

STEERING COMMITTEE FOR HUMAN RIGHTS /
COMITE DIRECTEUR POUR LES DROITS DE L'HOMME
(CDDH)

COMMITTEE OF EXPERTS ON THE SYSTEM OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS /
COMITE D'EXPERTS SUR LE SYSTEME DE LA
CONVENTION EUROPEENNE DES DROITS DE L'HOMME
(DH-SYSC)

DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER /
GROUPE DE REDACTION SUR LA PLACE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME
DANS L'ORDRE JURIDIQUE EUROPEEN ET INTERNATIONAL (DH-SYSC-II)

Notes of the presentation on Theme 1, sub-theme ii – State responsibility and extraterritorial application of the Convention

Notes de la présentation sur le Thème 1, sous-thème ii – Responsabilité des États et extraterritorialité de la Convention

submitted by / soumise par Prof. R. Lawson, University of Leiden (Netherlands) / Université de Leyde (Pays-Bas)

(available in English only / disponible en anglais uniquement)

State responsibility and extraterritorial application of the ECHR

Prof. Rick Lawson

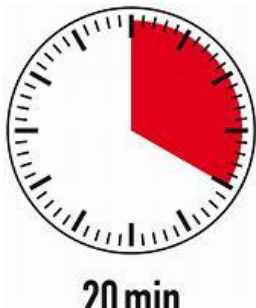
DH-SYSC-II – Strasbourg, 3 April 2018



**Universiteit
Leiden**
The Netherlands

Proposed structure

- preliminary remarks
- State responsibility under the ECHR
(→attribution)
- extraterritorial application of the ECHR



Concern: confusion and conflict

conflicting obligations under international law

- cf. *Soering v. UK* (1989) – extradition treaty v. ECHR
- Court tends to avoid conflicts:
 - *Waite & Kennedy v. FRG* (1999) – immunity of IO's
 - *Al-Adsani v. UK* (2001) – State immunity
 - *Bosphorus v. Ireland* (2005) – implementation EU law
 - *Avotiņš v. Latvia* (2016) – implementation EU law

confusion

- diminished predictability
- introduction of new obligations

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HUMAN RIGHTS



Problems arising from the co-existence of
the United Nations Covenants on Human Rights
and the European Convention on Human Rights

Differences as regards the Rights Guaranteed

Report of the Committee of Experts on Human Rights
to the Committee of Ministers

Problems arising from the
co-existence of the UN
Covenants and the ECHR
(1970; work started 1968)

comparison with specific
text: the UN Covenants

no case-law of the Court

Strasbourg, September 1970

Confusion and conflict: questions

1. confusion & conflict: real manifestations or rather a possibility?
2. if real manifestation: mere technicality or significant impact on outcome?
3. if significant impact: consensus among HCP that outcome is undesirable?
4. and what about judicial dialogue?

Jurisdiction & attribution



Court: usually first ‘jurisdiction’

but attribution defines relevant acts, which define ‘jurisdiction’

Article 2 ARSIWA:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is **attributable** to the State under international law; and
- (b) constitutes a breach of **an international obligation** of the State

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→ “secure to everyone within their **jurisdiction** the **rights and freedoms** defined in Section I of this Convention”

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- “secure to everyone within their **jurisdiction** the **rights and freedoms** defined in Section I of this Convention”

ARSIWA applicable at all?

Two elements in Draft Report

- § 39: appropriate framework? (argument: Article 33(2) – invocation of responsibility by States)
- § 67: “ECtHR has taken a rather varied and uneven approach”

Proposition: at least the attribution rules of ARSIWA *are* applicable

- Article 33 ARSIWA is meant to define the scope of obligations “set out in this Part”, i.e. Part Two – Content of the International Responsibility of a State
- Part One never limited to inter-State obligations
- at any rate ECHR consists of inter-State obligations

Attribution

no issue in overwhelming majority of cases

discussion to focus on:

(a) conduct of private individuals / non-state entities (“TRNC”, “MRT”)

(b) conduct of more than one State

Attribution (2)

(a) conduct of private individuals / entities

- in general: no issue
leading case: *Osman v. UK* (1998)
positive obligations, not attribution
“reasonable and appropriate measures”
- non-state entities (“TRNC”, “MRT”)
 - *Loizidou v. Turkey* (1996) – referred to in ARSIWA
 - “MRT” cases: *Ilaşcu* (2004), *Catan* (2012), *Mozer* (2016) – “controversial” (§ 25 Draft Report)

Attribution (3)

“MRT” cases (3 x GC) – “controversial”?

§ 49 Draft Report: “The **criteria used by the Court** in this context, in particular those of “decisive influence” and “surviving by virtue of the military, economic, financial and political support” **appear to depart from, and set a significantly lower threshold than, the “direction or control” criterion used by the ILC**”.

But see ILC Commentary on Article 8 ARSIWA (after reference to differences between *Nicaragua* and *Tadić* cases): “In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State”

Attribution (4)

(b) conduct of more than one State

- in general: no issue
 - *Drozd and Janousek v. France and Spain* (1992)
 - *Rantsev v. Cyprus and Russia* (2010)
- extraordinary rendition cases – “controversial”
 - *El-Masri v. FYROM* (2012)
 - *Al-Nashiri v. Poland* (2014)
 - *Nasr and Ghali v. Italy* (2016)

Attribution (5)

extraordinary rendition cases

- § 53 Draft Report: “controversial”
- § 65: “... the ECtHR does not appear to have followed the approach of the ARSIWA ...”
- § 67: “the Court has sought *de facto* to create on a case-by-case basis its own *lex specialis* regime of State responsibility under the Convention, whilst claiming at the same time that it follows the rules of general international law”

Attribution (6) – *El-Masri*

Facts established by ECtHR: FYROM officials directly involved in arrest and detention of El-Masri; deliberate decision to hand over to CIA; Macedonian state agents present when CIA officials assume control over and ill-treat El-Masri

“206. The Court must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, **the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilașcu* ... § 318)**”.

Attribution (7) – *El-Masri*

ECtHR in *Ilascu*:

“318. In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention (see *Cyprus v. Turkey*, cited above, § 81). That is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community”.

So in *Ilascu* § 318 no attribution of conduct of individuals to the State!

Attribution (8) – *El-Masri*

Back to *El-Masri*:

“198. The obligation on Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). The State’s responsibility may therefore be engaged where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known (see *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III)”.

Attribution (9) – *El-Masri*

211. The Court notes that the above-mentioned measures were used in combination and with premeditation, the aim being to cause severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant (see ...). In the Court's view, such treatment amounted to torture in breach of Article 3 of the Convention. **The respondent State must be considered directly responsible** for the violation of the applicant's rights under this head, **since its agents actively facilitated the treatment and then failed to take any measures** that might have been necessary in the circumstances of the case to prevent it from occurring (see *Z and Others v. the United Kingdom*, cited above; *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII; and *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, §§ 124 and 125, 3 May 2007).

Attribution (10) – *El-Masri*

212. ... there is **no question of** adjudicating on or **establishing the responsibility of the receiving country**, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is **liability incurred by the sending Contracting State** by reason of its having taken action which has as a direct consequence the exposure of an individual to ill-treatment (see *Soering*....)

So no attribution of the
conduct of CIA agents to
FYROM!

220. In such circumstances, the Court considers that by transferring the applicant into the custody of the US authorities, **the Macedonian authorities** knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention.

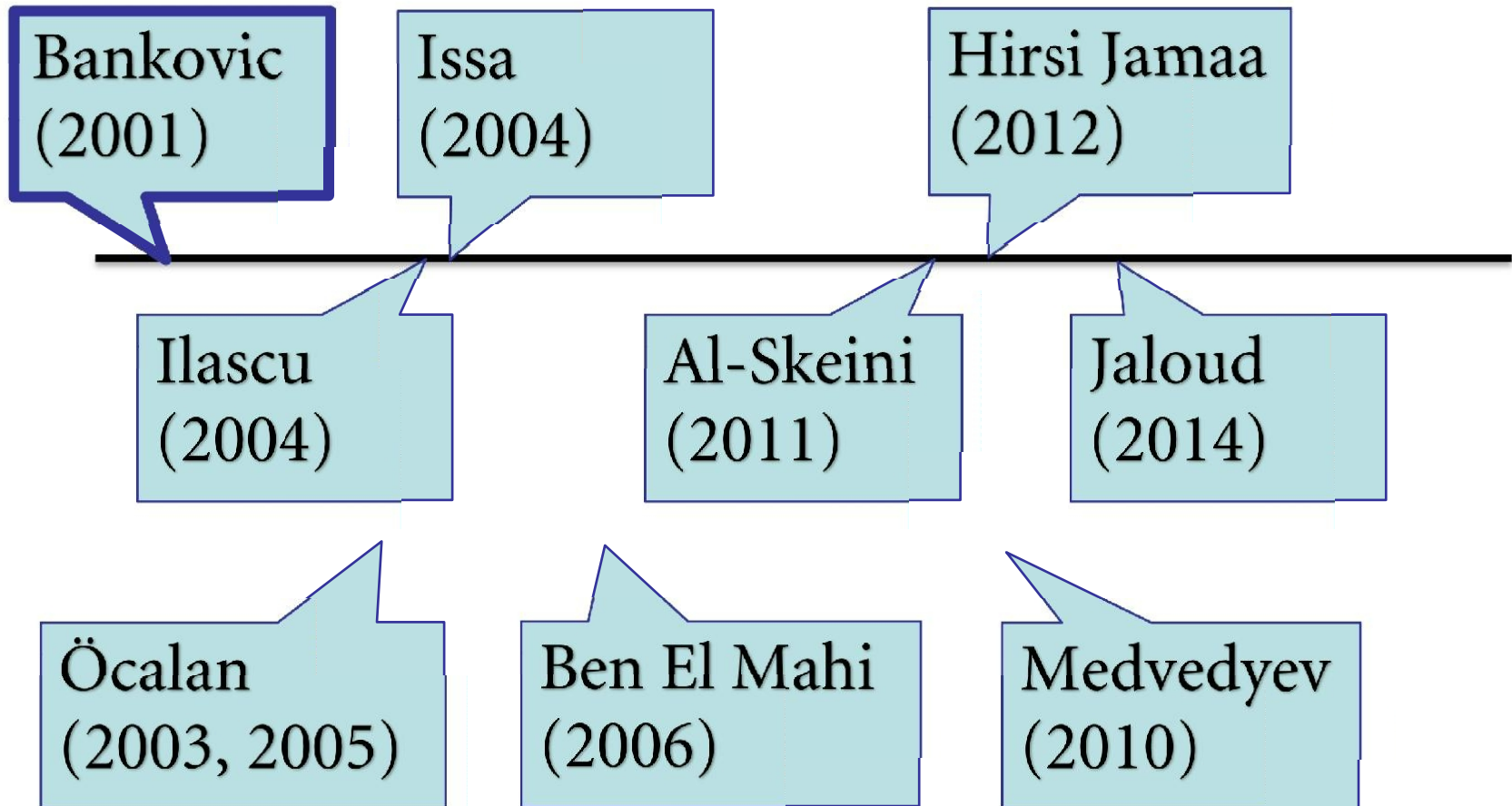
Attribution (11) – *El-Masri*

Re-read § 206:

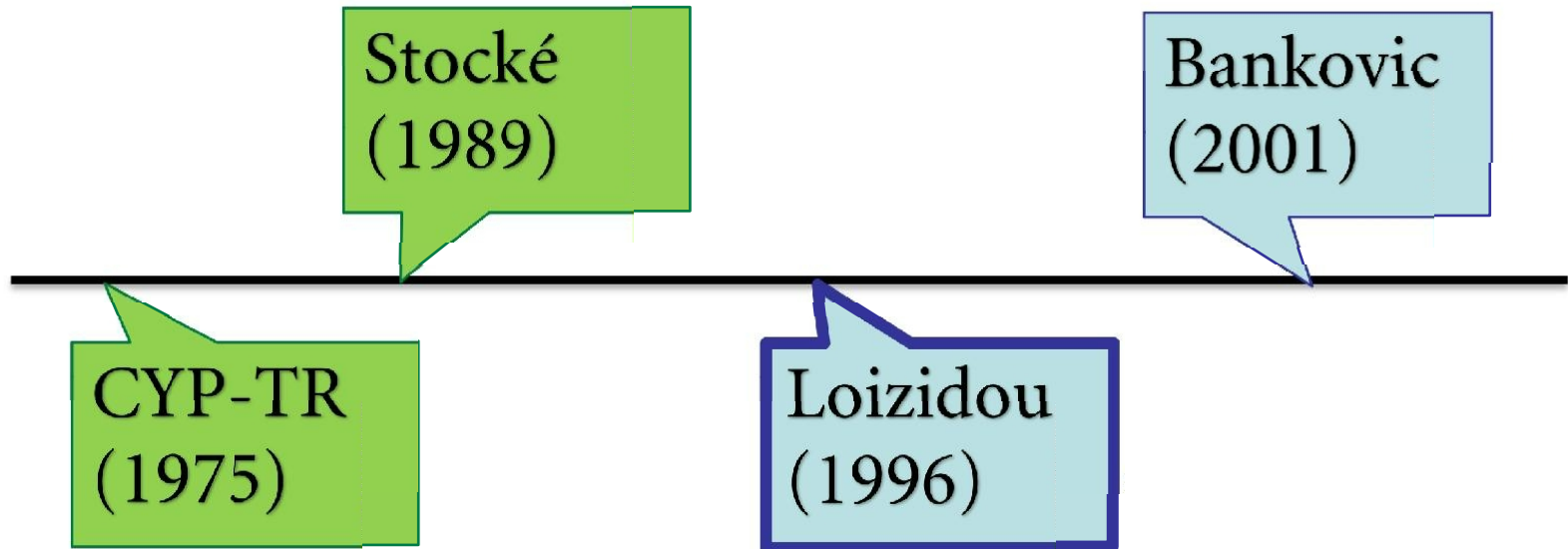
“The Court must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible for acts performed by foreign officials in its territory or under its connivance or acquiescence or with its assistance. The fact that the acts were performed by foreign officials is not a mere technicality or a legal fiction. It is a significant impact on the outcome of the proceedings. The fact that the acts were performed by foreign officials is a significant impact on the outcome of the proceedings. The fact that the acts were performed by foreign officials is a significant impact on the outcome of the proceedings.”

consensus among HCP
that outcome is
undesirable?

Jurisdiction



Jurisdiction (2)



Jur

“The High Contracting Parties are bound to secure the rights and freedoms defined in Section 1 to all persons under their authority and responsibility, whether that authority is exercised within their territory or abroad...

Stocké
(1989)

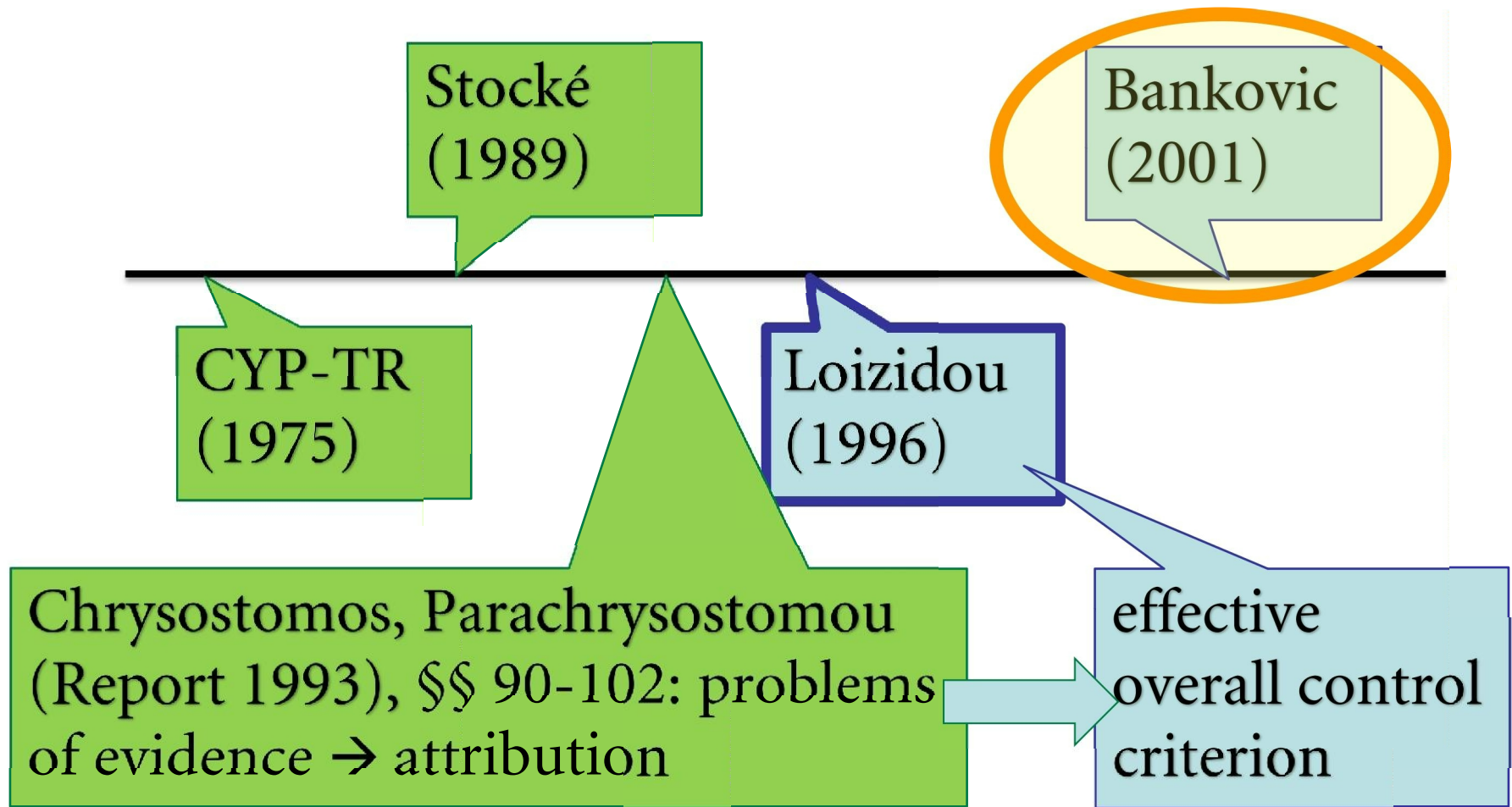
Bankovic
(2001)

CYP-TR
(1975)

Loizidou
(1996)

Authorised agents of a State, including armed forces, bring any other person or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property. In so far as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged”.

Jurisdiction (4)



Jurisdiction (5)

Concluding remarks:

- more continuity in Court's case-law than suggested (cf. Draft Report, §§ 13, 28)
- *Al Skeini* has roots going back to 1970's
- *Bankovic* perhaps 'outlier'
- interpretation of "jurisdiction" started well before most HCP joined ECHR (cf. Draft Report, § 68)