issa,* again against Turkey, this time in relation to its actions in northern Iraq—the very state at issue in **Al** *Skeini.* At the merits stage, the Court stated that it:

> " . . . does not exclude the possibility that, as a consequence of this military action, the respondent State [Turkey] could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States)."[18]

As the High Court stated in **Al** *Skeini,* this suggests that the "effective control of an area doctrine is essentially a territorial doctrine".[19] Given its conclusion as to the meaning of the *Banković* dictum, for the High Court the finding in *Issa* was at odds with that earlier dictum: "the doctrine that there is any difference between the *espace juridique* of the Convention and any other space anywhere in the world" had been "entirely sidelined.[20] The High Court faced a choice, then, between two supposedly different positions. It opted for its view of the *Banković* position, by dismissing the *Issa* dictum in three different ways.

In the first place, it called into question the European Court's motivation for making the comment. In *Issa,* the European Court considered both *spatial* and *personal* bases for jurisdiction, on the latter, concluding on the facts that the alleged human rights violations in question could not be imputed to Turkish soldiers.[21] In the light of this finding on the *personal* basis for jurisdiction, the Divisional Court viewed the European Court's decision to consider also the *spatial* basis for jurisdiction as taking it "out of its way" to an issue "it could have avoided".[22] The Divisional Court puzzled that it is "not plain" why the European Court did this—presumably meaning that there was no obvious purpose for doing so in terms of the reasoning of the judgment—and because of its puzzlement, offered its own conjectural reason: the European Court "was

[17] *Ocalan (Merits),* n.2 above, at [93].
[18] *Issa (Merits),* n.2 above, at [74]. See also *Issa v Turkey* **(App.** No.31821/96), decision of May 30, 2000, available at *www.echr.coe.int.*
[19] ***Al*** *Skeini,* n.12 above, at [219].
[20] *ibid.* at [219].
[21] *Issa* at [76]–[81].
[22] **Al** *Skeini* at [205].

conscious that claims arising out of the 2003 invasion of Iraq might in due course need consideration".[23]

Here, then, we have the suggestion that the European Court is making a statement it did not need to make for the purposes of judging the case before it, and the speculation that this was motivated by a desire to stake out a position on the applicability of the ECHR to Iraq for wider consumption.

The problem with this comment, which of course undermines the significance of the dictum as far as the case is concerned, is that it misperceives the relationship between the factual tests under the *spatial* and *individual* headings of jurisdiction, as far as state responsibility is concerned. The Divisional Court seems to assume that because the factual test for responsibility under the *personal* heading was not met—the violations could not be imputed to Turkish soldiers—responsibility could not be founded under the *spatial* heading. However, the test under the latter heading, unlike that under the former, does not require that the particular acts or omissions giving rise to the alleged violation to be those of agents of the state or actors acting on behalf of it: the key thing here, is that they take place within territory that is under the overall control of the state. In the *Cyprus v Turkey* case, which concerned, *inter alia,* complaints in relation to the actions of the local Turkish Cypriot authorities, as opposed to the Turkish troops occupying Northern Cyprus, in finding Turkey responsible for those actions, the Court stated that:

> "[I]t is not necessary to determine whether. . . Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus. . . that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' . . . Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention.. . Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."[24]

It follows, then, that in *Issa* the Court was *not* able to dispose of the case merely through its finding on the facts in relation to the *personal* heading **of** jurisdiction; although the same sets of facts were of course being considered in relation to both headings of jurisdiction, this consideration operated differently as between the two, and a negative finding under one heading would not necessarily rule out a positive finding under the other.

Turning to the Divisional Court's second basis for dismissing the *Issa* dictum, here the focus was on the European Court's finding on the existence of jurisdiction in the *spatial* category. For the Divisional Court, because the European Court held on the facts that Turkey did not exercise the necessary control over the area to meet the jurisdictional test, it followed that the Court's dictum that, if this test was met, the Convention would apply (and that the extraterritorial application of the Convention

[23] *ibid.*

[24] *Loizidou (Merits)* (above n.2) [56] and *Loizidou (Preliminary Objections)* case (above n.2) at [63] and [64].

under the *spatial* heading was not therefore limited to Council of Europe territories) was "on any view *obiter.*"[25]

This is a bizarre finding: the European Court needed to affirm the relevance of the legal test before applying it—it would make no sense to consider whether Turkey exercised effective control over the area of territory in Iraq if a supposed *espace juridique* limitation would in any case bar the applicability of the Convention—moreover, a Court not finding a legal test met on the facts does not necessarily render the Court's statement on the meaning of that test *obiter:* what is crucial is whether the finding is determinative of the outcome of the case. If it is, then the Court's articulation of the legal principle being applied forms the heart of the case. **As** we have seen, because the *spatial* and *personal* bases of jurisdiction are separate, and a finding of one can be made without a finding of the other, it follows that *both* findings in this case determined its outcome. In consequence, the Court's statement of the legal principle it applied in considering the *spatial* basis for jurisdiction forms part of the reasoning of the case, and is not *obiter.*

Indeed, it is remarkable that the Divisional Court made this observation, given the questionable juridical significance of the *Bankovic'* dictum in determining the outcome of that case. However, the High Court offered a third ground for dismissing the *Issa* dictum:

> " . . . in our judgment the dicta in *Issa* . . . are inconsistent with *Bankovic* and the development of the Strasbourg jurisprudence in the years immediately before *Bankovic.* In a sense *Issa* seems to us to look back to an earlier period of the jurisprudence, which has subsequently made way for a more limited interpretation of Article 1 jurisdiction. It may well be that there is more than one school of thought at Strasbourg; and that there is an understandable concern that modern events in Iraq should not be put entirely beyond the scope of the Convention: but at present we would see the dominant school as that reflected in the judgment in *Bankovic* and it is to that school that we think we owe a duty."[26]

Thus the High Court drops the notion of precedent in favour of an idea of what it considers to be the "dominant" approach within Strasbourg jurisprudence as a whole, following this approach even if flatly contradicted by the most recent case on the issue. Setting aside the problematic nature of this line of reasoning, what is certainly worth considering is the fact that *Issa* is only a Chamber decision whereas *Bankovic'* was a judgment of the Grand Chamber.

None of this is ultimately relevant, however, since the issue of resolving a conflict between *Issa* and *Bankovic'* only arises if the High Court was correct in its finding on *Banković,* which, it is argued, it was not. The correct reading of *Bankovic'* should lead to the conclusion that there is no "legal space" restriction; the later finding by the Court in *Issa* is therefore in harmony with this earlier decision, something which the Court itself affirmed in *Issa.* There is no contradiction, and so no choice to be made, let alone a choice made on the questionable grounds adopted by the High Court in ***Al*** *Skeini.*

[25] ***Al*** *Skeini* **at** [202].
[26] ***ibid.*** at [265].

It will be recalled that in *Banković* the Court said that:

> "The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."

What we see from post-*Banković* cases like *Öcalan* and *Issa* is that, in tune with the notion that the Convention is a "living instrument", this idea of the original design of the Convention—whatever its truth in terms of the intentions of the drafters—has given way to the notion that the Convention does apply to the actions of Member States outside the Council of Europe, and on the basis of control exercised over either individuals or territory.

The English High Court's mistaken reading of *Banković* in relation to jurisdiction founded on the exercise of control over territory in the *Al* Skeini case creates the strong possibility that its finding will not survive challenges to higher English courts and/or the European Court of Human Rights. As things currently stand, the "legal space" notion is of doubtful significance in operating as a limitation on the extraterritorial application of the ECHR, but it is clearly something that certain states—notably the United Kingdom—will attempt to invoke in order to achieve this effect.