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21/01/2019

STEERING COMMITTEE FOR HUMAN RIGHTS /

COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME

(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS /

COMITÉ D'EXPERTS SUR LE SYSTÈME DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

(DH-SYSC)

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DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER /

GROUPE DE RÉDACTION SUR LA PLACE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME DANS L'ORDRE JURIDIQUE EUROPÉEN ET INTERNATIONAL

(DH-SYSC-II)

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Comments on the revised draft chapter of Theme 1, subtheme ii) (*State responsibility and extraterritorial application of the European Convention on Human Rights*), in view of the 5th DH-SYSC-II meeting

Commentaires sur le projet de chapitre révisé du Thème 1, sous-thème ii) (*Responsabilité des États et extraterritorialité de la Convention européenne des droits de l'homme*), en vue de la 5e réunion du DH-SYSC-II

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Introduction

1. Following the revised planning of the work of the Drafting Group on the Place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II), the Secretariat was instructed to revise, under the responsibility of the Chair, the draft chapter of Theme 1 subtheme ii) on "State responsibility and extraterritorial application of the European Convention on Human Rights" in the light of the discussions of the DH-SYSC-II at its 4th meeting, in view of the 5th DH-SYSC-II meeting (5-8 February 2019).[1]

2. The experts of the DH-SYSC-II were invited to send their written comments on the revised draft chapter by 14 January 2019. The present compilation contains these comments.

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Introduction

1. Suite au planning révisé des travaux du Groupe de rédaction sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international (DH-SYSC-II), le Secrétariat a été chargé de réviser, sous la responsabilité de la Présidente, le projet de chapitre du Thème 1 sous-thème ii) sur « La Responsabilité des États et extraterritorialité de la Convention européenne des droits de l'homme » à la lumière des discussions au sein du DH-SYSC-II lors de la 4e réunion, en vue de la 5e réunion du DH-SYSC-II (5-8 février 2019)[2].

2. Les experts du DH-SYSC-II ont été invités à envoyer leurs commentaires écrits sur le projet de chapitre révisé jusqu'au 14 janvier 2019. La présente compilation contient ces commentaires.

[1] See for the Revised planning of the work of the DH-SYSC-II document DH-SYSC-II(2018)R4, Appendix III; and also document DH-SYSC-II(2018)R4, § 13.
[2] Voir pour le Planning révisé des travaux du DH-SYSC-II document DH-SYSC-II(2018)R4, Annexe III ; et également document DH-SYSC-II(2018)R4, § 13.

Member States / États membres

ARMENIA / ARMENIE

[…]

43. The Court further had to decide on the question of effective control of an area outside a State's own territory in *Chiragov and Others v. Armenia*.[3] The case concerned the complaints made by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh. Referring to *Catan and Others*, the Court reiterated that the assessment of whether, on the facts of the case, the Republic of Armenia exercised and continues to exercise effective control over the territories in question "will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance".[4] Examining Armenia's military involvement, the Court concluded that "it finds it established that the Republic of Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue, and the evidence, not the least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated".[5] Furthermore, examining other support provided by Armenia to the "Nagorno-Karabakh Republic" ("NKR"), the Court found that Armenia provided "general political support"[6], noted "the operation of Armenian law enforcement agents and the exercise of jurisdiction by Armenian courts on that territory"[7] and considered that "the 'NKR' would not be able to subsist economically without the substantial support stemming from Armenia"[8]. The Court concluded that "the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. (…) the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention."[9]

[…]

Comment [SE1]: ARMENIA / ARMENIE:

Firstly, I cannot remember any discussion that would have led to the present changes to the former Para 27/67 of the sub-theme. I have also consulted our expert in the CDDH, who did not recall such a reflection in the Steering Committee, either.

Thus, we have two requests for amendments: in Para 43 and Para 51.

We would like to request to revert to the previous wording on the case "Chiragov v. Armenia" in Para 43, removing the word "Similarly":

"…in cases relating to Nagorno-Karabakh such as Chiragov v. Armenia the Court appears to have diluted its criteria of effective control by adopting a rather broad and unspecific criterion of "military and economic support" in place of the relatively undisputable factor of mass military presence. (The case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Nagorno-Karabakh conflict)".

[3] *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015.
[4] Ibid., § 169.
[5] Ibid., § 180.
[6] Ibid., § 181.
[7] Ibid., § 182.
[8] Ibid., § 185.
[9] Ibid., § 186.

51. Several important decisions further defined the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In several cases concerning the creation, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military presence in the area. In *Catan*, in particular, it emphasised that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".[10] Similarly, in *Chiragov*, the Court found not only the respondent State's military support continues to be decisive for the continued control over the territories in question, but in addition that the "Nagorno Karabakh Republic" – whose army and administration and those of Armenia had been found to be highly integrated – survived "by virtue of the military, political, financial and other support" given to it by Armenia.[11] No direct action by respondent State in relation to the impugned act was thus found to be necessary in this group of cases in order for the acts to come within the respondent States' jurisdiction.

Comment [SE2]: ARMENIA / ARMENIE:

In similar vein [see comment on § 43], we would like to request to remove the reference to the case "Chiragov v. Armenia" in Para 51 (*two last sentences, starting with "Similarly, in Chiragov,…"*).

[10] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, ECHR 2012 (extracts).
[11] *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180, 185 and 186, ECHR 2015.

FRANCE

Observations du Gouvernement français sur le projet de rapport sur la responsabilité des Etats et l'extraterritorialité de la CEDH

1. Le Gouvernement français tient à remercier le Secrétariat pour le nouveau projet de rapport qui tient compte de l'ensemble des orientations données par le Groupe. Le Gouvernement français considère que le projet constitue une bonne base de discussion pour la prochaine réunion du Groupe. Le Gouvernement français souhaite également saluer la très bonne qualité de la traduction en langue française du projet.

2. Le Gouvernement français présentera dans le présent document quelques observations d'ordre général. Le Secrétariat trouvera par ailleurs en pièce jointe, pour faciliter le travail, quelques propositions rédactionnelles et commentaires sur le fond sur la version française du document.

3. **Sur la forme**, le Gouvernement français suggère d'ajouter des liens logiques entre les paragraphes pour rendre le propos plus clair. Par ailleurs, il suggère d'éviter des citations trop longues des arrêts de la Cour qui rendent le propos moins lisible. Par ailleurs les titres, mêmes si les notions sont explicitées dans le paragraphe d'introduction, doivent bien reprendre les notions du titre du chapitre. Il est ainsi suggéré de compléter le titre de la partie A par « la notion de « juridiction » au sens de l'article 1 de la Convention » Il apparait par ailleurs utile, pour clarifier la présentation de la jurisprudence de distinguer différents thèmes dans des sous parties (voir §37 et s)

4. **Sur le fond**, le Gouvernement considère que le projet de rapport aborde de façon objective l'ensemble des questions que soulève cet important sujet. Le descriptif de la jurisprudence de la Cour parait adapté. Il reste néanmoins encore certains passages où la décision Bankovic apparait comme la seule décision de référence, ce qui n'est pas le cas (§26).

5. Au §44 quand est évoquée la position des autres organes internationaux, le Gouvernement français suggère d'ajouter une référence à la récente observation générale n°36 du Comité des droits de l'Homme qui présente une conception très extensive de la notion d'extraterritorialité (§63). Pour le comité, en effet, l'application extraterritoriale du Pacte s'étend aux "persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner" (§63).

6. S'agissant de la partie « défis et solutions possibles », le Gouvernement français considère que le ton du rapport est plus adapté tout en mettant en avant les questions et difficultés identifiées par le groupe de rédaction. Certaines suggestions de reformulation sont néanmoins faites afin notamment d'éviter d'être trop prescriptif à l'égard de la Cour (§56) ou pour clarifier la démonstration (§ 55) Le Gouvernement considère par ailleurs qu'il conviendrait de veiller à éviter les redites (notamment sur les circonstances factuelles des affaires évoquées, qui figurent dans la partie

descriptive). En outre, il convient d'ajouter des liens logiques entre les paragraphes pour clarifier la démonstration du propos. Enfin, comme dans la partie descriptive, le Gouvernement français considère que certaines formulations laissent encore trop apparaitre l'affaire Bankovic comme l'affaire de référence (voir notamment §47).

7. S'agissant de la mention des conséquences d'une interprétation extensive de la notion de juridiction dans le domaine de l'exécution des arrêts, l'ajout fait au § 52 proposé par le Secrétariat parait conforme aux orientations données par le CDDH. Il parait néanmoins souhaitable de clarifier ce qu'on vise dans l'expression « dans des situations d'extraterritorialité ». En l'état, compte tenu de la position de ce § cette expression parait désigner uniquement les situations où le contrôle de l'Etat n'est pas exercé directement, mais par l'intermédiaire d'une administration subordonnée et non toutes les situations d'extraterritorialité.

8. Par ailleurs, il paraitrait utile de déplacer une partie des §53 et §54 dans la partie défis de la partie B car ces § évoquent les notions de responsabilité et d'attribution, également évoquées dans la partie B. Cela clarifierait la démonstration et éviterait les redites. Une proposition de reformulation et de réorganisation des différents § est ainsi proposée dans la partie défis et solutions possibles de la partie B (§ 93 et s) pour regrouper les idées et clarifier le sens de la démonstration.

9. Enfin au §60, le Gouvernement fait une suggestion rédactionnelle destinée à rappeler que les Articles sur la responsabilité de l'Etat pour fait internationalement illicite (AREFII) ne constituent pas un texte juridiquement contraignant. A ce jour, les Etats n'ont d'ailleurs pas souhaité faire des travaux de la CDI la base pour la conclusion d'une convention internationale en la matière. Il conviendrait donc de préciser que la Cour devrait se référer aux AREFII uniquement dans la mesure où ceux-ci reflètent les règles de droit international coutumier en la matière. De la même façon pour le §93.

10. Par ailleurs la Gouvernement approuve la précision apportée par le Secrétariat dans la note de bas de page n°93 :« les présents articles portent sur l'ensemble du domaine de la responsabilité des États. Ils ne sont donc pas limités aux violations d'obligations bilatérales, celles qui résultent par exemple d'un traité bilatéral conclu avec un autre État, mais s'appliquent à l'ensemble des obligations internationales des États, que l'obligation existe envers un ou plusieurs États, envers un individu ou un groupe, ou envers la communauté internationale dans son ensemble », même si le Gouvernement rappelle que la Cour (ou une autre juridiction internationale) devrait appliquer les AREFI qu'autant qu'ils reflètent les règles de droit coutumier.

11. Enfin, au §60, s'agissant de l'indication du secrétariat selon laquelle le SYSC II « Le DH-SYSC-II a décidé d'examiner la question du champ d'application des AREFII …) Il apparaît que le champ d'application des AREFII dans les différends entre un Etat et un individu fait l'objet d'avis divergents parmi les juristes. Il appartient donc au DH-SYSC-II de s'accorder sur une position à cet égard. », le Gouvernement s'interroge sur le point de savoir si une telle question relève du mandat du SYSC II, la question du champ d'application des AREFI n'étant pas déterminante pour l'examen de la question objet du présent rapport./.

[…]

2. La question de savoir si un État exerce sa « juridiction » doit être distinguée de la question de savoir si l'État peut être tenu responsable d'un acte contesté, ou si cet acte est imputable à cet État. ~~Cela~~ Ce sujet peut également être contesté par les États, notamment lorsque des acteurs non étatiques, d'autres États ou des organisations internationales, sont impliqués dans la conduite reprochée.

3. Il existe de nombreux textes de droit international sur les notions de juridiction de l'État et de responsabilité internationale. La Cour a la capacité de s'appuyer sur ces textes juridiques pour interpréter l'obligation énoncée à l'article 1, notamment en ~~s'appuyant sur~~se référant aux ~~les~~ règles de droit international relatives à l'interprétation des traités, et en particulier sur l'article 31.1) c) de la Convention de Vienne sur le droit des traités.

4. La notion de « juridiction » en droit international général désigne l'exercice par un État du pouvoir légitime d'affecter des personnes, des biens et des circonstances. Ce pouvoir peut être exercé par le biais d'actions législatives, exécutives ou judiciaires. La compétence législative s'exerce principalement à l'égard de personnes, de biens et de circonstances sur le territoire de l'État, mais peut parfois être exercée de manière extraterritoriale.[12] La compétence en matière de ~~la~~ mise en œuvre de la loi (c'est-à-dire les pouvoirs des tribunaux et ceux du pouvoir exécutif de faire respecter la loi) ne peut être exercée que sur la base de la territorialité (bien que la coopération internationale par le biais de mesures telles que l'extradition, l'entraide judiciaire, la reconnaissance et l'exécution des jugements puisse contribuer à l'exercice de la compétence d'exécution).

5. Dans le contexte de traités relatifs aux droits de l'homme tels que la CEDH, la notion de « juridiction » est différente :[13] elle fait référence à la juridiction d'un État, dans le but de limiter le champ d'application du traité concerné. Elle définit la catégorie de personnes qui jouissent des droits et libertés énoncés dans ce traité. Cette notion de « juridiction » ne concerne pas la question de savoir si ~~l'exercice de la compétence~~ l'acte accompli par l'Etat était licite ou illicite.

Comment [MF3]: Ces termes doivent être explicités

Comment [MF4]: Ces termes doivent être explicités

Comment [MF5]: Ne serait il pas preferable de dire "définir"

[12] Comme on le sait, le « *Draft Convention on Jurisdiction with Respect to Crime* » de 1935 identifie cinq principes d'exercice de la compétence législative, à savoir le principe de territoire, le principe de nationalité (ou le principe de personnalité active), le principe de protection, le principe d'universalité et le principe de personnalité passive; voir *Harvard Research in International Law*: *Draft Convention on Jurisdiction with Respect to Crime*, Supplément au Journal américain de droit international (1935), p. 437–635.

[13] Voir également Robert Spano, Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law (*Questions de compétence des États: l'évolution de la jurisprudence de la Cour européenne des droits de l'homme à la lumière du droit international*), dans: International and Comparative Law Research Center (éd.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, p. 45.

6. ~~Malgré cela, s~~Pour autant, Selon la jurisprudence bien établie de la Cour, « la notion de 'juridiction' au sens de l'article 1 de la Convention doit passer pour refléter la conception de cette notion en droit international public ».[14] En outre, « [l]a ' juridiction ', au sens de l'article 1, est une condition *sine qua non*. Elle doit avoir été exercée pour qu'un Etat contractant puisse être tenu pour responsable des actes ou omissions ~~à lui~~qui lui sont imputables et qui sont à l'origine d'une allégation de violation des droits et libertés énoncés dans la Convention ».[15] En d'autres termes, la question de la responsabilité de l'État[16] ne se pose que lorsque la Cour est convaincue que les questions incriminées relèvent de la ~~compétence~~ « juridiction » de l'État. Les requêtes dans lesquelles l'Etat défendeur est déclaré incompétent pour les faits dénoncés sont déclarées irrecevables en vertu de l'article 35 §§ 3 et 4 de la Convention, pour incompatibilité avec les dispositions de la Convention.[17]

[…]

8. La Cour EDH n'aborde pas toujours la question de savoir si l'État défendeur est responsable du comportement reproché ou si ce comportement est imputable à cet État en tant que question distincte. Dans les cas - relativement rares - dans lesquels cette question n'est pas claire et doit donc être examinée plus en détail par la Cour, elle traite de la question de savoir si le comportement reproché est attribué ou imputable à l'État défendeur lau stade de l'examen au fond de la ~~orsqu'il a statué sur le fond d'une~~ requête.[18]

9. S'agissant de la place de la Convention dans l'ordre juridique européen et international, il est important d'analyser si la notion de « juridiction » et son application extraterritoriale dans le cadre de la Convention diffèrent de celles du droit international général et, dans l'affirmative, dans quelle mesure (A.). De même, l'application ou le respect du droit international général en matière de responsabilité des États par la Cour EDH dans sa jurisprudence mérite une analyse plus

[14] Voir, entre autres, *Banković et autres c. Belgique* et autres (déc.) [GC], n° 52207/99, §§ 59-61, CEDH 2001-XII; *Assanidze c. Géorgie* [GC], n° 71503/01, § 137, CEDH 2004-II; et *Ilaşcu et autres c. Moldova et Russie* [GC], n° 48787/99, § 312, CEDH 2004-VII.

[15] Voir *Ilaşcu et autres c. Moldova et Russie* [GC], n° 48787/99, § 311, CEDH 2004-VII; *Al-Skeini et autres c. Royaume-Uni* [GC], n° 55721/07, § 130, 7 juillet 2011; *Catan et autres c. Moldova et Russie* [GC], n° 43370/04, 8252/05 et 18454/06, § 103, CEDH 2012 (extraits); et *Chiragov et autres c. Armenia* [GC], n° 13216/05, § 168, CEDH 2015.

[16] Voir Michael O'Boyle, *The European Convention on Human Rights and extraterritorial jurisdiction: a comment on 'Life after Banković'*, dans: Fons Coomans et Menno T. Kamminga (éd.), Extraterritorial Application of Human Rights Treaties, 2004, p. 130-131.

[17] Voir, entre autres, *Banković et autres c. Belgique et autres* (déc.) [GC], n° 52207/99, §§ 84-85, CEDH 2001-XII.

[18] Voir, par exemple, *Loizidou c. Turquie* (fond), 18 décembre 1996, §§ 52-57, Recueil des arrêts et décisions 1996-VI; et *El-Masri c. l'ex-République yougoslave de Macédoine* [GC], n° 39630/09, §§ 199 ss., CEDH 2012.

approfondie (B.). Sur cette base, les risques éventuels de fragmentation entre les différents systèmes juridiques ~~doivent être~~seront identifiés et discutés.

A. Application extraterritoriale de la Convention européenne des droits de l'homme : la notion de « juridiction » au sens de l'article 1 de la Convention »

[…]

13. Le terme « juridiction » n'est pas développé davantage dans la Convention. Dans l'affaire *Banković*, l'une des ~~ses~~ décisions importantes sur le sujet, la Cour avait affirmé que la compétence de l'État visée à l'article 1 était « essentiellement territoriale ».[19] Toutefois, l'expression « relevant de leur juridiction » plutôt que « sur leur territoire » pourrait impliquer que les obligations des Parties contractantes à la CEDH pourraient éventuellement s'étendre au-delà de leur territoire.

[…]

La jurisprudence

(i) Affaires concernant la situation dans le nord de Chypre

15. Les questions relatives à l'application extraterritoriale de la Convention ont été soulevées relativement rarement dans la jurisprudence antérieure des organes de la Convention.[20] Ils ont néanmoins été amenés à ~~dû~~ examiner plus en profondeur la possibilité d'un exercice de la juridiction hors du territoire d'un État, notamment ~~dans~~ à l'occasion de plusieurs requêtes concernant la situation dans le nord de Chypre à la suite des opérations militaires turques de 1974.

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[19] *Banković et autres c. Belgique et autres* (déc.) [GC], n° 52207/99, § 59, CEDH 2001-XII.

[20] Dans l'affaire *Soering c. Royaume-Uni* (7 juillet 1989, série A n° 161), la Cour a conclu que la décision d'un État contractant d'extrader une personne pouvait engager la responsabilité de cet État en vertu de la Convention lorsqu'il existait un risque de torture ou de mauvais traitement de cette personne si elle était extradée. Dans l'affaire *Stocké c. Allemagne* (19 mars 1991, §§ 51 et 54-55, série A n° 199), dans laquelle le requérant fut amené à retourner en Allemagne pour y être arrêté, la Cour ne put établir qu'il y avait eu des activités illicites à l'étranger pour lesquelles les autorités allemandes étaient responsables et pouvaient ainsi laisser ouverte la question de savoir si de telles activités pouvaient entraîner une violation des articles 5 ou 6 de la Convention par l'Allemagne. Voir également les décisions de la Commission européenne des droits de l'homme dans *Illich Sánchez Ramirez c. France*, requête n° 28780/95, décision de la Commission du 24 juin 1996, Décisions et rapports (DR) 86, p. 155-162; *Luc Reinette c. France*, n° 14009/88, décision de la Commission du 2 octobre 1989, DR 63, p. 189*; Freda v. Italie*, n° 8916/80, décision de la Commission du 7 octobre 1980, DR 21, p. 250; et *M. c. Danemark*, n°17392/90, décision de la Commission du 14 octobre 1992.

[…]

17. Dans l'affaire *Loizidou c. Turquie*, où la requérante, une Chypriote grecque, se plaignait d'avoir été privée de l'accès à sa propriété dans le nord de Chypre, la Cour se prononça de la façon suivante sur la question de savoir si les actes reprochés étaient susceptibles de tomber sous la « juridiction » de l'État défendeur :

> « La Cour rappelle à cet égard que, si l'article 1 (art. 1) fixe des limites au domaine de la Convention, la notion de 'juridiction' au sens de cette disposition ne se circonscrit pas au territoire national des Hautes Parties contractantes. Par exemple, selon sa jurisprudence constante, l'extradition ou l'expulsion, d'une personne par un Etat contractant peut soulever un problème au regard de l'article 3 (art. 3), donc engager la responsabilité de l'Etat en cause au titre de la Convention (arrêts *Soering c. Royaume-Uni* du 7 juillet 1989, série A no 161, pp. 35-36, par. 91, […]. De plus, la responsabilité des Parties contractantes peut entrer en jeu à raison d'actes émanant de leurs organes et se produisant sur ou en dehors de leur territoire (arrêt *Drozd et Janousek c. France et Espagne* du 26 juin 1992, série A no 240, p. 29, par. 91).
>
> Compte tenu de l'objet et du but de la Convention, une Partie contractante peut également voir engager sa responsabilité lorsque, par suite d'une action militaire - légale ou non -, elle exerce en pratique le contrôle sur une zone située en dehors de son territoire national. L'obligation d'assurer dans une telle région le respect des droits et libertés garantis par la Convention découle du fait de ce contrôle, qu'il s'exerce directement, par l'intermédiaire des forces armées de l'Etat concerné ou par le biais d'une administration locale subordonnée. »[21]

Comment [MF6]: N° de §?

[…]

(ii) L'affaire *Banković*

19. La Cour a ensuite exposé plus en détail les principes permettant de déterminer si, et dans quelles circonstances, des actes extraterritoriaux des États contractants peuvent constituer un exercice de leur juridiction au sens de l'article 1 dans l'une de ses principales décisions en la matière, ~~dans~~ l'affaire *Banković et autres c. Belgique et autres*.[22] Dans cette affaire, la Cour a ~~traité~~ examiné les griefs des victimes des frappes aériennes menées par les forces de l'Organisation du Traité de l'Atlantique Nord («OTAN») contre des installations de radio et de télévision à Belgrade le 23 avril 1999 dans le cadre d'une série de frappes aériennes de l'OTAN contre la République fédérale de Yougoslavie (qui n'était pas partie à la Convention à l'époque des faits) pendant le conflit du Kosovo.

20. Dans ~~son importante décision dans~~ l'affaire *Banković*, la Cour EDH a affirmé que la juridiction des États au sens de l'article 1 était « essentiellement territoriale ».[23] Elle a en outre conclu que « la pratique suivie par les États

Comment [MF7]: Il est déjà indiqué au § 19 qu'il s'agit d'une décision importante
C'est donc ici redondant

[21] *Loizidou c. Turquie* [GC] (exceptions préliminaires), 23 mars 1995, § 62, série A no. 310; voir également *Loizidou c. Turquie* [GC] (fond), 18 décembre 1996, § 52, Recueil des arrêts et décisions 1996 VI.
[22] *Banković et autres c. Belgique et autres* (déc.) [GC], n° 52207/99, CEDH 2001-XII.
[23] Ibid., §§ 61, 63 et 67.

contractants dans l'application de la Convention depuis sa ratification montre qu'ils ne redoutaient pas l'engagement de leur responsabilité extraterritoriale dans des contextes analogues à celui de la présente espèce ».[24] La Cour n'a pas appliqué son approche interprétative de la Convention en tant qu'« instrument vivant » dans le contexte de l'article 1 et s'est référée aux travaux préparatoires de la Convention dans ce contexte. Elle a constaté de la façon suivante :

[...]

21. La Cour a cependant reconnu que, dans des circonstances exceptionnelles, les actes des États contractants accomplis ou produisant des effets en dehors de leurs territoires pouvaient toujours relever de leur « juridiction » aux fins de l'article 1 de la CEDH, tout en reconnaissant clairement la juridiction extraterritoriale comme exceptionnelle.[25]

[…]

23. Dans ce contexte, il est rappelé que, dans l'affaire *Banković*, ~~qui concernait le bombardement par des forces aériennes de l'OTAN d'objets sur le territoire de la Yougoslavie (qui à l'époque des faits n'était pas partie à la Convention)~~, la Cour a précisé que « la Convention est un traité multilatéral opérant […] dans un contexte essentiellement régional, et plus particulièrement dans l'espace juridique des Etats contractants » « dont il est clair que » la République fédérale de Yougoslavie « ne relève pas », n'étant pas un État signataire de la Convention. En outre, la Cour a souligné que la Convention « n'a donc pas vocation à s'appliquer partout dans le monde, même à l'égard du comportement des Etats contractants. Aussi la Cour n'a-t-elle jusqu'ici invoqué l'intérêt d'éviter de laisser des lacunes ou des solutions de continuité dans la protection des droits de l'homme pour établir la juridiction d'un Etat contractant que dans des cas où, n'eussent été les circonstances spéciales s'y rencontrant, le territoire concerné aurait normalement été couvert par la Convention »[26] (« espace juridique »de la Convention).

Comment [MF8]: Pas necessaire. Cela figure déjà au §19

[…]

(iii) La jurisprudence menant à *Al-Skeini*

26. À la suite de sa décision dans l'affaire *Banković*, la Cour a développé sa jurisprudence sur la juridiction extraterritoriale; ~~à la fois~~tant la décision dans l'affaire *Banković* ~~et~~ que l'évolution de ~~a cohérence de la~~la jurisprudence ultérieure de la Cour ~~avec cette décision~~ ont fait l'objet de nombreuses observations et seront analysées plus avant.[27]

Comment [MF9]: La formulation fait apparaitre Bankovic comme l'affaire de reference ce qui n'est pas le cas. Cest une décision très importante mais pas la seule

[…]

[24] Ibid., § 62.
[25] Ibid., § 67.
[26] Ibid., § 80.
[27] Voir la section « Défis et solutions possibles », §§ 46 et suiv.

28. Dans son arrêt *Issa*, qui portait sur l'assassinat allégué de bergers irakiens par des soldats turcs sur le territoire de l'Iraq, la Cour a notamment abordé de nouveau la question de l'application extraterritoriale éventuelle de la Convention en dehors de l'espace juridique des États contractants. Elle a conclu que « l'article 1 de la Convention ne peut être interprété de manière à permettre à un État partie de commettre sur le territoire d'un autre État des violations de la Convention, qu'il ne pourrait pas commettre sur son propre territoire ».[28] La Cour est parvenue à cette conclusion en se référant notamment aux points de vue adoptés par le Comité des droits de l'homme dans les affaires *Lopez Burgos c. Uruguay et Celiberti de Casariego c. Uruguay*,[29] alors qu'elle avait conclu dans l'affaire *Banković* que la « reconnaissance exceptionnelle par le Comité des droits de l'homme des Nations unies de certains cas de juridiction extraterritoriale » n'étais pas de nature à battre en brèche la portée explicitement territoriale conférée à la notion de juridiction par l'article 2 § 1 du Pacte international relatif aux droits civils et politiques (CCPR).[30]

[…]

30. Dans son arrêt *Al-Skeini*,[31] un autre arrêt important sur ce sujet,[32] la Grande Chambre a précisé la notion de juridiction extraterritoriale au sens de la Convention. L'affaire concernait les requêtes présentées par six ressortissants irakiens à la suite d'actions menées par les forces britanniques en Irak en 2003, alors que ces dernières cherchaient à établir la sécurité et à soutenir l'administration civile à Bassorah et dans ses environs; les proches des requérants ont été tués au cours des opérations de sécurité en question.

[…]

(iv) La jurisprudence depuis *Al-Skeini*

- *Sur la notion de contrôle effectif sur une personne*

37. […]

[…]

- *Sur la notion de contrôle sur une zone ou un territoire*

40. S'agissant de la catégorie, établie par la Cour, d'application extraterritoriale basée sur le «contrôle effectif d'une zone», certains développements ont eu lieu concernant les facteurs que la Cour prendra en considération, notamment dans

Comment [MF10]: Il parait utile de faire des sous partie pour clarifier la présentation de la jurisprudence qui n'est pas toujours chronologique. Ainsi Catan a été rendue avant Jaloud

[28] *Issa et autres c. Turquie*, n° 31821/96, § 71, 16 novembre 2004 (*traduction du Secrétariat*).
[29] Ibid., § 71.
[30] *Banković et autres c. Belgique et autres*, précité, § 78.
[31] *Al-Skeini et autres c. Royaume-Uni* [GC], n° 55721/07, CEDH 2011.
[32] Voir aussi pour cette évaluation Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, Revue européenne de droit international, vol. 23, n° 1, p. 121.

l'arrêt de la Cour dans l'affaire *Catan et autres c. République de Moldova et Russie*.[33] L'affaire concernait la requête déposée par des enfants et des parents appartenant à la communauté moldave de Transnistrie concernant les effets d'une politique linguistique adoptée par le régime séparatiste de la « République moldave de Transnistrie » (« RMT ») interdisant l'utilisation de l'alphabet latin dans les écoles et les mesures prises par la suite pour mettre en œuvre cette politique. La Cour, établissant que les requérants relevaient de la juridiction de la Russie aux fins de l'article 1, a regardé au-delà de la question de la création de la « RMT » résultant de l'assistance militaire russe (en 1991-1992) et de l'ampleur du déploiement militaire russe (en 2002-2004)[34] et a également tenu compte du fait que la « RMT » a survécu pendant la période en question (2002-2004) uniquement grâce au soutien économique de la Russie, *inter alia*[35]. La Cour a conclu que la Russie continuait à fournir un soutien militaire, économique et politique aux séparatistes transnistriens, de sorte qu'il avait été constaté qu'elle avait exercé au cours de la période en question un contrôle effectif et une influence déterminante sur l'administration de la « RMT ».[36] Les faits incriminés relevaient donc de la juridiction de la Russie, même si aucun agent russe n'était directement impliqué dans les mesures prises à l'encontre des écoles des requérants.[37] La Cour a précisé :

> « 106. Le principe voulant que la juridiction de l'Etat contractant au sens de l'article 1 soit limitée à son propre territoire connaît une exception lorsque, par suite d'une action militaire – légale ou non –, l'Etat exerce un contrôle effectif sur une zone située en dehors de son territoire. L'obligation d'assurer dans une telle zone le respect des droits et libertés garantis par la Convention découle du fait de ce contrôle, qu'il s'exerce directement, par l'intermédiaire des forces armées de l'Etat ou par le biais d'une administration locale subordonnée (*Loizidou c. Turquie* (exceptions préliminaires), 23 mars 1995, § 62, série A n° 310 ; *Chypre c. Turquie* [GC], n° 25781/94, § 76, CEDH 2001-IV ; *Banković et autres*, décision précitée, § 70 ; *Ilaşcu et autres*, précité, §§ 314-316 ; *Loizidou c. Turquie* (fond), 18 décembre 1996, § 52, *Recueil des arrêts et décisions* 1996-VI, et *Al-Skeini et autres*, précité, § 138). Dès lors qu'une telle mainmise sur un territoire est établie, il n'est pas nécessaire de déterminer si l'Etat contractant qui la détient exerce un contrôle précis sur les politiques et actions de l'administration locale qui lui est subordonnée. Du fait qu'il assure la survie de cette administration grâce à son soutien militaire et autre, cet Etat engage sa responsabilité à raison des politiques et actions entreprises par elle. L'article 1 lui fait obligation de reconnaître sur le territoire en question la totalité des droits matériels énoncés dans la Convention et dans les Protocoles additionnels qu'il a ratifiés, et les violations de ces droits lui sont imputables (*Chypre c. Turquie*, précité, §§ 76-77 ; *Al-Skeini et autres*, précité, § 138).
>
> 107. La question de savoir si un Etat contractant exerce ou non un contrôle effectif sur un territoire hors de ses frontières est une question de fait. Pour se prononcer, la Cour se réfère principalement au nombre de soldats déployés par l'Etat sur le territoire en cause (*Loizidou* (fond), précité, §§ 16 et 56, et *Ilaşcu et autres*, précité,

Comment [MF11]: Il serait utile de résumer davantage car c'ets très long

[33] *Catan et autres c. République de Moldova et Russie* [GC], n^os^ 43370/04 et 2 autres, CEDH 2012 (extraits).
[34] Ibid., §§ 118-119.
[35] Ibid., § 120.
[36] Ibid., § 122.
[37] Ibid., § 114.

§ 387). D'autres éléments peuvent aussi entrer en ligne de compte, par exemple la mesure dans laquelle le soutien militaire, économique et politique apporté par l'Etat à l'administration locale subordonnée assure à celui-ci une influence et un contrôle dans la région (*Ilaşcu et autres*, précité, §§ 388-394 ; *Al-Skeini et autres*, précité, § 139). […]

114. La Cour […] a […] également dit qu'il peut y avoir exercice extraterritorial de sa juridiction par un Etat lorsque, par suite d'une action militaire – légale ou non –, cet Etat exerce un contrôle effectif sur une zone située en dehors de son territoire (paragraphe 106 ci-dessus). La Cour admet que rien n'indique que des agents russes aient été directement impliqués dans les mesures prises contre les écoles des requérants. Dès lors toutefois que les requérants soutiennent que la Russie exerçait un contrôle effectif sur la « RMT » pendant la période pertinente, elle doit rechercher si tel était ou non le cas. […]

121. Il s'ensuit, en résumé, que le gouvernement russe n'a pas convaincu la Cour que les conclusions auxquelles elle était parvenue en 2004 dans l'arrêt *Ilaşcu et autres* (précité) étaient erronées. La « RMT » avait été établie grâce au soutien militaire russe. Le maintien de la présence de militaires et d'armes russes dans la région indiquait clairement aux dirigeants de la « RMT », au gouvernement moldave et aux observateurs internationaux que la Russie continuait à fournir un soutien militaire aux séparatistes. De surcroît, la population était tributaire d'un approvisionnement gratuit ou fortement subventionné en gaz, du versement de pensions et d'autres types d'aide financière de la part de la Russie.

122. La Cour confirme donc les conclusions formulées par elle dans son arrêt *Ilaşcu et autres* (précité) et selon lesquelles de 2002 à 2004 la « RMT » n'avait pu continuer à exister – en résistant aux efforts déployés par la Moldova et les acteurs internationaux pour régler le conflit et rétablir la démocratie et la primauté du droit dans la région – que grâce à l'appui militaire, économique et politique de la Russie. Dès lors, le degré élevé de dépendance de la « RMT » à l'égard du soutien russe constitue un élément solide permettant de considérer que la Russie exerçait un contrôle effectif et une influence décisive sur l'administration de la « RMT » à l'époque de la crise des écoles. »

[…]

44. Il convient de noter que d'autres tribunaux internationaux et organes de traités ont développé une jurisprudence sur l'application extraterritoriale des clauses de juridiction d'autres traités relatifs aux droits de l'homme. En particulier :

- Dans son Avis consultatif sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, la CIJ a déclaré que le Pacte international relatif aux droits civils et politiques (PIDCP) s'appliquait aux actions des autorités lorsqu'elles exercent leur juridiction en dehors de leur territoire[38], se référant notamment aux conclusions du Comité des droits de l'homme[39], selon lesquelles « les dispositions du pacte s'appliquent au profit

[38] Cour internationale de justice, Avis consultatif, Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, 9 juillet 2004, §§ 110-111.
[39] Comité des droits de l'homme, Examen des rapports présentés par les États parties conformément à l'article 40 du Pacte - Observations finales du Comité des

de la population des territoires occupés, en ce qui concerne tous les actes accomplis par les autorités ou les agents de l'Etat partie dans ces territoires, qui compromettent la jouissance des droits consacrés dans le pacte et relèvent de la responsabilité de l'Etat d'Israël conformément aux principes du droit international public ».

- Le Comité des droits de l'homme, dans son Observation générale n° 31 sur « La nature de l'obligation juridique générale imposée aux États parties au Pacte », aux termes de laquelle le CDH prévoyait que les États étaient tenus de garantir et de respecter le PIDCP dans leur pays et à l'étranger pour les personnes sous le pouvoir ou le contrôle effectif d'un État Partie agissant en dehors de son territoire, quelles que soient les circonstances dans lesquelles ce pouvoir ou ce contrôle effectif a été obtenu.[40]

Comment [MF12]: Ajouter reference à l'OG 36 du Comité des droits de l'homme §63 ?

- La Commission interaméricaine des droits de l'homme interprétant la Convention américaine relative aux droits de l'homme (un traité inspiré de la Convention européenne) a invoqué la même approche en élargissant sa juridiction sur les affaires impliquant l'intervention militaire des États-Unis à Grenade en 1983[41] et à Panama en 1989[42], et les cas de détention illimitée d'étrangers par les États-Unis dans des camps situés à l'extérieur des États-Unis, à Guantanamo Bay, à Cuba.[43]

[…]

Défis et solutions possibles

[…]

47. En effet, la décision Bankovic a défini ~~À la suite des décisions des organes de la Convention sur l'application extraterritoriale de la Convention, notamment dans les affaires concernant la situation dans le Chypre de nord, la Cour a énoncé clairement les principes directeurs relatifs à l'interprétation de la notion de « juridiction » dans l'une de ses principales décisions sur le sujet dans l'affaire *Banković*. Elle définissait~~ la juridiction des États comme essentiellement territoriale et ~~énuméraient~~ a énuméré quatre catégories de juridiction extraterritoriale (affaires d'extradition / expulsion, affaires d'effet extraterritorial, affaires de contrôle effectif et affaires diplomatiques ou

droits de l'homme: Israël, 63e session, UN Doc. CCPR/C/79/Add.93, 18 août 1998, § 10.

[40] Comité des droits de l'homme, Observation générale n° 31: La nature de l'obligation juridique générale imposée aux États parties au Pacte, 80ème session, Doc. ONU. CCPR/C/21/Rev.1/Add.13, 26 mai 2004, § 10.

[41] Rapport de la Commission interaméricaine des droits de l'homme (CIDH) n° 109/99, affaire 10.951, Coard et al., États-Unis, 29 septembre 1999.

[42] Rapport de la CIDH n° 31/93, affaire 10.573, États-Unis, 14 octobre 1993.

[43] Rapport de la CIDH n° 17/12, pétition P-900-08, recevabilité, Djamel Ameziane, États-Unis, 20 mars 2012; Rapport de la CIDH n° 112/10, pétition inter-États n° 02, Franklin Guillermo Aisalla Molina, Équateur - Colombie, 21 octobre 2010.

consulaires). Elle a par ailleurs indiqué qu'étant donné que le champ d'application de l'article 1 déterminait la portée de l'ensemble du système de la Convention, il n'avait pas appliqué l'approche d'« instrument vivant » à son interprétation de l'article 1 dans cette affaire. En outre, la conclusion de la Cour selon laquelle la Convention opère « dans un contexte essentiellement régional, et plus particulièrement dans l'espace juridique des Etats contractants »[44] pourrait être interprétée comme indiquant que la Convention, si elle était exceptionnellement applicable de manière extraterritoriale, ne s'appliquerait qu'à l'égard du territoire d'un autre État contractant. Enfin, la conclusion de la Cour selon laquelle l'obligation énoncée à l'article 1 ne pourrait pas être « divisée et adaptée » en fonction des circonstances particulières de l'acte extraterritorial en question pourrait être considérée comme excluant l'obligation de ne garantir que les droits pertinents pour la situation du requérant. ~~Dans l'affaire en question, la Cour a conclu que les faits – concernant des frappes aériennes effectives en dehors du territoire de la Convention – relevaient du principe selon lequel il n'existait pas de juridiction extraterritoriale; les conditions pour l'une des exceptions n'étaient pas remplies~~.

Comment [MF13]: Déjà dit dans la partie descriptive

48. Cependant, ~~C~~certaines affaires ultérieures de la Cour ont soulevé des doutes quant ~~à l'~~cette interprétation de la portée de la juridiction extraterritoriale des États ~~telle qu'elle est exposée dans *Banković*~~. Ainsi, ~~D~~dans l'affaire *Issa*, la Cour a estimé que « l'article 1 de la Convention ne peut être interprété de manière à permettre à un État partie de commettre sur le territoire d'un autre État des violations de la Convention, qu'il ne pourrait pas commettre sur son propre territoire »[45] et a ainsi indiqué que la Convention pourrait être appliquée en dehors de l'espace juridique de la Convention. Dans l'affaire *Pad*, la Cour a conclu que la responsabilité de l'État défendeur pouvait être engagée dans une affaire impliquant le décès des personnes éventuellement provoqué par des tirs depuis un hélicoptère militaire en territoire étranger et donc dans une situation de frappes aériennes dont il n'avait pas été établi que les victimes relèvent de la juridiction de l'Etat défendeur dans *Banković*.

49. de la même façon, ~~D~~dans l'affaire *Al-Skeini*, un autre arrêt important sur la ~~portée~~ définition de la notion de juridiction, on peut considérer que la Cour restructure les différentes catégories d'exceptions à la règle de juridiction sur le territoire de l'État dans un effeort de clarifiaction de sa jurisprudence. La Cour a divisé les exceptions en deux groupes : premièrement, les cas de contrôle par un agent de l'État, dans lesquels l'État doit garantir à l'individu les droits qui s'appliquent à sa situation, et, deuxièmement, les cas de contrôle effectif dans une zone où l'État doit garantir, dans la zone sous son contrôle, l'ensemble des droits fondamentaux prévus par la Convention. Il ressort clairement de la définition de la Cour de la portée des obligations de l'État dans la première catégorie de cas d'autorité et de contrôle de l'agent de l'Etat, que les droits de la Convention peuvent, comme le reconnait la Cour elle-même, être « divisés et adaptés » en fin de compte, dans la mesure où seuls les droits conventionnels pertinents pour la situation doivent être assurés.[46] En outre, les faits de l'affaire, qui concernait le décès des parents des requérants au

Comment [MF14]: Ne devrait on pas également mentionner que c'est au regard de l'évolution des circonstances factuelles qui lui sont soumises ?

[44] *Banković et autres c. Belgique et autres*, précité, § 80.
[45] *Issa et autres c. Turquie*, n° 31821/96, § 71, 16 novembre 2004 (*traduction du Secrétariat*).
[46] *Al-Skeini et autres c. Royaume-Uni* [GC], n° 55721/07, § 137, CEDH 2011.

cours d'opérations de sécurité sur le territoire irakien, relevaient de l'exception de l'autorité et du contrôle de l'agent État. Contrairement à *Banković*, l'État défendeur s'est donc avéré avoir juridiction en dehors de l'espace juridique de la Convention ce qui, malgré les explications fournies par la Cour dans l'affaire *Al-Skeini* à cet égard,[47] semblait être exclu en vertu des principes énoncés dans *Banković*. Par conséquent, alors que la Cour inscrita ~~fondé ses~~les principes généraux sur la notion de « juridiction » dégagés dans *Al-Skeini* ~~sur~~ dans la lignée de sa jurisprudence antérieure, y compris les principes développés dans l'affaire *Banković*, leur application au cas d'espèce a abouti à ce que l'Etat défendeur soit obligé de garantir aux requérants les droits procéduraux prévus à l'article 2 de la Convention.

50. Dans d'autres ~~requêtes~~affaires, notamment dans les affaires *Hirsi Jamaa*, *Hassan et Jaloud*, la Cour, tout en invoquant les principes résumés dans *Al-Skeini*, a conclu que les faits de l'affaire relevaient de l'exception de l'autorité et du contrôle de l'agent de l'État, élargissant ainsi le champ d'application de la Convention à d'autres situations survenant en dehors du territoire des États défendeurs. Il a été souligné à cet égard que, compte tenu de l'évolution parallèle, dans la jurisprudence de la Cour, des droits fondamentaux garantis par la Convention, de manière à inclure notamment les obligations positives et / ou procédurales, il peut ne pas toujours être évident pour l'État défendeur de prévoir exactement la portée de ses obligations en vertu de la Convention par rapport aux droits pertinents pour la situation de l'individu relevant de sa juridiction.

51. Des questionnements similaires ont pu survenir à l'occasion de ~~P~~plusieurs décisions importantes ~~ont défini~~venues définir plus précisément le champ de la « juridiction » des États lorsque ceux-ci contrôlaient effectivement une région, en particulier dans les situations où ce contrôle était exercé non pas directement, mais par l'intermédiaire d'une administration subordonnée. Ainsi, ~~D~~dans plusieurs affaires concernant la création, sur le territoire d'un État contractant, d'une entité qui n'est pas reconnue par la communauté internationale en tant qu'État souverain, avec l'appui de l'État défendeur, la Cour n'a pas seulement tenu compte de la force de la présence militaire de l'État dans la région. Dans *Catan*, en particulier, il a souligné que l'État défendeur exerçait un « un contrôle effectif et une influence décisive » sur l'administration séparatiste, dont l'existence a été maintenue « que grâce à l'appui militaire, économique et politique de la Russie »[48]. De même, dans l'affaire *Chiragov*, la Cour a constaté que non seulement le soutien militaire de l'État défendeur restait déterminant pour le maintien du contrôle sur les territoires en question, mais aussi que la « République du Haut-Karabakh » – dont l'armée et l'administration et celles d'Arménie se sont avérées être très intégrées – a survécu « grâce à l'appui militaire, politique, financier et autre » que leur apporte l'Arménie.[49] Aucune action directe de l'État défendeur en ce qui concerne l'acte contesté n'a donc été jugée nécessaire dans ce groupe d'affaires pour que les faits relèvent de la juridiction de l'État défendeur.

[47] Ibid., § 142 et paragraphe 35 ci-dessus.
[48] *Catan et autres c. République de Moldova et Russie* [GC], n^os^ 43370/04 et 2 autres, § 122, CEDH 2012 (extraits).
[49] *Chiragov et autres c. Arménie* [GC], n^o^ 13216/05, §§ 180, 185 et 186, CEDH 2015.

52. Il a été souligné que dans cette catégorie d'affaires, lorsqu'un Etat défendeur n'exerce pas de contrôle territorial direct, mais seulement une influence décisive sur l'administration d'un territoire séparatiste, les conséquences ~~d'une constatation de~~d'un constat de l'exercice de la « juridiction » de l'Etat défendeur sur le requérant sont considérables. En effet, ~~I~~l'État défendeur est alors tenu de garantir sur un tel territoire l'ensemble des droits reconnus dans la Convention en tant qu'~~au sens d'une~~ obligation ~~d'obtenir le~~de résultat ~~escompté par la Convention,~~ et pas seulement en tant qu'obligation de moyens~~, c'est-à-dire de faire ce qui est possible pour atteindre ce résultat~~.[50] Il a par ailleurs été souligné que ~~C~~cette catégorie d'affaires, qui survient dans des situations d'extraterritorialité, peut poser des difficultés aux États au stade de l'exécution des arrêts, même si le caractère inconditionnel de l'obligation d'exécuter les arrêts de la Cour en vertu de l'article 46 de la Convention ~~doit être rappelé~~ne saurait être remis en cause. Toutefois, le choix a été fait de ne pas aborder cet aspect relatif à l'exécution des arrêts ~~ne sera pas abordé~~ dans le présent chapitre ~~car~~ dans la mesure où il va au-delà de la question de l'interaction entre la Convention et le droit international général et de l'analyse du risque de fragmentation résultant d'interprétations divergentes à prendre en considération dans le présent rapport.[51]

53. Il a également été avancé qu'en choisissant l'expression « contrôle effectif d'une zone », la Cour semble avoir ~~retenu~~ fait usage d' un concept familier du droit international, mais en s'en servant de ~~base~~ fondement pour attribuer le comportement d'une entité à une autre en droit de la responsabilité des États (voir plus en détail ci-dessous). En outre, le seuil pour établir l'existence de la~~de~~ juridiction de l'Etat serait supérieur si le critère de « contrôle effectif d'une zone » était appliqué dans ce sens. ~~La Cour, se référant à la différence entre les règles de juridiction et d'attribution d'un comportement à un État afin que celui-ci puisse être tenu pour responsable pour ce comportement en vertu du droit international, a expliqué à cet égard que « les critères permettant d'établir l'existence de la « juridiction » au sens de l'article 1 de la Convention n'ont jamais été assimilés aux critères permettant d'établir la responsabilité d'un Etat concernant un fait internationalement illicite au regard du droit international ».~~[52] ~~Néanmoins, il est clair que la Cour, bien que située dans le cadre de la juridiction des États en vertu du droit international général, a développé certaines particularités qui tiennent compte de la nature et de la portée de~~

Comment [MF15]: Clarifier ce qu'on désigne. Uniquement les affaires visées au § 51?

Comment [MF16]: Viser le § auquel il est renvoyé

Comment [MF17]: Il faudrait clarifier cette phrase. Supréieur à quoi?

[50] Voir Philippe Boillat, *Execution of judgements: new paths*, dans: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, p. 63-67.

[51] *Note du Secrétariat: Ce passage a été ajouté afin de refléter les indications données par le CDDH lors de sa réunion des 27-30 novembre 2018 sur la question de savoir si les questions relatives à l'exécution des arrêts devraient être traitées dans ce chapitre (voir le renvoi du cette question au CDDH DH-SYSC-II (2018) R4, § 12).*

[52] ~~Voir *Catan et autres c. Moldova et Russie* [GC], n^os^ 43370/04, 8252/05 et 18454/06, § 115, CEDH 2012 (extraits); *Mozer c. La République de Moldova et la Russie* [GC], n ° 11138/10, §§ 98 et 102, CEDH 2016 et *Chiragov et autres c. Arménie* [GC], n ° 13216/05, § 168, CEDH 2015.~~

~~la Convention en tant que traité relatifs aux droits de l'homme[53] et que le seuil ainsi développé apparaît moins élevé que celui de la loi — bien que différente — de la responsabilité de l'État.~~

~~54. Il ne semble donc pas que la Cour, dans sa jurisprudence en matière de juridiction, s'écarte d'une règle spécifique applicable en matière de juridiction en droit international général, mais il est clair qu'elle a développé certaines caractéristiques en ce qui concerne le caractère spécial de la Convention en tant que traité relatifs aux droits de l'homme. D'autres cours internationales et organes conventionnels ont également donné un effet extraterritorial aux clauses de juridiction d'autres traités relatifs aux droits de l'homme, même si cela a été contesté par certains États.~~

55. Toutefois, ~~ces dernières années, la Cour a plus souvent constaté que la Convention s'appliquait de manière extraterritoriale sur la base de ses principes établis et des faits de l'espèce. Cette~~cette intreprétation extensive de la notion de juridiction faite par la Cour ces dernières années est inhérente ~~évolution, dans le contexte des incertitudes inhérentes~~ à une approche factuelle. On peut également relever que d'autres cours internationales et organes conventionnels ont également donné un effet extraterritorial aux clauses de juridiction d'autres traités relatifs aux droits de l'homme, même si cela a été contesté par certains États. Il est néanmoins vrai que les quelques ~~et de certaines~~ incertitudes dans l'interprétation des principes concernant la portée des obligations des États ~~exposée ci-dessus,~~ entraînent dans une certaine mesure un manque de prévisibilité pour les États des obligations précises en vertu de l'article 1. Une telle incertitude peut compromettre la volonté des États, en particulier de participer à des missions de maintien de la paix régies par le droit international.

56. Il ne faut pas oublier que l'interprétation du champ d'application de l'article 1 est une question particulièrement délicate pour les États parties à la Convention, ~~car~~ puisqu' elle est déterminante pour le déclenchement de toute une série d'obligations de fond découlant de la Convention. Pour cette raison, il a été avancé qu'il existe des limites inhérentes à une interprétation évolutive dans ce domaine. Compte tenu de l'importance pour les États de connaître les circonstances exactes dans lesquelles ils sont obligés de garantir les droits de la Convention, la sécurité juridique est, en tout état de cause, essentielle dans ce domaine particulier.

[…]

60. Pour les besoins de la présente étude sur la notion de responsabilité des Etats et d'extraterritorialité de la Convention EDH ~~« juridiction », au sens de l'article 1 de la Convention~~, la première question qui se pose en matière de responsabilité de l'État est celle de l'« attribution ». La Convention ne contient aucune disposition se référant aux critères d'attribution d'un comportement à une Haute Partie

~~[53] Voir également Robert Spano, *Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law*, in: International and Comparative Law Research Center (ed.), Case law of the European Court of Human Rights — Extraterritorial jurisdiction: Looking for solutions, 2018, p. 43-47.~~

Comment [MF18]: Ces § font reference à la responsabilité. Il paraitrait plus clair de les déplacer dans la partie B)

Comment [MF19]: Repris du §54

Comment [MF20]: Proposition de reformulation pour clarifier ce que l'on souhaite dire

Comment [MF21]: Le Gouvernement français est reservé sur cette phrase qui parait très prescriptive à l'égard de la Cour

Comment [MF22]: Reprendre le titre du rapport

contractante. Il n'existe donc aucune *lex specialis* dans la Convention concernant l'attribution d'un comportement illicite (en effet, les questions concernant l'attribution sont souvent considérées comme faisant partie de la question de « juridiction » au sens de l'article 1). Par conséquent, il semblerait logique que la Cour se tourne vers les règles de droit international coutumier, telles que reflétées en partie dans les AREFII, en tant que *lex generalis*. Il convient de rappeler toutefois que ces articles ne concernent que la responsabilité des États envers d'autres États et organisations internationales[54]. En revanche, la Cour EDH considère en premier lieu les affaires sur la base des requêtes individuelles. On peut ainsi se demander si des articles développés pour une application inter-étatique sont un cadre de réflexion approprié. La Cour EDH a suggéré que la réponse à cette question est, dans l'ensemble, « oui », puisqu'elle a souvent fait référence aux AREFII dans la partie « droit pertinent » de ses arrêts, bien qu'elle ait eu moins souvent l'occasion de se pencher explicitement sur la question de l'application des règles d'attribution des AREFII aux faits spécifiques des cas qui lui ont été soumis.

[…]

62. Pour les besoins de la présente analyse, il est utile d'opérer une distinction entre les différentes situations dans lesquelles la question de l'attribution se pose :

(i) Affaires concernant des questions d'attribution à un État des actions de personnes privées ou d'acteurs non-étatiques;
(ii) Affaires concernant des questions d'attribution dans des situations impliquant plus d'un État dans les faits ;
(iii) Affaires concernant des questions d'attribution dans des situations impliquant un ou plusieurs États et une organisation internationale dans les faits.

63. La Cour a commencé à traiter des questions de juridiction et d'attribution bien avant que la plupart des États du Conseil de l'Europe n'aient ratifié la CEDH (notamment dans les affaires *Chypre c. Turquie* (1975)[55], *Stocké* (1989)[56] et

Comment [LL23]: Les Articles sur la responsabilité de l'Etat pour fait internationalement illicite (AREFII) ne constituent pas un texte juridiquement contraignant. A ce jour, les Etats n'ont d'ailleurs pas souhaité faire des travaux de la CDI la base pour la conclusion d'une convention internationale en la matière. Il conviendrait donc de préciser que la Cour devrait se référer aux AREFII uniquement dans la mesure où ceux-ci reflètent les règles de droit international coutumier en la matière.

Comment [MF24]: Voir commentaire séparé du Gouvernement

[54] Commentaire par le Secrétariat : Le DH-SYSC-II a décidé d'examiner la question du champ d'application des AREFII. Selon le Projet d'Articles sur la responsabilité de l'Etat pour fait internationalement illicite et commentaires y relatifs, point (5) « les présents articles portent sur l'ensemble du domaine de la responsabilité des États. Ils ne sont donc pas limités aux violations d'obligations bilatérales, celles qui résultent par exemple d'un traité bilatéral conclu avec un autre État, mais s'appliquent à l'ensemble des obligations internationales des États, que l'obligation existe envers un ou plusieurs États, envers un individu ou un groupe, ou envers la communauté internationale dans son ensemble ». Il apparaît que le champ d'application des AREFII dans les différends entre un Etat et un individu fait l'objet d'avis divergents parmi les juristes. Il appartient donc au DH-SYSC-II de s'accorder sur une position à cet égard.

[55] Voir *Chypre c. Turquie*, n° 6780/74 et 6950/75, Décision de la Commission du 26 mai 1975, Décisions et Rapports (DR) 2, p. 136; et rapport de la Commission adopté le 10 juillet 1976, p. 32.

[56] *Stocké c. Allemagne*, 19 mars 1991, § 54, Série A n°199.

Loizidou (1996)[57]). Dans l'affaire *Loizidou c. Turquie*[58], la Cour a traité la question de savoir si le requérant relevait de la « juridiction » de la Turquie au sens de l'article 1 de la Convention en statuant sur les exceptions préliminaires. La question de savoir si les faits faisant l'objet de la requête étaient imputables à la Turquie et pouvaient ainsi engager la responsabilité de cet Etat, a été quant à elle tranchée par la Cour dans ses conclusions sur le fond.[59] La Cour a décrit le standard pertinent pour statuer sur la question de l'attribution de la façon suivante :

[…]

64. En examinant les preuves afin de déterminer si le déni continu d'accès à la propriété de la requérante par les autorités de la « RTCN », qui a eu pour conséquence de lui faire perdre tout contrôle de sa propriété, était imputable à la Turquie, la Cour a estimé que :

Comment [MF25]: Refus?

[…]

[…]

72. Dans nombre de ses arrêts, la Cour EDH a traité de l'attribution d'un comportement dans des affaires où plusieurs États étaient impliqués dans un seul préjudice / une seule plainte. Il s'agit typiquement d'affaires dans lesquelles deux États agissent indépendamment l'un de l'autre et où la Cour détermine la responsabilité de chaque État contractant individuellement, en examinant le comportement respectif de chaque État au regard des obligations conventionnelles. A cet égard, l'arrêt *Ilaşcu*, dont les faits ont été relatés plus haut, est un exemple pertinent. Dans cette affaire, la Cour a considéré comme responsables la Moldavie et la Russie, chacune pour des actions ou omissions différentes de chacun des deux Etats. Ces actions et omissions avaient contribué à un préjudice / une plainte. Plus particulièrement, en ce qui concerne la plainte des requérants quant à l'illégalité et aux conditions de leur détention ainsi que les mauvais traitements ~~reçus~~ dont ils ont fait l'objet dans le cadre de celle-ci, la Moldavie a été reconnue responsable d'une violation des articles 3 et 5 à l'égard de trois des requérants, pour son manquement à son obligation positive de chercher à obtenir la libération ~~de ces~~des requérants. La responsabilité de la Russie a été engagée pour la détention des requérants par les autorités de la « RMT » étant donné qu'il a été établi que cette dernière se trouvait sous l'autorité effective, ou au moins sous l'influence décisive, de la Fédération de Russie ; ainsi le comportement contesté a été imputé à la Russie, qui a été reconnue coupable d'avoir violé les articles 3 et 5 à l'égard de l'ensemble des requérants.

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[57] *Loizidou c. Turquie* (exceptions préliminaires), 23 mars 1995, Série A n° 310.
[58] *Ibid.*, §§60-64. L'affaire est née de la plainte d'une ressortissante chypriote d'origine grecque de Kyrenia, dans le Nord de Chypre, qui avait déménagé à Nicosie après son mariage en 1972. Elle prétendait être propriétaire de plusieurs parcelles à Kyrenia, affirmant que depuis l'invasion des forces turques en 1974, elle avait été empêchée de retourner à Kyrenia et de faire usage de ses biens.
[59] *Loizidou c. Turquie* (fond), 18 décembre 1996, §§ 52-57, *Recueil des arrêts et décisions* 1996-VI.

[…]

75. L'approche de la Cour dans ces deux ~~cas~~affaires, ~~où~~ dans lesquelles il apparait clairement pour quel compte agissaient les personnes ou entités concernées, est cohérente avec le principe de la responsabilité indépendante – c'est à dire, le principe selon lequel chaque Etat est responsable de son propre comportement internationalement illicite et la responsabilité étatique est propre à l'Etat concerné[60] – sous-tendu dans les AREFII.[61]

[…]

77. Cependant, dans une autre catégorie d'affaires, la question s'est posée de savoir si la CEDH n'a pas attribué le comportement d'un Etat à un autre. Ainsi, dans l'affaire *El-Masri c. l'ex-République yougoslave de Macédoine*[62], le requérant a allégué, en particulier, qu'il avait fait l'objet d'une opération de remise secrète, c'est-à-dire qu'il avait été arrêté, détenu en secret, interrogé et maltraité par des agents de l'Etat défendeur, qui l'avaient remis à l'aéroport de Skopje à des agents de l'Agence centrale du renseignement (CIA) des États-Unis, qui l'avaient ensuite emmené, sur un vol spécialement affrété par la CIA, dans un établissement de détention secret en Afghanistan, où il avait subi de mauvais traitements jusqu'à son retour en Allemagne via l'Albanie.

[…]

80. […]

La Cour a conclu « qu'en remettant le requérant aux autorités américaines, les autorités macédoniennes l'ont sciemment exposé à un risque réel de mauvais traitements et à des conditions de détention contraires à l'article 3 de la Convention »[63].

Comment [MF26]: N° de § manque

81. La Cour a également examiné la question de savoir si, au titre de l'article 5 « la détention ultérieure [du requérant] à Kaboul peut être imputée à l'Etat défendeur »[64]. Elle a estimé à ce propos :

> « 239. La Cour rappelle qu'un Etat contractant méconnaîtrait l'article 5 de la Convention s'il renvoyait un requérant vers un Etat où l'intéressé serait exposé à un risque réel de violation flagrante de cette disposition (*Othman (Abu Qatada) c. Royaume-Uni*, no 8139/09, § 233, CEDH 2012). […] la Cour

Comment [MF27]: La citation parait trop longue

[60] Voir le Projet d'Articles sur la responsabilité de l'Etat pour fait internationalement illicite et commentaires y relatifs, commentaire de la Partie Une, Chapitre IV, point (1).
[61] Voir M. Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights', (2012) 04 *ACIL Research Paper (SHARES Series)*, à la p. 18.
[62] *El-Masri c. l'ex-République yougoslave de Macédoine* [GC], n° 39630/09, CEDH 2012.
[63] Ibid., § 220.
[64] Ibid., § 235.

estime qu'il aurait dû être clair pour les autorités macédoniennes que, une fois remis aux autorités américaines, le requérant courrait un risque réel de subir une violation flagrante de ses droits au titre de l'article 5. A cet égard, la Cour rappelle que cette disposition exige de l'Etat non seulement qu'il s'abstienne de porter activement atteinte aux droits en question, mais aussi qu'il prenne des mesures appropriées pour protéger l'ensemble des personnes relevant de sa juridiction contre toute atteinte illégale à ces droits […]. Or non seulement les autorités macédoniennes n'ont pas respecté leur obligation positive de protéger le requérant d'une détention contraire à l'article 5 de la Convention, mais elles ont en outre facilité activement sa détention ultérieure en Afghanistan en le remettant à la CIA, alors même qu'elles avaient ou auraient dû avoir connaissance du risque inhérent à ce transfert. Dès lors, la Cour considère que la responsabilité de l'Etat défendeur est également engagée à raison de la détention subie par le requérant du 23 janvier au 28 mai 2004 (voir, mutatis mutandis, *Rantsev c. Chypre et Russie*, n° 25965/04, § 207, CEDH 2010).

…

240. Eu égard à ce qui précède, la Cour estime que l'enlèvement et la détention du requérant s'analysent en une « disparition forcée » telle que définie par le droit international (paragraphes 95 et 100 ci-dessus). La « disparition forcée » du requérant, bien que temporaire, s'est caractérisée par une incertitude et un manque d'explications et d'informations quant au sort de l'intéressé qui ont persisté pendant toute la durée de sa captivité (*Varnava et autres*, précité, § 148). A cet égard, la Cour souligne que, lorsqu'il s'agit d'un ensemble d'actions ou d'omissions illicites, la violation débute avec la première des actions et dure aussi longtemps que ces actions ou omissions se répètent et restent non conformes à l'obligation internationale concernée (*Ilaşcu et autres*, précité, § 321 ; voir également le paragraphe 97 ci-dessus). »

[…]

Défis et solutions possibles

93. Il ressort de l'analyse de la jurisprudence de la Cour, développée plus haut, que cette dernière, lorsqu'elle détermine si une conduite peut être attribuée à l'Etat défendeur, ne précise pas clairement si, et dans quelle mesure, elle applique les règles d'attribution exposées dans les AREFII[65]. Alors qu'à maintes reprises la Cour s'est référée aux AREFII dans le cadre de la présentation des dispositions de droit international pertinentes, elle n'applique pas explicitement ces règles lorsqu'elle juge, sur le fond, si l'acte contesté relève de la responsabilité ou non de l'Etat défendeur.

Comment [MF28]: Il conviendrait néanmoins de rappeler là encore que les AREDI n'ont pas une valeur contraignante et que la Cour ne devrait les appliquer qu'autant qu'ils reflètent les règles du droit international

[65] Voir également Jane M. Rooney, *"The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands"*, Neth Int Law Rev 2015, vol. 62, p. 407–428 ; Kristen Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, Melbourne Journal of International Law, vol. 15, n° 2, 2014.

94. Par exemple, l'approche adoptée par la Cour dans l'affaire *Al Nashiri c. Pologne* reflète cela : après avoir cité les dispositions pertinentes des AREFII dans la partie concernant le droit international pertinent[66] et après que le requérant et les tiers intervenants ~~aient~~ ont soutenu que la responsabilité des Parties Contractantes au titre de la Convention pour avoir coopéré aux remises et détentions secrètes devrait être déterminée à la lumière de l'article 16 des AREFII[67], la Cour a affirmé qu'elle examinerait « les griefs et la mesure dans laquelle les événements incriminés sont imputables à l'Etat polonais, à la lumière des principes exposés ci-dessus de responsabilité de l'Etat en vertu de la Convention et tels qu'ils résultent de la jurisprudence de la Cour »[68] [*traduction non-officielle*] sans faire aucune autre référence aux AREFII dans son examen subséquent de la responsabilité de l'Etat défendeur.

95. Il apparaît ainsi que la Cour applique ses propres principes en prenant en compte les règles pertinentes du droit international et en les appliquant, comme elle le fait habituellement, en étant consciente du caractère particulier de la Convention en tant que traité relatif aux droits de l'homme[69]. Ainsi, en se référant à la différence entre les règles de juridiction et d'attribution d'un comportement à un État afin que celui-ci puisse être tenu pour responsable de ce comportement en vertu du droit international, la Cour a expliqué que « les critères permettant d'établir l'existence de la « juridiction » au sens de l'article 1 de la Convention n'ont jamais été assimilés aux critères permettant d'établir la responsabilité d'un Etat concernant un fait internationalement illicite au regard du droit international ».[70] Et le seuil ainsi développé pour conclure à l'existence de la juridiction de l'Etat au sens de l'article 1 apparaît moins élevé que celui du droit de la responsabilité de l'État.

Comment [MF29]: Partie reprise du §53 et 54

Comment [MF30]: Partie reprise du §53 et 54 en modifiant un peu la formulation

96. ~~Malgré le fait que l'approche méthodologique de la Cour ne soit pas complètement claire, une comparaison de sa jurisprudence montre que dans un grand nombre de décisions, l'approche de la Cour ne diffère pas de celle prévue par les règles des AREFII.~~

97. ~~Cependant~~ , Ainsi, dans l'affaire ~~l'analyse de l'affaire~~ *Ilaşcu* ~~a révélé~~la Coru a retenu la responsabilité de l'Etat défendeur en raison du ~~que le degré de contrôle nécessaire d'un Etat sur une entité afin que le~~ comportement ~~de cette dernière soit attribuable à l'Etat~~d'un eentité distincte en retenant que cette entité se trouvait ~~a été~~

[66] *Al Nashiri c. Pologne*, n° 28761/11, § 207, 24 juillet 2014.
[67] Ibid., §§ 446-449.
[68] Ibid., § 459.
[69] Comparer l'arrêt *Banković et autres c. Belgique et autres* (dec.) [GC], n° 52207/99, § 57, CEDH 2001-XII. Voir également Robert Spano, *Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law*, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, p. 43-47.
[70] Voir *Catan et autres c. Moldova et Russie* [GC], n^{os} 43370/04, 8252/05 et 18454/06, § 115, CEDH 2012 (extraits); *Mozer c. La République de Moldova et la Russie* [GC], n ° 11138/10, §§ 98 et 102, CEDH 2016 et *Chiragov et autres c. Arménie* [GC], n ° 13216/05, § 168, CEDH 2015.

~~défini comme étant~~ « sous l'autorité effective, ou tout au moins sous l'influence décisive »~~,~~ de l'Etat défendeur, et qu'elle « survi[~~vre~~vait] grâce au soutien militaire, économique, financier et politique que lui fournit » l'Etat défendeur. Ce ~~et que ce~~ seuil ~~était~~ est ainsi bien inférieur au degré de contrôle devant être exercé pour que le comportement d'un groupe de personnes soit attribuable à l'Etat en vertu de l'article 8 des AREFII tel qu'interprété par la CDI ou en vertu de la jurisprudence de la CIJ. Cependant, il a également été souligné que, comme la Cour, ~~,~~ le TPIY, faisant référence, *inter alia*, à son mandat particulier, a également appliqué un seuil moins élevé. Toutefois, il est regrettable que la Cour ne donne pas ~~de raisons~~une motivation plus détaillée poru expliquer les ~~s pour avoir développé ces~~ critères qu'elle applique et leur rapport avec les règles de droit international.

98. Ainsi, ~~D~~dans les ~~deux autres~~ affaires ~~développées plus haut,~~ *El-Masri* et *Al Nashiri c. Pologne*, évoquées précédemment, il est difficile de cerner quelles règles la Cour applique exactement en matière de responsabilité de l'Etat et, en particulier, si son raisonnement revenait à attribuer le comportement d'un Etat tiers à l'Etat défendeur[71].

[…]

101. ~~Au final~~Par ailleurs, une autre conclusion qui peut être tirée de la jurisprudence de la Cour, consiste à dire qu'elle ne fait pas toujours clairement la distinction entre, d'une part, la « juridiction » au sens de l'article 1 de la CEDH, et l'attribution d'un comportement selon le droit de la responsabilité des Etats de l'autre. Comme vu auparavant, la Cour a expressément reconnu qu'il y a une distinction conceptuelle entre les deux, par exemple dans son arrêt dans l'affaire *Jaloud*[72]. Elle a aussi constaté que la question de la juridiction précède celle de l'attribution. La reconnaissance, en théorie, que l'attribution et la juridiction sont deux choses différentes n'a pas toujours été clairement reflété dans les arrêts de la Cour. Par exemple, dans l'affaire *Ilaşcu*, il n'est pas évident de savoir si la Cour a fait une distinction claire entre l'attribution du comportement d'un côté, et la question de savoir si la Russie avait exercé sa juridiction sur le requérant au sens de l'article 1 de la CEDH de l'autre.

102. Pour autant, malgré le fait que l'approche méthodologique de la Cour ne soit pas toujours complètement claire, l'analyse globale de sa jurisprudence montre que dans un grand nombre de décisions, l'approche de la Cour ne diffère pas de celle prévue par les règles des AREFII.

Comment [MF31]: Suggestion de dire: dans la majorité

Comment [MF32]: §96 déplacé ici car cela parait plus logique

[71] Pour les difficultés à interpréter les conclusions de la Cour sur les questions relatives à la responsabilité étatique dans l'affaire *El-Masri*, voir l'intervention d'Helen Keller, *The Court's Dilution of Hard International Law: Justified by Human Rights Values?*, au Séminaire organisé pour le lancement des travaux du DH-SYSC-II, co-organisé par Pluricourts et le Conseil de l'Europe, Strasbourg, 29-30 mars 2017 ; et le discours de Rick Lawson, *State responsibility and extraterritorial application of the ECHR*, à la réunion du DH-SYSC du 3 avril 2018, document DH-SYSC(2018)12.

[72] *Jaloud c. Pays-Bas* [GC], n° 47708/08, §§ 112 et suiv. and 154 et suiv., CEDH 2014.

103. Pour conclure, ~~A~~au vu de ce qui précède, et afin d'éviter un risque~~é~~ de fragmentation de l'ordre juridique international, il serait souhaitable que la Cour donne davantage d'explications pour savoir si, et dans quelle mesure, elle considère les règles issues des AREFII pertinentes et applicables dans les affaires pendantes devant elle concernant l'attribution d'un comportement à l'Etat défendeur.

104~~3~~. Plus généralement, pour les cas qui couvrent des situations d'extra-territorialité, qui touchent généralement des domaines politiquement sensibles, notamment des questions de sécurité nationale, il est de la plus haute importance de déterminer une méthodologie claire et une interprétation précise des règles applicables, garantes de ~~afin de garantir~~ la sécurité juridique.

GEORGIA / GEORGIE

1. In considering the place of the European Convention on Human Rights ("the Convention", ECHR) in the European and international legal order, a key focus of the European Court of Human Rights' ("the Court" / ECtHR) case law and academic commentary has been on the core obligation contained in Article 1 of the Convention that State Parties shall secure to everyone within their "jurisdiction" the rights and freedoms set out in the Convention. The vast majority of cases brought before the Court concern challenges to the actions of a State within its territory; as jurisdiction is presumed to be exercised normally throughout the State's territory,[73] it is usually clear that a State has "jurisdiction" and the notion does not require further interpretation. However, a respondent State may notably dispute that it had "jurisdiction" where it acts outside its own territory.

[…]

3. There are extensive bodies of international law on the notions of State jurisdiction and international responsibility. The Court has the ability to draw on these bodies of law when construing the obligation in Article 1, not least by its reliance on the international law rules of treaty interpretation and in particular Article 31(1)(c) of the Vienna Convention on the Law of Treaties.

[…]

~~8. The ECtHR does not always address the question of whether the respondent State is responsible for the conduct complained of, or whether that conduct is attributable to that State, as a separate issue. In the relatively rare cases in which this issue is not clear and must therefore be examined in more detail by the Court, it deals with the question of whether the conduct complained of is attributable, or imputable to the respondent State when deciding on the merits of a complaint.~~[74]

[…]

11. The drafting history of Articles 1 and 56 reveals that it was Article 56 (also called "colonial clause") which provoked more extensive debate. The colonial powers – in particular the United Kingdom, Belgium and the Netherlands – insisted on including it in the text of the Convention to make clear that the scope of the

[73] See for exceptions in this respect, *inter alia*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312; ECHR 2004-VII~~; and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II.[comment: cases of Assanidze and Ilascu are fundamentally different from each other and they should not be considered in a similar fashion while dealing with "exceptions" from the State's jurisdiction].~~

[74] ~~See, for instance, *Loizidou v. Turkey* (merits), 18 December 1996, §§ 52-57, *Reports of Judgments and Decisions* 1996-VI; and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 199 ss., ECHR 2012.~~

Comment [A33]: *Assanidze v. Georgia* should **be deleted from the footnote.**

Comment: the cases of Assanidze and Ilascu are fundamentally different from each other and they should not be considered in a similar fashion while dealing with "exceptions" from the State's jurisdiction.

The case of Assanidze is about the classical - territorial jurisdiction and cannot be referred as "exception". In this case the Court clarified that the facts out of which the violations arose were within the territorial jurisdiction of Georgia within the meaning of Article 1 of the Convention and it was **solely** the responsibility of the Georgian State (§§ 149-150 of the judgment).

This is so, while in the case of Ilaşcu and Others a Contracting State was prevented from exercising its authority over its territory by a constraining de facto situation and such a factual situation reduced the scope of that jurisdiction and envisaged the responsibility of another Contracting State having the "extraterritorial" jurisdiction (but not the "territorial" jurisdiction).

Comment [A34]: Is there any jurisprudence of the Court that the authors can cite? Otherwise it can be seen as invitation for the Court what path to take. As for the invitation it is unclear what is the value of citing Article 31(3) (c) of the VCLT, whereas Article 31(3) (a) and 31(3) (b) may be applicable as well?

Comment [A35]: This might be interpreted in a way that it sets the State responsibility as a precondition for the Court to examine the question of jurisdiction and as such it runs contrary to the preceding paras. This paragraph should be clarified or, in alternative, removed from the final text.

Convention was not to extend automatically to dependent territories.[75] ~~In light of this~~However, according to the Court's case-law, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory (for further, see para 35 below).

12. ~~By contrast, Article 1 did not give rise to much debate.~~ The first draft of Article 1~~simply~~ provided that every State shall guarantee the rights to all persons "within its territory". Then the provision was ~~slightly~~ modified to say secure to everyone "residing in their territories the rights …". The final version containing the wording the "High Contracting Parties shall secure to everyone within their jurisdiction the rights …" was not contentious.[76] The reasons for that amendment are described in the following extract from the Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights: "The Assembly draft had extended the benefits of the Convention to 'all persons residing within the territories of the signatory States'. **It seemed to the Committee that the term 'residing' might be considered too restrictive**. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction' which are also contained in Article 2 of the Draft Covenant of the United Nations Commission." (Vol. III, p. 260).[77] This once again demonstrates that from the very beginning the notion of jurisdiction was not envisaged as exclusively territorial.

13. The term "jurisdiction" is not elaborated further by the Convention. In the case of *Banković*, ~~one of its important decisions on the topic,~~ the Court had affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial".[78] Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR Contracting Parties' obligations ~~may potentially~~can extend beyond their territory.

[…]

[25bis]. Nevertheless, it should be noted that the very involvement of NATO as an independent international organisation, and entanglement between responsibilities of States and international organisation, made a significant impact on ~~while~~ deciding the *Bankovic* case. For the same reasons, the *Bankovic* case should not be deemed as a landmark for classical examination of extraterritorial jurisdiction of States.

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[75] For an overview over the Preparatory work on (then) Article 63 of the European Convention on Human Rights see the Information document drawn up by the Registry of the European Court of Human Rights, document Cour(78)8.

[76] For an overview over the Preparatory work on Article 1 of the Convention see the Information document drawn up by the Registry of the European Court of Human Rights, document Cour(77)9.

[77] Guide to Article 1, echr, p 5/28; available at: https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf

[78] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 59, ECHR 2001-XII.

26. Following its decision in the *Banković* case, the Court further developed its case-law on extra-territorial jurisdiction; both the decision in *Banković* and the inconsistency of the Court's subsequent case-law with that decision, which once again questions its landmark nature, have been the subject of numerous comments and shall be further analysed below.[79]

27. In the string of cases leading to the Court's judgment in *Al-Skeini*, the Court elaborated two models of extraterritorial jurisdiction: (i) when a State exercises effective overall control over a given territory of another State (even a small portion of the territory like a prison or military base) – the so-called "spatial" model. In this respect, the Court found that *"It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory,* ***since even overall control of the area may engage the responsibility of the Contracting Party concerned****"* (Issa and others, para 70); and (ii) when a person is within the exclusive authority and/or control of a State's agent – "personal model of jurisdiction".[80] It appears that in all these cases the "control" exercised by a State implies, and means for the Court, that the responsibility of that State is engaged for any acts and omissions violating the Convention.

[…]

40. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there have been ~~some~~ significant developments as regards the factors the Court will consider, notably in the Court's judgment in *Catan and Others v. the Republic of Moldova and Russia*.[81] The case concerned the complaint lodged by children and parents belonging to the Moldovan community in Transdniestria about the effects of a language policy adopted by the separatist regime of the "Moldavian Republic of Transdniestria" ("MRT") prohibiting the use of the Latin alphabet in schools and the subsequent measures to implement that policy. The Court, in establishing that the applicants were within Russia's jurisdiction for the purposes of Article 1, looked beyond the question of the establishment of the "MRT" as a result of Russian military assistance (in 1991-1992) and the size of Russia's military deployment (in 2002-2004)[82] and had also regard to the fact that "the "MRT" only survived during the period in question (2002-2004) by virtue of Russia's economic support, *inter alia*"[83]. The Court concluded that Russia was continuing to provide military, economic and political support to the Transdniestrian separatists so that it was found to have exercised during the period in question effective control and decisive influence over the "MRT" administration.[84] The impugned facts therefore fell

[79] See the "Discussion" section, §§ 46 *et seq*.
[80] See the summary of the principles in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 130-142, ECHR 2011.
[81] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts).
[82] Ibid., §§ 118-119.
[83] Ibid., § 120.
[84] Ibid., § 122.

within the jurisdiction of Russia, even if no Russian agents had been directly involved in the measures adopted against the applicants' schools.[85] The Court specified:

[...]

[…]

42. In a series of further cases arising from the situation in Transdniestria the Court, basing itself on the findings it made in *Ilaşcu and Others v. Moldova and Russia*[86] in 2004 and without further inquiry into the circumstances of Russian involvement in the impugned acts, has held the Russian Federation responsible for all acts of the "MRT", including unlawful detentions,[87] poor medical treatment in prisons[88] and also confiscation of agricultural produce by "MRT" customs officials[89], on the ground that Russia exercised effective control over the "MRT". In Ilascu the Grand Chamber elaborated that *"It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned. Where a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support."* (Ilascu, paras 315-316).

[…]

Challenges and possible solutions

46. The Court's case law on the extraterritorial application of the Convention set out above shows that the Convention organs have established already at an early stage that the notion of "jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties. However, it is equally clear that, despite the attention given by the Court to defining and categorising in detail the exceptions to the principle that jurisdiction is primarily though not exclusively territorial, ~~some unresolved~~ issues requiring ~~of~~ further

[85] Ibid., § 114.
[86] *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, see in more detail §§ 46 ss. below.
[87] See *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 116-120 and §§ 132-134, 15 November 2011; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 101-111 and §§ 156-158, ECHR 2016; and *Apcov v. the Republic of Moldova and Russia*, no. 13463/07, §§ 23-25 and §§ 47-49, 30 May 2017.
[88] See *Mozer*, cited above, §§ 101-111, §§ 156-158 and § 184; and *Apcov v. the Republic of Moldova and Russia*, no. 13463/07, §§ 23-25 and §§ 47-49, 30 May 2017.
[89] See *Sandu and Others v. the Republic of Moldova and Russia*, nos. 21034/05, 41569/04, 41573/04, 41574/04, 7105/06, 9713/06, 18327/06 and 38649/06, §§ 36-38, 17 July 2018 (not final).

interpretation ~~of that notion and its scope~~still remain.

47. Following the Convention organ's decisions on the extraterritorial application of the Convention notably in the cases concerning the situation in northern Cyprus, the Court ~~set out the guiding principles on~~outlined the interpretation of the notion of "jurisdiction" ~~in a clear manner~~ in ~~one of its main decisions on the subject matter in the case of~~its *Banković* decision. ~~It~~ The Court marked the States' jurisdiction as essentially territorial and~~, as an example~~ however, also enumerated four categories of extraterritorial jurisdiction (extradition/expulsion cases, extraterritorial effects cases, effective control cases and diplomatic or consular cases). It indicated that, given that the scope of Article 1 was determinative of the reach of the entire Convention system it had not applied the "living instrument" approach to its interpretation of Article 1 in that case. Moreover, the Court's finding that the Convention operated "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States"[90] could be read as indicating that the Convention, if exceptionally applicable extraterritorially, would be applied only in respect of territory of another Convention State. Finally, the Court's finding that the obligation in Article 1 could not be "divided and tailored" in accordance with the particular circumstances of the extra-territorial act in question could be seen as excluding an obligation to secure only rights that were relevant to an applicant's situation. In the case at issue, the Court found that the facts of the case at issue – concerning air strikes effective outside Convention territory – to fall under the principle that there was no jurisdiction extraterritorially; the conditions for any of the exceptions were not met.

48. ~~Some s~~Subsequent development of the Court's case~~s~~ law ~~of the Court raised doubts as to~~further clarified interpretation of the scope of the States' extraterritorial jurisdiction as set out in *Banković*. In *Issa* the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"[91] and thereby indicated that the Convention could be applied outside the Convention legal space. In *Pad* the Court found that the respondent State could potentially be held liable in a case involving the death of persons possibly brought about by shots from a military helicopter on foreign territory and thus possibly in a situation concerning air strikes which had not been found to make the victims thereof fall within the respondent State's jurisdiction in *Banković*.

[…]

51. Several important decisions further defined the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate local administration. In several cases concerning the creation, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military

[90] *Banković and Others v. Belgium and Others*, cited above, § 80.
[91] *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004.

presence in the area. In *Catan*, in particular, it emphasised that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".[92] Similarly, in *Chiragov*, the Court found not only the respondent State's military support continues to be decisive for the continued control over the territories in question, but in addition that the "Nagorno Karabakh Republic" – whose army and administration and those of Armenia had been found to be highly integrated – survived "by virtue of the military, political, financial and other support" given to it by Armenia.[93] No direct action by respondent State in relation to the impugned act was thus found to be necessary in this group of cases in order for the acts to come within the respondent States' jurisdiction.

52. It has been stressed that in this category of cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.[94] ~~This category of cases, arising in situations of extraterritoriality, may cause difficulties for the States at the stage of the execution of judgments, even if the unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention should be recalled. However, this aspect relating to the execution of judgments will not be addressed in the present chapter as it goes beyond the question of the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the present report.~~[95]

[…]

~~55. However, the Court, in the past years, has more frequently found the Convention to apply extraterritorially on the basis of its established principles and the particular facts of the case. This development, against the background of the inherent uncertainties of a fact dependent approach and some uncertainties in the interpretation of the principles regarding the scope of the States' obligations outlined above, entails to a certain extent a lack of foreseeability for the States of the exact obligations under Article 1. Such an uncertainty may compromise the States'~~

Comment [A36]: The mentioned passage should be deleted or at least reformulated as follows:

"The unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention should be recalled. Any difficulties named by the States within the context of the execution of the judgments in relation to the category of cases arising in situations of extraterritoriality, should not be addressed in the present chapter as it goes beyond the questions of interaction between the Convention and public international law and the analyses of the risk of fragmentations arising from diverging interpretations which are to be addresses in the present report. "

[92] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, ECHR 2012 (extracts).
[93] *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180 and 185 , ECHR 2015.
[94] See Philippe Boillat, Execution of judgements: new paths, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 63-67.
[95] ~~*Note by the Secretariat: This passage has been added in order to reflect the guidance given by the CDDH in its meeting of 27-30 November 2018 on whether questions relating to the execution of judgments should be addressed in this chapter (see for the referral of this question to the CDDH DH-SYSC-II(2018)R4, § 12).*~~

~~willingness, in particular, to participate in peacekeeping missions governed by international law.~~

~~56. It must be born in mind that the interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. For this reason, it has been argued that there are inherent limits in an evolutive interpretation in this area. In view of the importance for the States of knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is, in any event, of the essence in this particular field.~~

B. The application of the international law of State responsibility by the European Court of Human Rights

[…]

60. For the purposes of the current consideration of the notion of "jurisdiction" in Article 1 of the Convention, the primary issue of State responsibility that arises is that of "attribution". The ECHR does not contain any provision referring to criteria for the attribution of conduct to a High Contracting Party. There is thus no *lex specialis* in the Convention in relation to such attribution (indeed, issues of attribution are often examined as part of the consideration of "jurisdiction" for the purposes of Article 1). Therefore, it would seem to be a logical step for the Court to turn to the ARSIWA as the *lex generalis*. ~~However, it must be remembered that those Articles are concerned only with the responsibility of States towards other States and international organisations.~~[96] In contrast, the ECtHR primarily considers cases on individual applications. One may thus ask whether Articles developed for application between States are the appropriate framework. The ECtHR has suggested that the answer to that question is broadly "yes", as it has on a number of occasions referred to the ARSIWA under the heading "applicable law", although the ECtHR has addressed the explicit question of the application of rules of attribution in the ARSIWA to the specific facts of a case less often.

[…]

~~[96] Comment by the Secretariat: The DH-SYSC-II decided to look into the issue of the scope of application of the ARSIWA. According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (5) "the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole." It appears that the scope of application of the ARSIWA in disputes between a State and an individual is contested amongst lawyers. It is therefore for the DH-SYSC-II to agree on a stance in this respect.~~

93. It emerges from the analysis of the Court's case law described above that the Court, in determining whether conduct is attributable to the respondent State does not make clear whether, and in how far it applies the rules of attribution reflected in the ARSIWA.[97] While the Court repeatedly referred to specific Articles of the ARSIWA when listing the relevant provisions of international law, it does not explicitly apply these rules when deciding at the merits stage whether an impugned act can be attributed to the respondent State.

[…]

96. ~~Despite the fact that the Court's methodological approach is not entirely clear, a~~A comparison of the Court's case law showed that in a large number of decisions, the Court's approach ~~does not differ from that under~~remains harmonious with the ARSIWA rules while maintaining the object and spirit of the Convention as a normative multilateral treaty.

97. ~~However~~That being so, an analysis of the case of *Ilaşcu* disclosed that the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was defined as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State and that this threshold was lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under Article 8 of the ARSIWA as interpreted by the ILC or under the case-law of the ICJ. However, it was equally noted that the ICTY, by reference, *inter alia*, to its different mandate, had equally considered a lower threshold to apply. ~~It must be regretted though that the Court does not give more detailed reasons for the development of these criteria and their relationship with the rules of international law.~~

[…]

101. Finally, ~~another conclusion that can be drawn from the case law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. A~~as shown above, the Court, for instance in its judgment in the *Jaloud case,*[98] has ~~expressly~~ acknowledged that there is a conceptual distinction between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand.~~the two, for instance in its judgment in the *Jaloud case.*~~[99] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the

~~[97] See also Jane M. Rooney, "The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands", Neth Int Law Rev 2015, vol.62, p.p.407–428; Kristen Boon, Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines, Melbourne Journal of International Law, Vol. 15, No. 2, 2014.~~

[98] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.

~~[99] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.~~

Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other.

NETHERLANDS / PAYS-BAS

DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER (DH-SYSC-II)

Comments by the Kingdom of the Netherlands on Draft chapter of Theme 1, subtheme ii):

State responsibility and extraterritorial application of the European Convention on Human Rights (DH-SYSC-II(2018)24)

1. Introduction

The Netherlands is grateful to the co-rapporteurs and to the contributors for their work. It considers that the Revised draft chapter has developed into a good contribution to the Report of the Drafting Group.

At this stage, the Netherlands wishes to make the following specific remarks on the revised draft chapter.

Para 3, line 4: replace “Article 3 (1) (c)” with “Article 31 (3) (c)”

Rationale: Article 31 (1) does not have subparagraphs. Article 31 (3) (c) is concerned with any other relevant rules of international law applicable in the relations between the parties.

Para 4, line 9

Suggestion to insert after the last sentence of this paragraph ”and in the territory of another State with the consent of that State”

Rationale: enforcement jurisdiction can be exercised extraterritorially in the territory of another State if that State consents. This happens frequently in the case of military personnel deployed abroad, for example, based on Status of Forces Agreements between the sending and receiving States.

Para 6, line 10

Insert “are” before “declared”

Rationale: editorial.

Para 23, line 6

Replace “signatory State” with “High Contracting Party”

Rationale: signature of a treaty is normally – and in the case of the ECHR – insufficient to become bound by that treaty.

Para 39, line 2

Delete “by Netherlands troops”

Rationale: it was not established that Mr Jaloud was killed by Netherlands’ personnel. Paragraph 16 of the ECtHR judgment states in this regard that “It was not determined by whom the bullet or bullets had been fired, nor from what weapon.”

Para 40:

Suggestion to delete the long citation from the Catan and others v. the Republic of Moldova and Russia judgment. Or alternatively to paraphrase or summarize the cited paragraphs in one or two sentences.

Rationale: Suggestion based on the readability and taking into account the word limit of the report against the added value of the lengthy citation.

Para 45, footnote 79

Insert the relevant paragraph from the UN document, which reads:

“19. Having said that, the Government disagrees with the Committee’s suggestion that the provisions of the International Covenant on Civil and Political Rights are applicable to the conduct of Dutch blue helmets in Srebrenica (para. 8). Article 2 of the Covenant clearly states
that each State Party undertakes to respect and to ensure to all individuals “within its territory
and subject to its jurisdiction” the rights recognized in the Covenant, including the right to life enshrined in article 6. It goes without saying that the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope of that provision. The strong commitment of the Netherlands to investigate and assess the deplorable events of 1995 is therefore not based on any
obligation under the Covenant.”

Rationale: the statement by the Netherlands did not necessarily refer to extraterritorial application of the ICCPR as such, rather than in the particular circumstances of the case.

Para 49, line 1
Suggestion to alter “main” into “leading”
Rationale: consistancy

Para 49 line 15/16
The line “… appeared to be excluded under the principles laid down in Bancovic.” Seems ambiguous. Does it refer to the legal space-doctrine or the state agents? Suggestion to clarify

Para 49, line 16

Suggestion to add “ purportedly” before “based”.
Rationale: without the additions there is the suggestion that earlier case law was consistent., whereas in the previous paragraphs it is explained that this was not the case.

Para 49, line 18
Replace facts with fact

Para 56, line 1

Replace “born” with “borne”

Rationale: editorial

Para 60, text accompanying footnote 93

We agree on the formulation also on the footnote. Leaving out the first and last sentence.

Para 69, line 6

Insert “of” after “conduct”

Rationale: editorial

Para 96, line 3

It is unclear what is exactly meant by the notion that he Court does not differ from ARSWA. In other paragraphs it is underlined that the Court does not apply ARSWA. Please clarify.

Para 97, line 9-10.

Suggestion: replace “It must be regretted that the Court does not give ” with “It would be welcomed if the Court in its future judgements would give a ”

Rationale: This chapter is the chapter with challenges and possible solutions. To regret something is not directed to a solution.

Para 99, line 8:

Add: “to the respondent State” after “… of a third State.

Rationale: clarifies the sentence.

Para 100:

It is unclear what the challenge (or the possible solution of this paragraph is. Suggestion to add a concluding remark along the lines that therefore it remains unclear whether the Court has held the respondent states responsible for their own conduct or attributed the conduct of foreign officials to the respondent State.

Para 101, line 4

Replace “show” with “shown”

Rationale: editorial

Para 102, line 2

Replace “gave more explanations” with “would give in its judgements a more detailed reasoning”

Rationale: Courts don’t explain but could give a more detailed reasoning.

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

1. In considering the place of the European Convention on Human Rights ("the Convention", ECHR) in the European and international legal order, a key focus of the European Court of Human Rights' ("the Court" / ECtHR) case law and academic commentary has been on the core obligation contained in Article 1 of the Convention that State Parties shall secure to everyone within their "jurisdiction" the rights and freedoms set out in the Convention. The vast majority of cases brought before the Court concern challenges to the actions of a State within its territory; as jurisdiction is presumed to be exercised normally throughout the State's territory,[100] it is usually clear that a State has "jurisdiction" and the notion does not require further interpretation. However, a respondent State may notably dispute ~~**that it had**~~ **its** "jurisdiction" and **responsibility** ~~**where it acts outside its own territory,**~~ **when it is brought to liability for violations outside its territory.**

2. The question of whether a State had "jurisdiction" ~~**must be distinguished from the question whether the State can be held responsible for an impugned act, or whether that act is attributable to that State. This**~~ **may** ~~**equally**~~ be disputed by States, notably where non-State actors or other States or international organisations are involved in the conduct complained of, **as well as where there is no direct causal link between actions (omissions) of a State or its agents and the consequences that occurred at the end.**

[…]

4. The notion of "jurisdiction" in general international law refers to the exercise of lawful power by a State to **directly** affect persons, property, and circumstances. Such may be exercised through legislative, executive, or judicial actions; Legislative jurisdiction is exercised primarily in respect of persons, property and circumstances within the territory of the State, but can sometimes be exercised extraterritorially.[101] Enforcement jurisdiction (i.e. the powers of the courts and the executive actually to enforce the law) can only be exercised on the basis of territoriality (though international co-operation through measures such as extradition, mutual legal assistance, recognition and enforcement of judgments may contribute to the exercise of enforcement jurisdiction). **But the notion of 'jurisdiction' in human rights treaties refers to the jurisdiction of a state, not to the jurisdiction of a court.**

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[100] See for exceptions in this respect, *inter alia*, ~~***Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312; ECHR 2004-VII; and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II.~~ ***Cyprus v. Turkey*** **[GC], nos. 6780/74 and 6950/75, 10 May 2001, and *Loizidou v. Turkey* [GC], 18 December 1996.**

[101] As is well known, the "*Harvard Draft Convention on Jurisdiction with Respect to Crime"* from 1935 identifies five principles for the exercise of legislative jurisdiction, namely the territorial principle, the nationality principle (or active personality principle), the protective principle, the universality principle and the passive personality principle; see Harvard Research in International Law: *Draft Convention on Jurisdiction with Respect to Crime*, Supplement to the American Journal of International Law (1935) pp. 437–635.

~~5. In the context of human rights treaties such as the ECHR, the notion of "jurisdiction" is different:[102] it refers to the jurisdiction of a State, for the purpose of setting limits on the scope of application of the treaty concerned. It defines the category of persons who enjoy the rights and freedoms set out in that treaty. This notion of jurisdiction is not concerned with the question whether the exercise of jurisdiction was lawful or unlawful.~~

5. ~~Despite this,~~ According to the Court's well-established case law, "the concept of 'jurisdiction' for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law".[103] Furthermore, "'[j]urisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention".[104] In other words, only when the Court is satisfied that the matters complained of were within the State's jurisdiction, the question of State responsibility arises.[105] Applications in which the respondent State is found not to have jurisdiction in respect of the acts complained of declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention for being incompatible with the provisions of the Convention.[106] **Thus, it is extremely important to determine the jurisdictional connection between a State and actions appealed against before the European Court.**

6. The notion of State responsibility in general international law addresses the identification of an internationally wrongful act and the consequences that flow from

[102] See also Robert Spano, Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, p. 45.

[103] See, *inter alia*, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, ECHR 2004-VII.

[104] See *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, 7 July 2011; *Catan and Others v. Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, § 103, ECHR 2012 (extracts); and *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 168, ECHR 2015.

[105] See Michael O'Boyle, The European Convention on Human Rights and extraterritorial jurisdiction : a comment on 'Life after Banković', in: Fons Coomans and Menno T. Kamminga (eds.), Extraterritorial Application of Human Rights Treaties, 2004, pp. 130-131.

[106] See, *inter alia*, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 84-85, ECHR 2001-XII.

it.[107], **as well as direct causal link between actions (omissions) of a State or its agents and the consequences that occurred as a result.** Pursuant to Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), "[e]very internationally wrongful act of a State entails the international responsibility of that State". An internationally wrongful act within that provision covers both actions and omissions, and the wrongfulness or otherwise of such conduct is to be judged according to the requirements of the allegedly violated obligation.[108] Furthermore, in international law the notion of "attribution" is used to determine when there is a sufficiently close link between a certain conduct and a State so as to consider that conduct as an "act of a State" within the meaning of Article 1 of the ARSIWA.[109]

[…]

12. The term "jurisdiction" is not elaborated further by the Convention. **Interpretation of the term is one of the most pressing and still unresolved challenges both for the ECtHR and the States Parties to the Convention.** In the case of *Banković*, one of its important decisions on the topic, the Court had affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial".[110] Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR Contracting Parties' obligations may potentially extend beyond their territory.

[…]

14. From the outset, it should be noted that under Article 1 of the Convention the term "jurisdiction" relates to situations in which an individual enjoys Convention rights and the relevant State Party has correlative Convention obligations with respect to these rights. As the Court noted, the exercise of jurisdiction by a Contracting State is a necessary condition for that State to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

[107] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (1).
[108] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 1, point (1), and on Article 2, point (4) with a number of examples.
[109] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 2, point (5), and Commentary on Part One, Chapter II, points (1) – (9).
[110] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 59, ECHR 2001-XII.

The case law[111]

[…]

26. Following its decision in the *Banković* case, the Court further **moved in a markedly different direction, seeking to develop a more extensive interpretation of Article 1 of the ECHR, having** developed its case-law on extra-territorial jurisdiction; both the decision in *Banković* and the consistency of the Court's subsequent case-law with that decision have been the subject of numerous comments and shall be further analysed below.[112]

[…]

29. In its decision in *Pad and Others v. Turkey*, the Court then dealt with the applications of several Iranian nationals that concerned the alleged killing of their relatives either, as claimed by the Government, by shots from a Turkish military helicopter over Turkish territory near the Turkish border, or, as claimed by the applicants, after physical arrest on Iranian territory by the helicopter crew after landing and after having been brought on Turkish territory. Following its reasoning in the *Issa* judgment the Court held that Turkey could potentially be liable under the personal model of jurisdiction, **in a clear departure from the Banković decision and despite striking resemblance of factual circumstances with the Banković case** [113]

30. In its *Al-Skeini* judgment[114], another leading case,[115] the Grand Chamber elaborated further on the concept of extraterritorial jurisdiction under the Convention. The case concerned the applications of six Iraqi nationals brought in respect of actions of UK forces in Iraq in 2003, when the latter were seeking to establish security and support civil administration in and around Basra; the applicants' relatives were killed during the security operations in question. **On the issue of "jurisdiction" for the purposes of Article 1, the Court drew a number of significant conclusions implying that Article 1 could also be the subject of an evolutive interpretation by the Court. However, in doing so, the Court purported not to reverse its reasoning in the Banković decision. On the contrary, the Court reiterated the approach it had set out in Banković that extraterritorial jurisdiction shall be exceptional and justified by general international law.**

[…]

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[111] Chronological order, in which the Court's judgments are listed in the present document, is aimed at reflection of genesis of the relevant case-law without prejudice to the primary character of the territorial jurisdiction of the State Parties.

[112] See the "Discussion" section, §§ 46 *et seq*.

[113] *Pad and Others v. Turkey* (dec.), no. 60167/00, § 53, 28 June 2007.

[114] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.

[115] See for this assessment also Marko Milanovic, *Al-Skeini* and *Al-Jedda* in Strasbourg, European Journal of International Law, Vol. 23, no. 1, p. 121.

(iv) The case law since *Al-Skeini*

37. As will be discussed below, the analytical framework the Court set out in Al Skeini may raise a number of questions as to how clear and appropriate limitations can be drawn around the extension of extraterritorial application of the Convention. And such concerns are borne out to extent in subsequent case law of the Court.

[…]

41. Whilst not entirely clear, this finding may suggest that the Court was applying the "State agent authority" test. If so, it is unclear what role the existence of the checkpoint played. It has been suggested by commentators that this was intended as factor limiting the application of the "State agent authority" test, but the Court does not make clear whether this was indeed the intention and if so, how the limitation operates.

42. Another question that this finding raises is how the statement "within the limits of its SFIR mission" relates to the findings of the Court in paragraphs 135 – 136 of the Al-Skeini judgment, in particular concerning the exercise of "public powers". In paragraph 135 of Al-Skeini, the Court referred to the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government. In paragraph 136, where the Court talked about the use of force as a separate basis for establishing jurisdiction, it did not refer to the exercise of "public powers". The facts of Jaloud seem to be closer to the case described in paragraph 136, but the Court by invoking the SFIR mission appears to be referring to the exercise of "public powers."

43. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there have been ~~**some developments**~~ **essential expansion** as regards the factors the Court will consider, notably in the **contradictory** Court's judgment in *Catan and Others v. the Republic of Moldova and Russia.*[116] The case concerned the complaint lodged by children and parents belonging to the Moldovan community in Transdniestria about the effects of a language policy adopted by the separatist regime of the "Moldavian Republic of Transdniestria" ("MRT") prohibiting the use of the Latin alphabet in schools and the subsequent measures to implement that policy. The Court, in establishing that the applicants were within Russia's jurisdiction for the purposes of Article 1, looked beyond the question of the establishment of the "MRT" as a result of Russian military assistance (in 1991-1992) and the size of Russia's military deployment (in 2002-2004)[117] and had also regard to the fact that "the "MRT" only survived during the

[116] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts).
[117] Ibid., §§ 118-119.

period in question (2002-2004) by virtue of Russia's economic support, *inter alia*"[118]. The Court concluded that Russia was continuing to provide military, economic and political support to the Transdniestrian separatists so that it was found to have exercised during the period in question effective control and decisive influence over the "MRT" administration.[119] The impugned facts therefore fell within the jurisdiction of Russia, ~~**even if no Russian agents had been directly involved in the measures adopted against the applicants' schools.**~~ **although the Court expressly admitted that there was no evidence of any direct involvement of Russian agents in the action taken against the applicants' schools** [120] The Court specified:

> "106. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that 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 the Contracting State's own armed forces, or through a subordinate local administration (*Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković*, cited above, § 70; *Ilaşcu*, cited above, §§ 314-316; *Loizidou* (merits), cited above, § 52; *Al-Skeini*, cited above, § 138). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (*Cyprus v. Turkey*, cited above, §§ 76-77; *Al-Skeini*, cited above, § 138).
>
> 107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56; *Ilaşcu*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu*, cited above, §§ 388-394; *Al-Skeini*, cited above, § 139). (…)
>
> 114. … the Court has also held that a State can exercise jurisdiction extra-territorially when, as a consequence of lawful or unlawful military action, a

[118] Ibid., § 120.
[119] Ibid., § 122.
[120] Ibid., § 114.

Contracting State exercises effective control of an area outside that national territory (see paragraph 106 above). The Court accepts that there is no evidence of any direct involvement of Russian agents in the action taken against the applicants' schools. However, it is the applicants' submission that Russia had effective control over the "MRT" during the relevant period and the Court must establish whether or not this was the case. (…)

118. The Court accepts that, by 2002 – 2004, the number of Russian military personnel stationed in Transdniestria had decreased significantly **(see *Ilaşcu*, cited above, § 387) and was small in relation to the size of the territory.**

121. In summary, therefore, the Russian Government have not persuaded the Court that the conclusions it reached in 2004 in the *Ilaşcu* judgment (cited above) were inaccurate. The "MRT" was established as a result of Russian military assistance. The continued Russian military and armaments presence in the region sent a strong signal, to the "MRT" leaders, the Moldovan Government and international observers, of Russia's continued military support for the separatists. In addition, the population were dependent on free or highly subsidised gas supplies, pensions and other financial aid from Russia.

122. The Court, therefore, maintains its findings in the *Ilaşcu* judgment (cited above), that during the period 2002-2004 the "MRT" was able to continue in existence, resisting Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, only because of Russian military, economic and political support. In these circumstances, the "MRT"'s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the "MRT" administration during the period of the schools' crisis.

[…]

45. In a series of further cases arising from the situation in Transdniestria the Court, basing itself on the findings it made in *Ilaşcu and Others v. Moldova and Russia*[121] in 2004 and without further inquiry into the circumstances of Russian involvement in the impugned acts, has held the Russian Federation responsible for all acts of the "MRT", including unlawful detentions,[122] poor medical treatment in prisons[123] and **~~also~~ even** confiscation of agricultural produce by "MRT" customs

[121] *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, see in more detail §§ 46 ss. below.
[122] See *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 116-120 and §§ 132-134, 15 November 2011; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 101-111 and §§ 156-158, ECHR 2016; and *Apcov v. the Republic of Moldova and Russia*, no. 13463/07, §§ 23-25 and §§ 47-49, 30 May 2017.
[123] See *Mozer*, cited above, §§ 101-111, §§ 156-158 and § 184; and *Apcov v. the Republic of Moldova and Russia*, no. 13463/07, §§ 23-25 and §§ 47-49, 30 May 2017.

officials[124], on the ground that Russia exercised effective control over the "MRT".
This category of cases, arising in situations of extraterritoriality, may cause *objective* difficulties for the States at the stage of the execution of judgments, even if the unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention should be recalled. However, this aspect relating to the execution of judgments will not be addressed in the present chapter as it goes beyond the question of the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the present report.[125]

46. ~~**The Court further had to decide on the question of effective control of an area outside a State's own territory in *Chiragov and Others v. Armenia*.[126]**~~ **Similarly in cases relating to Nagorno-Karabakh such as Chiragov v. Armenia the Court appears to have diluted its criteria of effective control by adopting a rather broad criterion of "military and economic support" in place of the relatively undisputable factor of mass military presence (The case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Nagorno-Karabakh conflict).** The case concerned the complaints made by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh. Referring to *Catan and Others*, the Court reiterated that the assessment of whether, on the facts of the case, the Republic of Armenia exercised and continues to exercise effective control over the territories in question "will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance".[127] Examining Armenia's military involvement, the Court concluded that "it finds it established that the Republic of Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue, and the evidence, not the least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated".[128] Furthermore, examining other support provided by Armenia to the "Nagorno-Karabakh Republic" ("NKR"), the Court found that Armenia provided "general political support"[129], noted

[124] See *Sandu and Others v. the Republic of Moldova and Russia*, nos. 21034/05, 41569/04, 41573/04, 41574/04, 7105/06, 9713/06, 18327/06 and 38649/06, §§ 36-38, 17 July 2018 (not final).
[125] *Note by the Secretariat: This passage has been added in order to reflect the guidance given by the CDDH in its meeting of 27-30 November 2018 on whether questions relating to the execution of judgments should be addressed in this chapter (see for the referral of this question to the CDDH DH-SYSC-II(2018)R4, § 12).*
[126] *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015.
[127] Ibid., § 169.
[128] Ibid., § 180.
[129] Ibid., § 181.

"the operation of Armenian law enforcement agents and the exercise of jurisdiction by Armenian courts on that territory"[130] and considered that "the 'NKR' would not be able to subsist economically without the substantial support stemming from Armenia"[131]. The Court concluded that "the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. (…) the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention."[132]

Challenges and possible solutions

~~**46. The Court's case law on the extraterritorial application of the Convention set out above shows that the Convention organs have established already at an early stage that the notion of "jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties. However, it is equally clear that, despite the attention given by the Court to defining and categorising in detail the exceptions to the principle that jurisdiction is primarily territorial, some unresolved issues of interpretation of that notion and its scope remain.**~~

~~**47. Following the Convention organ's decisions on the extraterritorial application of the Convention notably in the cases concerning the situation in northern Cyprus, the Court set out the guiding principles on the interpretation of the notion of "jurisdiction" in a clear manner in one of its main decisions on the subject matter in the case of *Banković*. It marked the States' jurisdiction as essentially territorial and enumerated four categories of extraterritorial jurisdiction (extradition/expulsion cases, extraterritorial effects cases, effective control cases and diplomatic or consular cases). It indicated that, given that the scope of Article 1 was determinative of the reach of the entire Convention system it had not applied the "living instrument" approach to its interpretation of Article 1 in that case. Moreover, the Court's finding that the Convention operated "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States"[133] could be read as indicating that the Convention, if exceptionally applicable extraterritorially, would be applied only in respect of territory of another Convention State. Finally, the Court's finding that the obligation in Article 1 could not be "divided and tailored" in accordance with the particular circumstances of the extra-territorial act in question could be seen as excluding an obligation to secure**~~

130 Ibid., § 182.
131 Ibid., § 185.
132 Ibid., § 186.
133 *Banković and Others v. Belgium and Others*, cited above, § 80.

~~only rights that were relevant to an applicant's situation. In the case at issue, the Court found that the facts of the case at issue – concerning air strikes effective outside Convention territory – to fall under the principle that there was no jurisdiction extraterritorially; the conditions for any of the exceptions were not met.~~

~~48. Some subsequent cases of the Court raised doubts as to interpretation of the scope of the States' extraterritorial jurisdiction as set out in *Banković*. In *Issa* the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"[134] and thereby indicated that the Convention could be applied outside the Convention legal space. In *Pad* the Court found that the respondent State could potentially be held liable in a case involving the death of persons possibly brought about by shots from a military helicopter on foreign territory and thus possibly in a situation concerning air strikes which had not been found to make the victims thereof fall within the respondent State's jurisdiction in *Banković*.~~

~~49. In *Al-Skeini*, another main judgment on the scope of the notion of jurisdiction, the Court can be seen to restructure the different categories of exceptions to the rule of jurisdiction within the State's own territory. It divided the exceptions into two groups: first, cases of State agent authority and control, in which the State must secure to the individual the rights relevant to the individual's situation and, second, cases of effective control over an area in which the State must secure, within the area under its control, the entire range of substantive rights of the Convention. It is clear from the Court's definition of the scope of the State's obligations in the first category of State agent authority and control cases that the Convention rights can, as recognised by the Court itself, be "divided and tailored" in the end, in so far as only Convention rights relevant to the situation must be secured.[135] Moreover, the facts of the case, which concerned the death of the applicants' relatives during security operations on the ground in Iraq, were found to fall under the exception of State agent authority and control. Other than in *Banković*, the respondent State was thus found to have jurisdiction outside the Convention legal space, which, despite the explanations given by the Court in *Al-Skeini* in this regard,[136] appeared to be excluded under the principles laid down in *Banković*. Therefore, while the Court based its general principles on the notion of "jurisdiction" in *Al-Skeini* on its previous case law including the principles developed in *Banković*, their application to the fact of the case at issue resulted in the respondent State being obliged to secure the procedural rights under Article 2 of the Convention to the applicants.~~

~~50. In further applications including the cases of *Hirsi Jamaa*, *Hassan* and~~

[134] *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004.
[135] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 137, ECHR 2011.
[136] *Ibid.*, § 142 and paragraph 35 above.

~~*Jaloud*, the Court, while relying on the principles as summarised in *Al-Skeini*, found the facts of the case to fall under the exception of State agent authority and control, thus enlarging the scope of application of the Convention to further situations arising outside the respondent States' territory. It has been raised in this context that given the parallel development, in the Court's case law, of the substantive rights under the Convention, so as to include notably also positive and/or procedural obligations, it may not always be obvious for the respondent State to foresee exactly the scope of its obligations under the Convention in respect of the rights that are relevant to the situation of the individual falling under its jurisdiction.~~

~~51. Several important decisions further defined the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In several cases concerning the creation, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military presence in the area. In *Catan*, in particular, it emphasised that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".[137] Similarly, in *Chiragov*, the Court found not only the respondent State's military support continues to be decisive for the continued control over the territories in question, but in addition that the "Nagorno Karabakh Republic" – whose army and administration and those of Armenia had been found to be highly integrated – survived "by virtue of the military, political, financial and other support" given to it by Armenia.[138] No direct action by respondent State in relation to the impugned act was thus found to be necessary in this group of cases in order for the acts to come within the respondent States' jurisdiction.~~

~~52. It has been stressed that in this category of cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.[139] This category of cases, arising in situations of extraterritoriality, may cause difficulties for the States at the stage of the execution of judgments, even if the~~

[137] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, ECHR 2012 (extracts).
[138] *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180 and 185 , ECHR 2015.
[139] See Philippe Boillat, Execution of judgements: new paths, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 63-67.

~~unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention should be recalled. However, this aspect relating to the execution of judgments will not be addressed in the present chapter as it goes beyond the question of the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the present report.~~[140]

~~53. It was further advanced that in choosing the term "effective control of an area", the Court appears to have taken up a concept familiar to international law, but as a basis for attributing the conduct of one entity to another in the law of State responsibility (see in more detail below). Moreover, the threshold for assuming jurisdiction would be higher if the criteria of "effective control of an area" in that sense were applied. The Court, referring to the difference between the rules governing jurisdiction and attribution of conduct to a State so that it may be held responsible under international law for that conduct, has explained in this respect that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law".~~[141] ~~Nevertheless, it is clear that the Court, although set in the framework of States' jurisdiction under general international law, has developed some particular features which take account of the nature and scope of the Convention as a human rights treaty,~~[142] ~~and that the threshold thus developed appears less high than that under the – albeit different –law of State responsibility.~~

~~54. It does not appear, therefore, that the Court, in its case law on jurisdiction, diverges from a specific applicable rule on jurisdiction in general international law, but it is clear that it developed some features with regard to the special character of the Convention as a human rights treaty. Other international courts and treaty organs have equally given extraterritorial effect to the jurisdiction clauses of other human rights treaties, albeit not without this being contested by some States.~~

~~[140] *Note by the Secretariat: This passage has been added in order to reflect the guidance given by the CDDH in its meeting of 27-30 November 2018 on whether questions relating to the execution of judgments should be addressed in this chapter (see for the referral of this question to the CDDH DH-SYSC-II(2018)R4, § 12).*~~

[141] See *Catan and Others v. Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, § 115, ECHR 2012 (extracts); *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 98 and 102, ECHR 2016; and *Chiragov and Others v. Armenia* ([GC], no. 13216/05, § 168, ECHR 2015.

[142] See also Robert Spano, Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 43-47.

49. For many commentators the Bankovic judgment remains the clearest statement of principle on the extraterritorial application of the Convention. It provides some important "bright lines" by way of guidance on the primarily territorial aspect of the Convention that permits only few exceptions that the Court hitherto had been slow to find. Firstly the Court's finding in Bankovic that the scope of "jurisdiction" for the purposes of Article 1 should not be the subject of evolutive interpretation. The risks of taking an evolutive approach to such a fundamental question as the territorial application of the Convention carries with it clear risks to the stability and predictability of the caselaw, giving rise to genuine difficulties for States in seeking to meet the Convention's requirements.

50. Secondly the finding in Bankovic on the Convention's vocation as regional instrument operating within the "espace juridique" of the territories of the Contracting States accorded with the primary territorial approach to "jurisdiction" and the scheme of the Convention (including Art 56). Likewise the Court's finding that Article 1 required that the rights under the Convention should be guaranteed as a whole, rather than divided and tailored can be considered as seeking to ensure the coherence and integrity of the Convention system.

51. Developments in the subsequent case law have seen some significant steps away from those "bright lines", but without achieving similar clarity in the rules that are proposed to replace them. Thus for example there is an ongoing acceptance of the idea of the *espace juridique* in the sense of the Convention as a constitutional instrument of European public order. However in the Al Skeini judgment the Court says that his does not mean that "jurisdiction under Article 1 of the Convention can never exist outside the territory covered by Council of Europe member States".

52. In relation to the question of dividing and tailoring Convention rights as we have seen the Court has gone further and, apparently overturned its finding on this Bankovic, and found that in situations where a State agent, acting outside the State's territory, exercises control and authority over an individual, the State must secure the rights "that are relevant to the situation of that individual". The concern here is for the coherence and integrity of the guarantees of the Convention as they have been elaborated systematically in the case law of the Court. The ever-increasing sophistication in the body of interpretative jurisprudence on the Convention rights and the Court's emphasis on the effectiveness of the Convention Guarantees, mean that simply to say a given Article of the Convention is "relevant" to a particular situation is likely to raise as many questions as it answers. In the Court's jurisprudence many Convention rights, as well as having close interrelations, now include additional positive and/ or procedural obligations, and require the interaction of a number of State organs to ensure their effective guarantee. In many of the situations in which the Court has found the Convention applies extra-territorially the respondent State has had (entirely appropriately) only limited powers that would not equip it to ensure the effective application of the Convention or the respective Court judgments. The result of the "dividing and tailoring" of the Convention in these circumstances is likely to increase the

legal uncertainty, rather than provide effective protection of Convention rights.

53. Similarly the potential breadth of the Court's sub-categories within "State agent authority and control" of (a) the exercise of public powers and (b) use of force/exercise of physical control are so broadly expressed that they potentially enlarge what is an exceptional basis for extraterritorial application of the Convention very broadly indeed, since almost any action of a State official, and particularly one that involved some impact on individuals, could by definition be described as "an exercise of public powers". In other words this could potentially signal a reversal of the central proposition of Bankovic that the application of the Convention is primarily territorial, and examples of its extraterritorial are exceptional.

54. A parallel expansion of the extraterritorial reach of the Convention by use of broad and highly contextual criteria has also been observed in recent case law on the question of "effective control of an area". In choosing the term "effective control" the Court appears to have taken up a concept familiar to international law, but as basis for attributing the conduct of one entity to another in the law of State responsibility . Nevertheless in the earlier caselaw such as Loizidou which was based on a sufficient military presence to enable the State in question to exercise genuine "control" of the territory, has is closest analogy in international law in the law of belligerent occupation. It is perhaps instructive to consider the Art 42 of the Hague Regulations, which provides:

> **Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.**
> **The occupation extends only to the territory where such authority has been established and can be exercised.**

55. Whilst the relationship between international humanitarian law and human rights will be considered in greater depth elsewhere, it is striking that threshold for the application of the law of occupation (which in some respects sets out a less onerous set of obligations on an occupying power than human rights law) appears to be set higher than the threshold for the application of the Convention. This is particularly so in the case where the Court purports to dilute the standard of "effective control" to issues relating to non-military factors such as political and economic influence. In the words of one leading commentator that "in its post Al-Skeini trend the Court is now likely to find Article 1 jurisdiction and is being increasingly generous on threshold questions of the Convention's extraterritorial application".

56. ~~**However,**~~ the Court, in the past years, has more frequently found the Convention to apply extraterritorially on the basis of its established principles and the particular facts of the case. This development, against the background of the inherent uncertainties of a fact-dependent approach and some uncertainties in the interpretation of the principles regarding the scope of the States' obligations outlined above, entails to a certain extent a lack of foreseeability for the States of the exact obligations under Article 1. Such an uncertainty may compromise the States' willingness, in particular, to participate in peacekeeping missions governed by

international law.

57. It must be born in mind **that the category of cases, arising in situations of extraterritoriality, where a respondent State does not have direct territorial control, may cause difficulties for the States at the stage of the execution of judgments** ~~**the interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. For this reason, it has been argued that there are inherent limits in an evolutive interpretation in this area. In view of the importance for the States of knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is, in any event, of the essence in this particular field.**~~

B. The application of the international law of State responsibility by the European Court of Human Rights

[…]

61. For the purposes of the current consideration of the notion of "jurisdiction" in Article 1 of the Convention, the primary issue of State responsibility that arises is that of "attribution". The ECHR does not contain any provision referring to criteria for the attribution of conduct to a High Contracting Party. There is thus no *lex specialis* in the Convention in relation to such attribution (indeed, issues of attribution are often examined as part of the consideration of "jurisdiction" for the purposes of Article 1). Therefore, it would seem to be a logical step for the Court to turn to the ARSIWA as the *lex generalis*. **However, it must be remembered that those Articles are concerned only with the responsibility of States towards other States and international organisations.**[143] In contrast, the ECtHR primarily considers cases on individual applications. One may thus ask whether Articles developed for application between States are the appropriate framework. The ECtHR has suggested that the answer to that question is broadly "yes", as it has on a number of occasions referred to the ARSIWA under the heading "applicable law", although the ECtHR has addressed the explicit question of the application of rules of attribution in the ARSIWA to the specific facts of a case less often.

[143] **Comment by the Secretariat: The DH-SYSC-II decided to look into the issue of the scope of application of the ARSIWA. According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (5) "the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole." It appears that the scope of application of the ARSIWA in disputes between a State and an individual is contested amongst lawyers. It is therefore for the DH-SYSC-II to agree on a stance in this respect.**

[…]

69. It may be noted that **in** its discussion of State responsibility in *Loizidou* the Court appears to have found that all actions of the "TRNC" were attributable to Turkey. This would constitute a fairly straightforward application by the Court of the principle of attribution which was subsequently set out in Article 8 ARSIWA, dealing with conduct of a person or a group of persons directed or controlled by a State. Indeed, the International Law Commission (ILC) commentary on this article refers to the *Loizidou* judgment in a footnote.[144]

[…]

71. However, the said Commentary equally reveals that international courts have not agreed on the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State. The Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY), in *Prosecutor v. Duško Tadić*, disapproved the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case and found that "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The "*degree of control"* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[145] **Thus, the Appeals Chamber held that "Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)."** The Commentary refers to the fact that the mandates of the two courts are different and that, "[i]n 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, to such an extent that the conduct controlled should be

[144] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 YILC, Vol. II (Part two). The footnote [160] states: "The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by […] the European Court of Human Rights: […] *Loizidou v. Turkey*, *Merits*, *Eur. Court H.R.*, *Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid.*, *Preliminary Objections*, *Eur. Court H.R.*, *Series A*, *No. 310*, p. 23, para. 62 (1995)."

[145] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117.

attributed to it."[146]

~~72. As regards the ECtHR, its mandate differs both from that of the ICJ and that of the ICTY, and the Court regularly stresses "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings".[147] It may be noted that the necessary degree of control of a State over an entity, defined in *Ilaşcu and Others* as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State, is lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ referred to above.~~

[…]

91. Thus, at least in El-Masri and Al-Nashiri, the ECtHR does not appear to have followed the approach in the ARSIWA concerning the attribution of conduct (of a third State) to a State, or of cases of aid or assistance by one State in the commission of an internationally wrongful act of another State (Article 16 ARSIWA).

[…]

99. However, an analysis of the case of *Ilaşcu* disclosed that the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was defined as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State and that this threshold was lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under Article 8 of the ARSIWA as interpreted by the ILC or under the case-law of the ICJ. However, it was equally noted that the ICTY, by reference, *inter alia*, to its different mandate, had equally considered a lower threshold to apply, **which is however higher than the "effective authority" or "decisive influence".** It must be regretted though that the Court does not give more detailed reasons for the development of these criteria and their relationship with the rules of international law.

[…]

103. Finally, another conclusion that can be drawn from the case law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. As show above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in

[146] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 8, point (5).
[147] *Cyprus v. Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV.

its judgment in the *Jaloud case.*[148] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. **It has been argued that the Court conflated the two. 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 lower threshold than, the "direction or control" criterion used by the ARSIWA.**

104. Apparent inconsistencies in the ECtHR's interpretation of "jurisdiction" make it difficult for a High Contracting Party to the ECHR to determine whether the Court will consider a person to be within its jurisdiction. Inconsistent and insufficiently reasoned case law of the ECtHR will result in unpredictability and uncertainty among the States as to how their actions might be qualified by the ECtHR. Providing legal certainty is central to the legitimacy of the ECtHR and the maintenance of its effectiveness and authority as an independent and competent judicial institution, which is authorised to control proper fulfillment of obligations of the States under the Convention and effectively guarantee the rights of those within their jurisdiction.

[148] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.

TURKEY / TURQUIE

Second sentence of paragraph 35 of the revised draft chapter reads as follows:

> *"It further explained that it "has emphasized that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle ne held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of Convention" (see Cyprus v. Turkey, cited above, ..)*

Although the paragraph above is related to the Al Skeini judgement of the ECHR, the reference in parenthesis refers to the unrelated Cyprus vs. Turkey judgement. This is not only confusing but also highly disturbing for us. In order to remove the confusion in the paragraph, the reference to the Cyprus vs. Turkey has to be deleted.

UNITED KINGDOM / ROYAUME-UNI

1. In considering the place of the European Convention on Human Rights ("the Convention", ECHR) in the European and international legal order, a key focus of the European Court of Human Rights' ("the Court" / ECtHR) case law and academic commentary has been on the core obligation contained in Article 1 of the Convention that State Parties shall secure to everyone within their "jurisdiction" the rights and freedoms set out in the Convention. The vast majority of cases brought before the Court concern challenges to the actions of a State within its territory; as jurisdiction is presumed to be exercised normally throughout the State's territory,[149] it is usually clear that a State has "jurisdiction" and the notion does not require further interpretation. However, there are two situations where a respondent State may ~~notably~~ dispute that it had "jurisdiction" (a) where it acts outside its own territory and (b) where it contends that it is not responsible for the impugned acts in issue~~.~~

2. ~~The question of whether a State had "jurisdiction" must be distinguished from the question whether the State can be held responsible for an impugned act, or whether that act is attributable to that State. This may equally be disputed by States, notably where non-State actors or other States or international organisations are involved in the conduct complained of.~~

[…]

5. It has been argued that in the context of human rights treaties such as the ECHR, the notion of "jurisdiction" ~~is different~~has a specific function,~~:~~[150] in so far as it refers to the jurisdiction of a State, for the purpose of setting limits on the scope of application of the treaty concerned. It defines the category of persons who enjoy the rights and freedoms set out in that treaty. This notion of jurisdiction is not concerned with the question whether the exercise of jurisdiction was lawful or unlawful.

6. Despite this, according to the Court's well-established case law, "the concept of 'jurisdiction' for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law".[151] Furthermore, "'[j]urisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary

[149] See for exceptions in this respect, *inter alia*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312; ECHR 2004-VII; and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II.

[150] See also Robert Spano, Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, p. 45.

[151] See, *inter alia*, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, ECHR 2004-VII.

condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention".[152] In other words, only when the Court is satisfied that the matters complained of were within the State's jurisdiction, that a State can be found liable for a violation of the Convention. ~~the question of State responsibility arises.~~[153] Applications in which the respondent State is found not to have jurisdiction in respect of the acts complained of declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention for being incompatible with the provisions of the Convention.[154]

7. The notion of State responsibility in general international law addresses the identification of an internationally wrongful act and the consequences that flow from it.[155] ~~Pursuant to Article 1 of the Draft~~ In the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). prepared by the Internatoinal law Commission to codify the law of State responsibility, ~~,~~ "Article 1 provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State". An internationally wrongful act within that provision covers both actions and omissions, and the wrongfulness or otherwise of such conduct is to be judged according to the requirements of the allegedly violated obligation.[156] Furthermore, in international law the notion of "attribution" is used to determine when there is a sufficiently close link between a certain conduct and a State so as to consider that conduct as an "act of a State" within the meaning of Article 1 of the ARSIWA.[157]

[…]

26. Following its decision in the *Banković* case, the Court further developed its case-law on extra-territorial jurisdiction; both the decision in *Banković* and the consistency of the Court's subsequent case-law with that decision have been the

[152] See *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, 7 July 2011; *Catan and Others v. Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, § 103, ECHR 2012 (extracts); and *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 168, ECHR 2015.

[153] See Michael O'Boyle, The European Convention on Human Rights and extraterritorial jurisdiction : a comment on 'Life after Banković', in: Fons Coomans and Menno T. Kamminga (eds.), Extraterritorial Application of Human Rights Treaties, 2004, pp. 130-131.

[154] See, *inter alia*, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 84-85, ECHR 2001-XII.

[155] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (1).

[156] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 1, point (1), and on Article 2, point (4) with a number of examples.

[157] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 2, point (5), and Commentary on Part One, Chapter II, points (1) – (9).

subject of numerous comments (some supportive and some critical) and shall be further analysed below.[158]

Comment [CW(37]: Would it be worth also including some of that literature in a footnote

[…]

47. Following the Convention organ's decisions on the extraterritorial application of the Convention notably in the cases concerning the situation in northern Cyprus, the Court set out clearly the guiding principles on the interpretation of the notion of "jurisdiction" ~~in a clear manner~~ in ~~one of its main decisions on the subject matter~~ in the case of *Banković*, which remains one of the leading cases on this issue. It marked the States' jurisdiction as essentially territorial and enumerated four categories of extraterritorial jurisdiction (extradition/expulsion cases, extraterritorial effects cases, effective control cases and diplomatic or consular cases). It indicated that, given that the scope of Article 1 was determinative of the reach of the entire Convention system it had not applied the "living instrument" approach to its interpretation of Article 1 in that case. Moreover, the Court's finding that the Convention operated "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States"[159] could be read as indicating that the Convention, if exceptionally applicable extraterritorially, would be applied only in respect of territory of another Convention State. Finally, the Court's finding that the obligation in Article 1 could not be "divided and tailored" in accordance with the particular circumstances of the extra-territorial act in question could be seen as excluding an obligation to secure only rights that were relevant to an applicant's situation. In the case at issue, the Court found that the facts of the case at issue – concerning air strikes effective outside Convention territory – to fall under the principle that there was no jurisdiction extraterritorially; the conditions for any of the exceptions were not met.

[…]

49. In *Al-Skeini*, another main judgment on the scope of the notion of jurisdiction, the Court can be seen to restructure the different categories of exceptions to the rule of jurisdiction within the State's own territory. It divided the exceptions into two groups: first, cases of State agent authority and control, in which the State must secure to the individual the rights relevant to the individual's situation and, second, cases of effective control over an area in which the State must secure, within the area under its control, the entire range of substantive rights of the Convention. In an apparent departure from *Bankovic*, ~~t is clear from~~ the Court's definition of the scope of the State's obligations in the first category of State agent authority and control cases ~~that~~ suggest that ~~the~~ Convention rights ~~can, as recognised by the Court itself,~~ may be "divided and tailored" ~~in the end~~, in so far as only the Convention rights relevant to the situation must be secured.[160] Moreover, the facts of the case, which concerned the death of the applicants' relatives during security operations on the ground in Iraq, were found to fall under the exception of State agent authority and

[158] See the "Discussion" section, §§ 46 *et seq*.
[159] *Banković and Others v. Belgium and Others*, cited above, § 80.
[160] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 137, ECHR 2011.

control. ~~Other than in *Banković*, t~~The respondent State was thus found to have jurisdiction outside the Convention legal space, which, despite the explanations given by the Court in *Al-Skeini* in this regard,[161] appeared to be excluded under the principles laid down in *Banković*. Therefore, while the Court based its general principles on the notion of "jurisdiction" in *Al-Skeini* on its previous case law including the principles developed in *Banković*, their application to the fact of the case at issue resulted in the respondent State being obliged to secure the procedural rights under Article 2 of the Convention to the applicants.

50. In further applications including the cases of *Hirsi Jamaa*, *Hassan* and *Jaloud*, the Court, while relying on the principles as summarised in *Al-Skeini*, found the facts of the case to fall under the exception of State agent authority and control, thus enlarging the scope of application of the Convention to further situations arising outside the respondent States' territory. ~~It has been raised in this contex~~The broad formulation of the principles set out in Al Skeini,in respect of State agent authority and control, ~~t that given the parallel development, in the Court's case-law, of the substantive rights under the Convention, so as to include notably also positive and/or procedural obligations,~~ means that it ~~may~~ is not always ~~be~~ obvious for ~~the respondent~~a State to foresee exactly the scope of its obligations under the Convention in respect of ~~the~~ individual rights in a given situation. This is particularly so in the light of the development of the substantive rights under the Convention now also to comprise positive and/ or procedural obligations ~~that are relevant to the situation of the individual falling under its jurisdiction~~.

[…]

53. I~~t was further advanced that i~~n choosing the term "effective control of an area", the Court appears to have taken up a concept familiar to international law, but as a basis for attributing the conduct of one entity to another in the law of State responsibility (see in more detail below). Moreover, the threshold for assuming jurisdiction would be higher if the criteria of "effective control of an area" in that sense were applied. The Court, referring to the difference between the rules governing jurisdiction and attribution of conduct to a State so that it may be held responsible under international law for that conduct, has explained in this respect that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law".[162] Nevertheless, it is clear that the Court, although set in the framework of States' jurisdiction under general international law, has developed some particular features which take account of the nature and scope of the Convention as a human rights treaty,[163] and that the

~~[161] *Ibid.*, § 142 and paragraph 35 above.~~

[162] See *Catan and Others v. Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, § 115, ECHR 2012 (extracts); *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 98 and 102, ECHR 2016; and *Chiragov and Others v. Armenia* ([GC], no. 13216/05, § 168, ECHR 2015.

[163] See also Robert Spano, Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law, in: International and Comparative Law Research Center (ed.), Case-law of the

threshold thus developed appears less high than that under the – albeit different – law of State responsibility.

54. The Court's caselaw on jurisdiction tends not to enquire into the legality of a State's extraterritorial activity by reference to the law of international law on jurisdiction. It does not appear, therefore, that the Court~~, in its case law on jurisdiction,~~ diverges from a specific applicable rule on jurisdiction in general international law. However ~~, but~~ it is clear that in this caselaw ~~it~~the Court has developed some features with regard to the special character of the Convention as a human rights treaty. Other international courts and treaty organs have equally given extraterritorial effect to the jurisdiction clauses of other human rights treaties, albeit not without this being contested by some States.

55. However, the Court, in recent~~the past~~ years, has more frequently found the Convention to apply extraterritorially on the basis of ~~its established~~ principles it has sought to develop and the particular facts of the case. This development, against the background of the inherent uncertainties of a fact-dependent approach and some uncertainties in the interpretation of the principles regarding the scope of the States' obligations outlined above, entails to a certain extent a lack of foreseeability for the States of the exact obligations under Article 1. Such ~~an~~ uncertainty may compromise the States' willingness, in particular, to participate in certain forms of international cooperation, for example peacekeeping missions governed by international law.

56. It must be borne in mind that the interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. For this reason, it has been argued that there are inherent limits in an evolutive interpretation in this area. In view of the importance for the States of knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is, in any event, of the essence in this particular field.

57. The ~~Draft~~ Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001 (ARSIWA), largely codify customary rules of international law on this subject, though some aspects constitute progressive development of the law. They provide a code of secondary rules[164] which determine whether a State has committed an internationally wrongful act such as to engage its responsibility towards another State(s). Article 55 of the ARSIWA states that "these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of

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European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 43-47.

[164] Whereas primary rules define the content of the international obligation under substantive customary and conventional law (the breach of which gives rise to responsibility), secondary rules govern the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom, see Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (1).

the international responsibility of a State are governed by special rules of international law".

[…]

70. However, the said Commentary equally reveals that international courts have not agreed on the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State. The Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY), in *Prosecutor v. Duško Tadić*, disapproved the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case and found that "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The "*degree of control"* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[165] The Commentary refers to the fact that the mandates of the two courts are different and that, "[i]n 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, to such an extent that the conduct controlled should be attributed to it."[166]

71. As regards the ECtHR, its mandate differs both from that of the ICJ and that of the ICTY, and the Court regularly stresses "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings".[167] It may be noted that the necessary degree of control of a State over an entity, defined in *Ilaşcu and Others* as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State, is lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ referred to above.

[…]

93. It emerges from the analysis of the Court's case law described above that the Court, in determining whether conduct is attributable to the respondent State does not make clear whether, and ~~in~~ how far it applies the rules of attribution reflected in the ARSIWA.[168] While the Court repeatedly referred to specific Articles of the

Comment [SE38]: We also had an additional point in relation to paras 70-71 and 97 and the reference to the apparent difference in the caselaw between the ICJ and the ICTY, where we think that the ICJ caselaw if more significant for the general international law of State responsibility (not least as the ICTY jurisprudence was not dealing with the question attribution for the purposes of establishing responsibility).

[165] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117.
[166] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 8, point (5).
[167] *Cyprus v. Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV.
[168] See also Jane M. Rooney, "The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands", Neth Int Law Rev 2015, vol.62, p.p.407–428; Kristen Boon, Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines, Melbourne Journal of International Law, Vol. 15, No. 2, 2014.

ARSIWA when listing the relevant provisions of international law, it does not explicitly apply these rules when deciding at the merits stage whether an impugned act can be attributed to the respondent State.

[…]

97. However, an analysis of the case of *Ilaşcu* disclosed that the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was defined as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State and that this threshold was lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under Article 8 of the ARSIWA as interpreted by the ILC or under the case-law of the ICJ. However, it was equally noted that the ICTY, by reference, *inter alia*, to its different mandate, had equally considered a lower threshold to apply. It must be regretted though that the Court does not give more detailed reasons for the development of these criteria and their relationship with the rules of international law.

Comment [SE39]: See comment on §§ 70-71 above

[…]

101. Finally, another conclusion that can be drawn from the case law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. As shown above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in its judgment in the *Jaloud case.*[169] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other.

[169] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.