



DH-SYSC-II(2018)24

7 December 2018

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

Revised draft chapter of Theme 1, subtheme ii:

**State responsibility and extraterritorial application of the European Convention
on Human Rights**

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and as amended by the Secretariat, under the responsibility of the Chair, in the light of the
discussions at the 4th DH-SYSC-II meeting)*

STATE RESPONSIBILITY AND EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS¹

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INTRODUCTION

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,² 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.

¹ The present chapter was prepared by the co-Rapporteurs Professor Alexei ISPOLINOV and Mr Chanaka WICKREMASINGHE. The co-Rapporteurs are grateful to the Contributors for their valuable input. The co-Rapporteurs also took into account the results of the Seminar on the place of the Convention in the European and international legal order organised in March 2017 for launching of the work of the DH-SYSC-II.

² 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.

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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.

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.

4. The notion of “jurisdiction” in general international law refers to the exercise of lawful power by a State to 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.³ 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).

5. In the context of human rights treaties such as the ECHR, the notion of “jurisdiction” is different:⁴ 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”.⁵ 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”.⁶ In other words, only when the Court is satisfied that the matters complained of were within the

³ 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.

⁴ 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.

⁵ 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.

⁶ See *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.

State's jurisdiction, the question of State responsibility arises.⁷ 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.⁸

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.⁹ 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.¹⁰ 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.¹¹

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.¹²

9. When regarding the place of the Convention in the European and international legal order, it is important to examine if the notion of "jurisdiction" and its extraterritorial application differ in general international law and under the Convention and if so, to what extent (A.). Likewise, the application or respect of the general international law on State responsibility by the ECtHR in its case-law merits a closer analysis (B.). On this basis, possible risks of fragmentation between the different legal systems shall be identified and discussed.

A. Extra-territorial application of the European Convention on Human Rights

Introduction

10. Two articles of the Convention relate to the scope of its territorial application. Article 1 of the Convention states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". At the same time Article 56 § 1 stipulates that "[a]ny State may ... declare ... that the present Convention

⁷ 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.

⁸ See, *inter alia*, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 84-85, ECHR 2001-XII.

⁹ See [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), General commentary, point (1).

¹⁰ 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.

¹¹ 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).

¹² 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.

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shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible". Pursuant to Article 56 § 4, a State making such a declaration may also (but is not obliged to) accept the competence of the Court to receive and examine individual applications in relation to such territories.

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 Convention was not to extend automatically to dependent territories.¹³

12. By contrast, Article 1 did not give rise to much debate. The first draft 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.¹⁴

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".¹⁵ 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. In the case of *Cyprus v. Turkey* the Court reiterated in respect of the interpretation of the notions contained in the Convention that:

"... the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969."¹⁶

The case law

(i) Cases concerning the situation in northern Cyprus

15. Questions concerning the extraterritorial application of the Convention were raised relatively rarely in the Convention organs' earlier case-law.¹⁷ They had to deal with the

¹³ 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](#).

¹⁴ 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](#).

¹⁵ *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 59, ECHR 2001-XII.

¹⁶ See *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 23, ECHR 2014.

¹⁷ In the case of *Soering v. the United Kingdom* (7 July 1989, Series A no. 161) the Court concluded that the decision by a Contracting State to extradite a person might engage that State's responsibility under the Convention where a risk existed that the person would be tortured or otherwise ill-treated if extradited. In the case of *Stocké v. Germany* (19 March 1991, §§ 51 and 54-55, Series A no. 199), in which the applicant was tricked into returning to Germany for being arrested, the Court could not establish that there had been unlawful activities abroad for which the German authorities were responsible and could thus leave open the question whether such activities could lead to a breach of Articles 5 or 6 of the Convention by Germany. See also decisions of the European Commission of

possibility of an exercise of jurisdiction outside a State's own territory in more depth notably in several applications concerning the situation in northern Cyprus following the Turkish military operations in 1974.

16. As early as 1975, the Commission, in the case of *Cyprus v. Turkey*, which concerned allegations of a number of breaches of the Convention committed by Turkey in northern Cyprus following the Turkish military operations in 1974, found in respect of the respondent States' jurisdiction as follows:

"8. In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad. The Commission refers in this respect to its decision on the admissibility of Application No. 1611/62 - X. v/Federal Republic of Germany - Yearbook of the European Convention on Human Rights, Vol. 8, pp. 158-169 (at pp. 168-169)."¹⁸

17. In the case of *Loizidou v. Turkey*, where the applicant, a Greek Cypriot, complained that she had been deprived of access to her property in northern Cyprus, the Court found as follows with regard to the question whether the impugned acts were capable of falling within the respondent State's "jurisdiction":

"... the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; ...). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be

Human Rights in *Illich Sánchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June 1996, Decisions and Reports (DR) 86, p. 155-162; *Luc Reinette v. France*, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189; *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250; and *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992.

¹⁸ See *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission decision of 26 May 1975, Decisions and Reports (DR) 2, p. 136. See on this case law also Michele de Salvia, Extra-territorial jurisdiction: the birth of the notion, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 17-19.

exercised directly, through its armed forces, or through a subordinate local administration.”¹⁹

18. The Court subsequently reiterated these principles in the case of *Cyprus v. Turkey*, which concerned, *inter alia*, alleged violations of the rights of Greek-Cypriot missing persons and their relatives and of the home and property rights of displaced persons.²⁰ In finding that Turkey’s jurisdiction extended to “securing the entire range of substantive rights set out in the Convention”,²¹ the Court had regard to “the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings”²². It further noted that in view of Cyprus’s inability to exercise its Convention obligations in northern Cyprus, any other finding as to “jurisdiction” would “result in a regrettable vacuum in the system of human-rights protection in the territory in question”²³.

(ii) The case of *Banković*

19. The Court subsequently set out in more detail the principles on whether, and in what circumstances, extra-territorial acts of Contracting States can constitute an exercise of jurisdiction by them within the meaning of Article 1 in one of its leading decisions on the subject-matter in the case of *Banković and Others v. Belgium and Others*.²⁴ In this case the Court dealt with complaints of the victims of air strikes carried out by North Atlantic Treaty Organisation (“NATO”) forces against radio and television facilities in Belgrade on 23 April 1999 as part of a series of NATO air strikes against the Federal Republic of Yugoslavia during the Kosovo conflict.

20. In its important *Banković* decision, the ECtHR has affirmed that the States’ jurisdiction as referred to in Article 1 is “essentially territorial”²⁵. It further found “State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case”²⁶. The Court did not apply its interpretative approach of the Convention being a “living instrument” in the context of Article 1 and referred to the *travaux préparatoires* of the Convention in that context. It found as follows:

“64. It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court’s case-law. The Court has applied that approach not only to the Convention’s substantive provisions (for example, the *Soering* judgment cited above, at § 102; ...) but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs (the above-cited *Loizidou* judgment (*preliminary objections*), at § 71). (...)

65. However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties’ positive obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection as

¹⁹ *Loizidou v. Turkey* [GC] (preliminary objections), 23 March 1995, § 62, Series A no. 310; see also *Loizidou v. Turkey* [GC] (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI.

²⁰ *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV.

²¹ *Ibid.*, § 77.

²² *Ibid.*, § 78.

²³ *Ibid.*, § 78.

²⁴ *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

²⁵ *Ibid.*, §§ 61, 63 and 67.

²⁶ *Ibid.*, § 62.

opposed to the question, under discussion in the *Loizidou* case (*preliminary objections*), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 “solely” in accordance with the *travaux préparatoires* or finding those *travaux* “decisive”; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).”

21. The Court recognised that in exceptional circumstances acts of Contracting States performed, or producing effects, outside their territories can still fall within their “jurisdiction” for the purposes of Article 1 of the ECHR, but clearly marking extra-territorial jurisdiction as exceptional.²⁷

22. The ECtHR noted four examples of extraterritorial jurisdiction in its case law, each of which should be “exceptional and requir[e] special justification”²⁸:

(i) Extradition or expulsion cases involving the extradition or expulsion of an individual from a Member State’s territory which give rise to concerns about possible death or ill-treatment in the receiving country under Articles 2 or 3 or, in extreme cases, the lawfulness of detention or denial of a fair trial under Articles 5 or 6 in the receiving State;

(ii) Extraterritorial effects cases where the acts of State authorities produced effects or were performed outside their own territory (based on the *Drozd and Janousek* judgment in which the “jurisdiction” of France or Spain was not in fact established);

(iii) Effective control cases where as a consequence of military action (lawful or unlawful) a Contracting Party exercises effective control of an area outside its national territory (based on the line of ECtHR cases starting with *Loizidou v. Turkey* and *Cyprus v. Turkey* (see above); and

(iv) Diplomatic or consular cases, and flag jurisdiction cases that involve activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.²⁹

23. In this context it is recalled that in *Banković*, which concerned the bombing by NATO air forces of objects in the territory of Yugoslavia (which at the material time was not a party to the Convention), the Court made it clear that “the Convention is a multilateral treaty operating ... in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States” and the Federal Republic of Yugoslavia “clearly does not fall within this legal space” not being a signatory state of the Convention. Furthermore, the Court stressed that the “Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention”³⁰ (*‘espace juridique’* of the Convention).

²⁷ Ibid., § 67.

²⁸ Ibid., § 61.

²⁹ Ibid., §§ 68-73.

³⁰ Ibid., § 80.

24. Finally, the Court held that “the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question”.³¹

25. In the case at issue, the Court was not persuaded that exceptional circumstances existed which amounted to the extraterritorial exercise of jurisdiction in the applicants’ case also when having regard to the practice of other international human rights bodies.³²

(iii) The case law leading to *Al-Skeini*

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 subject of numerous comments and shall be further analysed below.³³

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; and (ii) when a person is within the exclusive authority and/or control of a State’s agent – “personal model of jurisdiction”.³⁴ 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.

28. In its judgment in *Issa*, which dealt with the alleged killing of Iraqi shepherds by Turkish soldiers on the territory of Iraq, the Court notably re-addressed the question of the potential extra-territorial application of the Convention outside the legal space (*espace juridique*) of the Contracting States. It 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”.³⁵ The Court reached that conclusion by reference, *inter alia*, to the views adopted by the Human Rights Committee in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*³⁶ whereas it had found in *Banković* that “exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction” did not displace the territorial jurisdiction expressly conferred by Article 2 § 1 of the Covenant on Civil and Political Rights (CCPR)³⁷.

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

³¹ *Ibid.*, § 75.

³² *Ibid.*, §§ 78 and 82.

³³ See the “Challenges and possible solutions” section, §§ 46 *et seq.*

³⁴ See the summary of the principles in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 130-142, ECHR 2011.

³⁵ *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004.

³⁶ *Ibid.*, § 71.

³⁷ *Banković and Others v. Belgium and Others*, cited above, § 78.

potentially be liable under the personal model of jurisdiction.³⁸

30. In its *Al-Skeini* judgment³⁹, another leading case,⁴⁰ 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.

31. In its judgment the Court reformulated its categorisation of the exceptions to the territorial scope of jurisdiction as they stood at the time, as being:

(a) Cases of State agent authority and control (i.e. the personal model of jurisdiction), which included:

- (i) acts of diplomatic and consular agents of Convention States on foreign territory, where these agents exert authority and control over others;
- (ii) exercise of public powers by a Convention State in the territory of another State, with the consent, invitation or acquiescence of the latter; and
- (iii) in certain cases by virtue of a use of force by agents of a Convention State in the territory of another State.⁴¹

32. The Court described its personal model of jurisdiction as the "exercise of physical power and control" and hence of jurisdiction of the State through its agents outside its territory "over the person in question".⁴² The Court held that, in these circumstances, "the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".⁴³

33. The second category of cases in which a State may exceptionally be found to exercise jurisdiction extraterritorially covers

(b) Cases of effective control over an area (the spatial model of jurisdiction)

34. Describing the spatial model of jurisdiction, the Court held that this "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". The Court added that "[w]here 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".⁴⁴ It went further by holding that

"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

³⁸ *Pad and Others v. Turkey* (dec.), no. 60167/00, § 53, 28 June 2007.

³⁹ *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.

⁴⁰ 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.

⁴¹ *Ibid.*, §§ 133-136.

⁴² *Ibid.*, § 136.

⁴³ *Ibid.*, § 137.

⁴⁴ *Ibid.*, § 138.

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).⁴⁵

139. 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, and *Ilaşcu and Others*, 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 and Others*, cited above, §§ 388-94)."

35. The Court distinguished Article 56 of the Convention regarding unilateral declarations of the States on the applicability of the Convention to their dependent territories from the situation of "effective control" exercised by the State over a part of the territory of another State, holding that the "effective control" principle of jurisdiction does not replace the system of declarations under Article 56.⁴⁶ It further explained that it "has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be 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 the Convention' (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa and Others*; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above)."⁴⁷

36. In relation to the applicants in *Al-Skeini*, the Court found that in the relevant security operations the British forces were exercising "authority and control over individuals killed in the course of such security operations" so as to establish a jurisdictional link between the deceased and the UK for the purposes of Article 1.⁴⁸

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

37. In its judgment in *Hirsi Jamaa and Others v. Italy*⁴⁹ the Court dealt with complaints of Somali and Eritrean migrants travelling aboard three vessels from Libya who had been intercepted at sea by the Italian authorities and returned to Libya on Italian military ships, exposing them to a risk of ill-treatment. The Court concluded that the applicants "were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities".⁵⁰ The Court based its finding that Italy had *de jure* control on the fact that the applicants were brought on board naval vessels flying the Italian flag. It observed that by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas was subject to the

⁴⁵ Ibid., § 138.

⁴⁶ Ibid., § 140.

⁴⁷ Ibid., § 142.

⁴⁸ Ibid., §§ 143-149.

⁴⁹ *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

⁵⁰ Ibid., § 81.

exclusive jurisdiction of the State of the flag it is flying.⁵¹ The Court further based its finding that Italy exercised also *de facto* control over the applicants on the fact that in the period between boarding the ships and being handed over to the Libyan authorities, the applicants were under the control of a crew composed exclusively of Italian military personnel.⁵²

38. The subsequent case of *Hassan v. the United Kingdom* concerned the capture of the applicant's brother, an Iraqi national, by the British armed forces, his detention at Camp Bucca in Iraq during the hostilities in 2003 and his death several months after his release. The Court reiterated the applicable principles on jurisdiction within the meaning of Article 1 exercised outside the territory of the Contracting States as summarised in *Al-Skeini*, that is, the territorial principle, the exceptions of State agent authority and control and of effective control of an area, as well as the explanations regarding the Convention legal space (*'espace juridique'*).⁵³ Relying on this case-law, the Court found that from his capture until his release from Camp Bucca the applicant's brother was within the physical power and control of the UK soldiers and thus fell within UK jurisdiction under the State agent authority and control exception covering instances of a use of force by agents of a Convention State in the territory of another State.⁵⁴

39. In its judgment in *Jaloud v. the Netherlands* (the case arose out of the shooting of an Iraqi citizen by Netherlands troops at a checkpoint in Iraq), the Court concluded that the respondent State had jurisdiction over the applicant's son on the basis that he:

“... met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its “jurisdiction” within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.”⁵⁵

40. In relation to the Court's category of extraterritorial application on the basis of “effective control of an area”, there have been some 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*.⁵⁶ 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

⁵¹ *Ibid.*, § 77; the Court referred to the cases of *Banković and Others v. Belgium and Others*, cited above, § 73, and *Medvedyev and Others v. France* [GC], no. 3394/03, § 65, ECHR 2010, in this respect, see *ibid.*, § 75.

⁵² *Ibid.*, § 81.

⁵³ *Hassan v. the United Kingdom* [GC], no. 29750/09, § 74, ECHR 2014.

⁵⁴ *Ibid.*, §§ 76-80.

⁵⁵ *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014. Compare also *Pisari v. Moldova and Russia*, no. 42139/12, § 33, 21 April 2015 (concerning the death of the applicants' son at a peacekeeping checkpoint in the Transdniestrian region of Moldova as a result of a Russian soldier's decision to shoot at his passing vehicle).

⁵⁶ *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts).

military deployment (in 2002-2004)⁵⁷ 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*”⁵⁸. 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.⁵⁹ 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.⁶⁰ 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 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. (...)

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

⁵⁷ *Ibid.*, §§ 118-119.

⁵⁸ *Ibid.*, § 120.

⁵⁹ *Ibid.*, § 122.

⁶⁰ *Ibid.*, § 114.

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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.”

41. When further analysing the responsibility of the Russian Federation for the alleged violation of Article 2 of Protocol No. 1 to the Convention, the Court stated:

“149. The Court notes that there is no evidence of any direct participation by Russian agents in the measures taken against the applicants. Nor is there any evidence of Russian involvement in or approbation for the “MRT”’s language policy in general. Indeed, it was through efforts made by Russian mediators, acting together with mediators from Ukraine and the OSCE, that the “MRT” authorities permitted the schools to reopen as “foreign institutions of private education” (see paragraphs 49, 56 and 66 above).

150. Nonetheless, the Court has established that Russia exercised effective control over the “MRT” during the period in question. In the light of this conclusion, and in accordance with the Court’s case-law, it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration (see paragraph 106 above). By virtue of its continued military, economic and political support for the “MRT”, which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants’ rights to education. In conclusion, the Court holds that there has been a violation of Article 2 of Protocol No. 1 to the Convention in respect of the Russian Federation.”

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*⁶¹ 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,⁶² poor medical treatment in prisons⁶³ and also confiscation of agricultural produce by “MRT” customs officials⁶⁴, on the ground that Russia exercised effective control over the “MRT”.

⁶¹ *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, see in more detail §§ 46 ss. below.

⁶² See *Ivanțoc 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.

⁶³ 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.

⁶⁴ 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.

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*.⁶⁵ 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".⁶⁶ 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".⁶⁷ Furthermore, examining other support provided by Armenia to the "Nagorno-Karabakh Republic" ("NKR"), the Court found that Armenia provided "general political support"⁶⁸, noted "the operation of Armenian law enforcement agents and the exercise of jurisdiction by Armenian courts on that territory"⁶⁹ and considered that "the 'NKR' would not be able to subsist economically without the substantial support stemming from Armenia"⁷⁰. 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."⁷¹

(v) Approaches taken by other international organs

44. It is worth noting that other international courts and treaty organs have given extraterritorial effect to the jurisdiction clauses of other human rights treaties. In particular:

- The ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it held that the International Covenant on Civil and Political Rights (ICCPR) was applicable to the actions of authorities when they exercise their jurisdiction outside their territory,⁷² notably referring to the Human Rights Committee findings,⁷³ according to which "the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories

⁶⁵ *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015.

⁶⁶ *Ibid.*, § 169.

⁶⁷ *Ibid.*, § 180.

⁶⁸ *Ibid.*, § 181.

⁶⁹ *Ibid.*, § 182.

⁷⁰ *Ibid.*, § 185.

⁷¹ *Ibid.*, § 186.

⁷² International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, §§ 110-111.

⁷³ Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant - Concluding observations of the Human Rights Committee: Israel, 63rd sess., UN Doc. CCPR/C/79/Add.93, 18 August 1998, § 10.

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that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law".

- The Human Rights Committee in its General Comment No. 31 on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", where the HRC provided that States have the duty to guarantee and respect the ICCPR at home and abroad for individuals within the power or effective control of a State Party acting outside of its territory, regardless of the circumstances in which such power or effective control was obtained.⁷⁴
- The Inter-American Commission of Human Rights interpreting the American Convention on Human Rights (a treaty modelled after the European Convention) invoked the same approach expanding its jurisdiction over the cases that involved the US military intervention in Grenada in 1983⁷⁵ and in Panama in 1989⁷⁶, and the cases of indefinite detention of aliens by the US in camps outside the US, in Guantanamo Bay, Cuba⁷⁷.

45. This being said, extraterritorial application of human rights treaties and notably of the ICCPR, even when relating to direct actions of State agents, was persistently objected to by such states as the USA⁷⁸, Israel, the Netherlands⁷⁹ United Kingdom and Canada⁸⁰.

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

⁷⁴ Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th sess., UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 10.

⁷⁵ Inter-American Commission of Human Rights (IACHR) Report No. 109/99, Case 10.951, Coard et al., United States, 29 September 1999.

⁷⁶ IACHR Report No. 31/93, Case 10.573, United States, 14 October 1993.

⁷⁷ IACHR Report No. 17/12, Petition P-900-08, Admissibility, Djamel Ameziane, United States, 20 March 2012; IACHR Report No. 112/10, Inter-State Petition IP-02, Franklin Guillermo Aisalla Molina, Ecuador – Colombia, 21 October 2010.

⁷⁸ The United States informed the HRC during the presentation of its initial report that "[t]he Covenant was not regarded as having extraterritorial application" because of the "dual requirement" of Article 2(1), UN Doc. CCPR/C/SR.1405, 24 April 1995, § 20, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FR.1405&Lang=en; see also the HRC Third periodic report of the United States of America, UN Doc. CCPR/C/USA/3, 28 November 2005, p. 109-112, available at: http://www.bayefsky.com/reports/us_ccpr_c_usa_3_2005.pdf; and the Opening Statement to the UN Human Rights Committee by Matthew Waxman, Head of U.S. Delegation and Principal Deputy Director of Policy Planning at the Department of State, on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR), held 17 July 2006 in Geneva, Switzerland, available at: <https://2001-2009.state.gov/g/drl/rls/70392.htm>; as well as the statements of Eleanor Roosevelt in the Travaux Préparatoires of the ICCPR, Commission on Human Rights, 6th sess., UN Doc. E/CN.4/SR.193, 26 May 1950, § 78; UN Doc. E/CN.4/SR.194, 25 May 1950, §§ 16, 18, 21.

⁷⁹ Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, UN Doc. CCPR/CO/72/NET/Add.I, 29 April 2003, § 19.

⁸⁰ See the proceedings of the discussion of the HRC with Canada about the sixth periodic report of Canada, 114th sess., 8 July 2015, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E>, concerning extraterritorial application of the ICCPR concerning corporate social responsibility for Canadian companies for human rights violations abroad.

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”⁸¹ 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 subsequent cases of the Court raised doubts as to the 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”⁸² 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.⁸³ 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

⁸¹ *Banković and Others v. Belgium and Others*, cited above, § 80.

⁸² *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004.

⁸³ *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 137, ECHR 2011.

jurisdiction outside the Convention legal space, which, despite the explanations given by the Court in *Al-Skeini* in this regard,⁸⁴ 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 facts 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 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”.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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

⁸⁴ *Ibid.*, § 142 and paragraph 35 above.

⁸⁵ *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, ECHR 2012 (extracts).

⁸⁶ *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180, 185 and 186, ECHR 2015.

⁸⁷ 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.

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.⁸⁸

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”.⁸⁹ 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,⁹⁰ 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.

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’ 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.

⁸⁸ *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).*

⁸⁹ 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.

⁹⁰ 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.

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

Introduction

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 rules⁹¹ 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 the international responsibility of a State are governed by special rules of international law”.

58. The ECHR does not contain any provision that expressly differs from the general regime of the responsibility of States, or a *lex specialis* regime. In *Banković* the Court set out its view on the relationship between the rules of State responsibility and the Convention:

“57. ... The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention’s special character as a human rights treaty (the above-cited *Loizidou* judgment (*merits*), at §§ 43 and 52). The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani v. the United Kingdom*, [GC], no. 35763, § 60, to be reported in ECHR 2001).”

59. The Court has never expressly claimed that the regime of State responsibility under the Convention constitutes *lex specialis* except in respect of Article 41 concerning just satisfaction (“bearing in mind the specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law”⁹²).

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.⁹³ In contrast, the ECtHR primarily considers cases on individual

⁹¹ 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).

⁹² *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 42, ECHR 2014.

⁹³ 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

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.

Case law of the Court

61. In its case law, the ECtHR generally does not explicitly address the question of the attribution of the conduct that is alleged to have violated the ECHR to the respondent State. However in a relatively small number of cases (which very largely relate to extraterritorial jurisdiction) the issue of attribution has been addressed, usually when a respondent State has raised it,⁹⁴ although on occasion the Court has inquired into attribution of its own accord.⁹⁵

62. For the purposes of this analysis, it is useful to distinguish between different situations in which the question of attribution arises:

- (i) Cases concerning questions of attribution of the actions of private or non-State actors to a State;
- (ii) Cases concerning questions of attribution in situations in which more than one State was involved in the underlying facts;
- (iii) Cases concerning attribution in situations in which one or more States and an international organisation were involved in the underlying facts.

(i) Cases concerning questions of attribution of the actions of private or non-State actors to a State

63. The Court started to deal with the issues of jurisdiction and attribution well before most States of the Council of Europe ratified the ECHR (notably in the cases of *Cyprus v. Turkey* (1975),⁹⁶ *Stocké* (1989)⁹⁷ and *Loizidou* (1996)⁹⁸). In *Loizidou v. Turkey*,⁹⁹ the Court dealt with the question of whether the applicant fell within the jurisdiction of Turkey within the meaning of Article 1 ECHR in its judgment on preliminary objections. The question whether the matters complained of were imputable to Turkey and gave rise to that State’s responsibility was determined by the Court at the merits phase.¹⁰⁰ The Court has described

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.

⁹⁴ See, for instance, *Loizidou v. Turkey* (merits), 18 December 1996, §§ 51-57, *Reports of Judgments and Decisions* 1996-VI.

⁹⁵ See e.g. *Stephens v. Malta* (no. 1), no. 11956/07, § 45, 21 April 2009.

⁹⁶ See *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission decision of 26 May 1975, *Decisions and Reports* (DR) 2, p. 136; and Commission report adopted on 10 July 1976, p. 32.

⁹⁷ *Stocké v. Germany*, 19 March 1991, § 54, Series A no. 199.

⁹⁸ *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310.

⁹⁹ *Ibid.*, §§ 60-64. The case originated from the complaint of a Cypriot national of Greek origin from Kyrenia in northern Cyprus who had moved to Nicosia after her marriage in 1972. She claimed to be the owner of several plots of land in Kyrenia and alleged that since the invasion of the Turkish forces in 1974, she had been prevented from returning to Kyrenia and using her property.

¹⁰⁰ *Loizidou v. Turkey* (merits), 18 December 1996, §§ 52-57, *Reports of Judgments and Decisions* 1996-VI.

the relevant standard for determining attribution as follows:

“... the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (see the above-mentioned *Loizidou* judgment (preliminary objections), *ibid.*).”¹⁰¹

64. In assessing the evidence with a view to determining whether the continuous denial of access to the applicant’s property by the authorities of the “TRNC” and the ensuing loss of all control over it were imputable to Turkey, the ECtHR held:

“It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the “TRNC”. It is obvious from the large number of troops engaged in active duties in northern Cyprus (see paragraph 16 above) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the “TRNC” (see paragraph 52 above). Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.

In view of this conclusion the Court need not pronounce itself on the arguments which have been adduced by those appearing before it concerning the alleged lawfulness or unlawfulness under international law of Turkey’s military intervention in the island in 1974 since, as noted above, the establishment of State responsibility under the Convention does not require such an enquiry (see paragraph 52 above).”¹⁰²

65. In the case of *Ilaşcu and Others v. Moldova and Russia*, the Court was concerned with the responsibility of Russia for acts committed in the “Moldovan Republic of Transdniestria” (“MRT”), an entity set up in Moldavian territory. The applicants, who had been arrested during the conflict between Moldova and Transdniestrian separatists, had been handed over by the Russian military authorities to the “MRT” in 1992, and had been detained and sentenced variously to death and heavy prison sentences by the “supreme court” of the “MRT”, complained of a series of violations of the Convention which they alleged were imputable to Russia.¹⁰³ Much of the judgment was devoted to a discussion of the relationship between the “MRT” and the Russian Federation, both before and after the moment of ratification of the ECHR by the latter.

66. The Court held with respect to the period before ratification that:

¹⁰¹ *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI.

¹⁰² *Ibid.*, § 56.

¹⁰³ *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

“... the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova.

The Court also notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime (see paragraphs 111-61 above), thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy *vis-à-vis* Moldova.”¹⁰⁴

67. With respect to the period after ratification of the ECHR by the Russian Federation, the Court held:

“392. All of the above proves that the “MRT”, set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

393. That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.

Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.

394. In conclusion, the applicants therefore come within the “jurisdiction” of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.”

68. It may be noted that 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.¹⁰⁵

69. In *Ilaşcu*, the Court does not seem to make a clear distinction between the issue of

¹⁰⁴ *Ibid.*, § 382.

¹⁰⁵ 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).”

attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicants on the other.¹⁰⁶ With respect to the issue of attribution, it does not appear that the Court considered the “MRT” as an organ of the Russian Federation. Had the Court therefore referred to Article 8 of the ARSIWA, it would have had to examine whether the conduct of the “MRT” could be attributed to Russia as being the conduct of a group of persons which is in fact acting under the direction or control of that State. It may be noted that the ILC Commentary on this Article stipulates that conduct will be attributable to the State in such a situation “only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation”¹⁰⁷, an approach supported by the case-law of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case.¹⁰⁸

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.”¹⁰⁹ 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.”¹¹⁰

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”.¹¹¹ 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.

¹⁰⁶ See also the dissenting opinion of Judge Kovler in *Ilaşcu and Others*, cited above, pp. 149 ss.

¹⁰⁷ See [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), Commentary on Article 8, point (3).

¹⁰⁸ Compare [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), Commentary on Article 8, point (4); and the findings of the International Court of Justice in *Nicaragua v. USA* [1986] ICJ Rep. 14, at pp. 62 and 64-5, paras. 109 and 115; and also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep. 42, at pp. 207-211, paras. 398-407.

¹⁰⁹ *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.

¹¹⁰ See [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), Commentary on Article 8, point (5).

¹¹¹ *Cyprus v. Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV.

(ii) Cases concerning questions of attribution in situations in which more than one State was involved in the underlying facts

72. A number of judgments of the ECtHR have dealt with attribution of conduct in cases in which more than one State was involved in a single injury / claim. These are typically cases in which two States act independently of each other and where the Court determines the responsibility of each Contracting State individually, by assessing the State's own conduct in relation to its Convention obligations. In this regard *Ilaşcu and Others*, the facts of which have been described above, is a relevant example. In this case the Court held Moldova and Russia responsible, each for different acts or omissions that the Court attributed to the State concerned. Those acts and omissions contributed to one injury/claim. In particular, as regards the applicants' complaints about their ill-treatment in, and the conditions and lawfulness of their detention, Moldova was held responsible for a violation of Articles 3 and 5 in respect of three of the applicants for its failure to discharge its positive obligations with a view to obtaining these applicants' release. Russia' responsibility for the applicants' detention by the authorities of the "MRT" was engaged as the latter had been found to remain under the effective authority, or at the very least under the decisive influence, of the Russian Federation; therefore, the impugned conduct was imputable to Russia, which was found to have breached Articles 3 and 5 in respect of all applicants.

73. Other examples include the cases of *Rantsev v. Cyprus and Russia*¹¹², and *Stojkovic v. France and Belgium*.¹¹³ In *Rantsev v. Cyprus and Russia*, the applicant's daughter O. Rantseva, a Russian national, died in unexplained circumstances after falling from a window of a private property in Cyprus where she had gone to work in March 2001; in the circumstances, there was a suspicion that she might be a victim of human trafficking. The Court held that Cyprus had breached Article 2 of the Convention because of its failure to conduct an effective investigation into Ms Rantseva's death and Article 4 on account of its failure to establish a suitable framework to combat trafficking in human beings or to take the necessary measures to protect Ms Rantseva. It further found that there had been a violation of Article 4 of the Convention by Russia for its failure to conduct an effective investigation into the recruitment of the young woman on its territory by the traffickers.

74. In *Stojkovic v. France and Belgium*, the applicant had been first questioned in Belgium about his involvement in a robbery (which had been committed in France) by Belgian police officers acting under an international letter of request issued by a French judge, who was equally present at the interview. Despite the applicant's request for legal assistance, no lawyer had been present during the questioning. As for Belgium, whose police had conducted the interview in the absence of a lawyer, the application was rejected as inadmissible for being out of time. France was found to be responsible for, and to have breached Article 6 §§ 1 and 3 (c) as a result of the absence of a lawyer at the applicant's interview. The French investigating judge present should have reminded the Belgian authorities responsible for the interview that he had stipulated that the applicant's lawyer should be present. It was also for the French authorities to assess *ex post facto* the validity of the acts undertaken pursuant to the letter of request for the purposes of the proceedings pending in France.

75. The approach of the Court in those two cases, in which it was clear on whose behalf particular persons or entities were acting, is consistent with the principle of independent responsibility – that is, the principle that each State is responsible for its own internationally

¹¹² *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).

¹¹³ *Stojkovic v. France and Belgium*, no. 25303/08, 27 October 2011.

wrongful conduct and that State responsibility is specific to the State concerned¹¹⁴ – that underlies the ARSIWA.¹¹⁵

76. In another category of cases, the ECtHR was confronted with conduct by a State organ that had been placed at the disposal of another State. In this category of cases it was not clear from the outset to which State conduct of that organ had to be attributed. This is illustrated by the Court's judgment in *Drozdz and Janousek v. France and Spain*.¹¹⁶ The applicants in this case complained of the unfairness of their trial in Andorra (which the Court held it had no jurisdiction to examine) and of their detention in France. The case raised the question of the attribution of the conduct of French and Spanish judges carrying out judicial functions in Andorra. On this point, the Court accepted the arguments of the respondent Governments. It held:

“Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain. Moreover, there is nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial.”¹¹⁷

77. In a further category of cases, however, the question arises whether the ECtHR has attributed the conduct of one State to another. Thus, in the case of *El-Masri v. the former Yugoslav Republic of Macedonia*,¹¹⁸ the applicant alleged, in particular, that he had been subjected to a secret rendition operation, namely that agents of the respondent State had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated until he was returned to Germany via Albania.

78. The Court held that the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team was imputable to the respondent State. In this connection it emphasised that:

“... the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 318, ECHR 2004-VII).”¹¹⁹

79. It also held that the former Yugoslav Republic of Macedonia

“... must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case

¹¹⁴ See [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), Commentary on Part One, Chapter IV, point (1).

¹¹⁵ See M. Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights', (2012) 04 *ACIL Research Paper (SHARES Series)*, at p. 18.

¹¹⁶ *Drozdz and Janousek v. France and Spain*, 26 June 1992, Series A no. 240.

¹¹⁷ *Ibid.*, § 96.

¹¹⁸ *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012.

¹¹⁹ *Ibid.*, § 206.

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to prevent it from occurring (see *Z and Others v. the United Kingdom*, cited above; *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII; and *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, §§ 124 and 125, 3 May 2007).¹²⁰

80. The Court further examined under Article 3 “whether any responsibility may be attributed to the respondent State for having transferred the applicant into the custody of the US authorities”.¹²¹ In the general principles applicable in this regard the Court reiterated that

“... there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (see *Soering*, cited above, § 91; ...).¹²²

The Court concluded that “by transferring the applicant into the custody of the US authorities, the Macedonian authorities knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention”.¹²³

81. The Court also examined under Article 5 “whether the applicant’s subsequent detention in Kabul is imputable to the respondent State”.¹²⁴ It found in this respect as follows:

“239. The Court reiterates that a Contracting State would be in violation of Article 5 of the Convention if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 233, ECHR 2012). ... the Court considers that it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights under Article 5. In this connection the Court reiterates that Article 5 of the Convention lays down an obligation on the State not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction (...). The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant’s detention between 23 January and 28 May 2004 (see, *mutatis mutandis*, *Rantsev v. Cyprus and Russia*, no. 25965/04, § 207, ECHR 2010).

...

240. Having regard to the above, the Court considers that the applicant’s abduction and detention amounted to “enforced disappearance” as defined in international law (see paragraphs 95 and 100 above). The applicant’s “enforced disappearance”, although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity (see *Varnava and Others*, cited above, § 148). In this connection the Court would point out

¹²⁰ *Ibid.*, § 211.

¹²¹ *Ibid.*, § 215.

¹²² *Ibid.*, § 212.

¹²³ *Ibid.*, § 220.

¹²⁴ *Ibid.*, § 235.

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that in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see *Ilaşcu and Others*, cited above, § 321, and see also paragraph 97 above).”

82. The case of *Al Nashiri v. Poland*¹²⁵ arose from comparable facts. Mr. *Al Nashiri* was captured in Dubai and transferred to the custody of the CIA. He was subsequently transferred to a CIA ‘black site’ in Poland where he was subjected to various forms of ill-treatment. He was subsequently transferred to further countries, ultimately ending up in Guantanamo Bay. As regards the State’s responsibility for an applicant’s treatment and detention by foreign officials on its territory, the Court reiterated that:

“... in accordance with its settled case-law, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilaşcu and Others*, cited above, § 318; and *El-Masri*, cited above, § 206).”¹²⁶

83. As regards the State’s responsibility for an applicant’s removal from its territory, the Court reiterated that “removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination.”¹²⁷ It explained that:

“While the establishment of the sending State’s responsibility inevitably involves an assessment of conditions in the destination country against the standards set out in the Convention, there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise.

In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment or other violations of the Convention (see *Soering*, cited above, §§ 91 and 113; *Mamatkulov and Askarov*, cited above, §§ 67 and 90; *Othman (Abu Qatada)*, cited above, § 258; and *El-Masri*, cited above, §§ 212 and 239).”¹²⁸

84. The Court concluded that Poland, “on account of its ‘acquiescence and connivance’ in the [US] Programme must be regarded as responsible for the violation of the applicant’s rights under Article 3 of the Convention committed on its territory (see paragraph 452 above and *El-Masri*, cited above, §§ 206 and 211).”¹²⁹ This was so despite findings that Poland was not directly involved in the interrogations (and, therefore, the torture inflicted in Poland), and, while Poland knew of the nature and purposes of the CIA’s activities on its territory at the material time and cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory, it was unlikely that the Polish officials witnessed or knew exactly what happened inside the facility. However, “under Article 1 of the Convention, taken together with Article 3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or

¹²⁵ *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.

¹²⁶ *Ibid.*, § 452. The Court reiterated this statement, for instance, in *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 449, 24 July 2014.

¹²⁷ *Ibid.*, § 453.

¹²⁸ *Ibid.*, § 457. The Court reiterated this statement, for instance, in *Husayn (Abu Zubaydah) v. Lithuania*, no. 46454/11, § 584, 31 May 2018.

¹²⁹ *Ibid.*, § 517.

degrading treatment or punishment” and its responsibility was based on having “facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring”.¹³⁰

85. With respect to the transfer of the applicant, the Court found that “Poland was aware that the transfer of the applicant to and from its territory was effected by means of ‘extraordinary rendition’, that is, ‘an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment” (see *El-Masri*, cited above, § 221). In these circumstances, the possibility of a breach of Article 3 was particularly strong and should have been considered intrinsic in the transfer (...). Consequently, by enabling the CIA to transfer the applicant to its other secret detention facilities, the Polish authorities exposed him to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3 of the Convention”.¹³¹

86. In the case of *Nasr and Ghali v. Italy*,¹³² the Court was similarly confronted with a case of extraordinary rendition by the US, in this instance from Italy to Egypt. The Court found it established that the applicant had been abducted in the presence of a carabinieri and that the Italian authorities had been aware of the CIA’s plan to abduct the applicant in order transfer him abroad in an extraordinary rendition operation.¹³³

87. With regard to the alleged ill-treatment in breach of Article 3 of the applicant by US agents while in Italy, the Court recalled the standard it employed in *El-Masri* and *Al-Nashiri* according to which:

"... la responsabilité de l'État défendeur est engagée au regard de la Convention à raison des actes commis sur son territoire par des agents d'un État étranger, avec l'approbation formelle ou tacite de ses autorités (*Ilaşcu et autres c. Moldova et Russie* [GC], n° 48787/99, § 318, CEDH 2004-VII : *El Masri*, précité, § 206 et *Al Nashiri*, précité, § 452)."¹³⁴

88. The Court however went on to find Italy directly responsible, stating:

"288. ...en laissant la CIA opérer le transfert du requérant hors de leur territoire, les autorités italiennes l'ont exposé à un risque sérieux et prévisible de mauvais traitements et de conditions de détention contraires à l'article 3 de la Convention. (paragraphe 242 ci-dessus et *Al Nashiri*, précité, § 518).

289. Aux termes des articles 1 et 3 de la Convention, les autorités italiennes étaient dès lors tenues de prendre les mesures appropriées afin que le requérant, qui relevait de leur juridiction, ne soit pas soumis à des actes de torture ou à des traitements ou peines inhumains et dégradants. Or, tel ne fut pas le cas, et l'État défendeur doit être considéré comme directement responsable de la violation des droits du requérant de ce chef, ses agents s'étant abstenus de prendre les mesures qui auraient été nécessaires dans les circonstances de la cause pour empêcher le traitement litigieux (*El Masri*, précité, § 211 et *Al Nashiri*, précité, § 517)."

¹³⁰ *Ibid.*, § 517.

¹³¹ *Ibid.*, § 518.

¹³² *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016.

¹³³ *Ibid.*, §§ 221-235.

¹³⁴ *Ibid.*, § 241. The Court reiterated this statement in *Al Nashiri v. Romania*, no. 33234/12, § 594, 31 May 2018; and *Husayn (Abu Zubaydah) v. Lithuania*, no. 46454/11, § 581, 31 May 2018.

89. The Court thus appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents. The Court also appears to have extended this approach to the transfer of Mr. Nasr from Italy, and in respect of his detention in Egypt.

(iii) Cases concerning attribution in situations in which one or more States and an international organisation were involved in the underlying facts

90. The question of whether particular conduct should be attributed to either a (member) State or an international organisation, or to both, in situations in which one or more States and an international organisation were involved in the underlying facts, was addressed by the Court in the landmark cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*¹³⁵ and *Al-Jedda v. the United Kingdom*.¹³⁶

91. The *Behrami and Behrami* case dealt with responsibility for the death of, and serious injury caused to children from unexploded cluster munitions in the part of Kosovo for which a multinational brigade led by France was responsible. The brigade was part of an international security force (KFOR) deployed pursuant to UN Security Council Resolution 1244. The *Saramati* case concerned the applicant's arrest by two UNMIK police officers, acting on orders from a Norwegian KFOR commander in the zone of Kosovo where the KFOR multinational brigade was under the authority of Germany and his detention ordered by KFOR, subsequently directed by a French general, under UN Security Council Resolution 1244. The case of *Al-Jedda v. the United Kingdom*, for its part, concerned the detention of a dual British/Iraqi citizen in a Basra facility run by British forces acting on the basis of UN Security Council Resolution 1546.

92. All of these cases thus concerned military operations authorised by the United Nations. These are considered in the section of the report on the Interaction between the resolutions of the Security Council and the European Convention on Human Rights.

Challenges and possible solutions

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.¹³⁷ 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.

94. This can be illustrated, for instance, by the Court's approach in *Al Nashiri v. Poland*: After having quoted the relevant provisions of the ARSIWA in the section on relevant international law¹³⁸ and after the applicant and the third-party interveners had argued that the Contracting Party's responsibility under the Convention for co-operation in renditions and secret detentions should be established in the light of Article 16 of the ARSIWA,¹³⁹ the Court stated that it would "examine the complaints and the extent to which the events complained

¹³⁵ *Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.

¹³⁶ *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011.

¹³⁷ 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.

¹³⁸ *Al Nashiri v. Poland*, no. 28761/11, § 207, 24 July 2014.

¹³⁹ *Ibid.*, §§ 446-449.

of are imputable to the Polish State in the light of the above principles of State responsibility under the Convention, as deriving from its case-law¹⁴⁰ and does not make any further reference to the ARSIWA in its ensuing examination of the question of the respondent State's responsibility.

95. It therefore appears that the Court applies its own principles, having taken into account the relevant rules of international law and applying them, as it usually does, while remaining mindful of the Convention's special character as a human rights treaty.¹⁴¹

96. Despite the fact that the Court's methodological approach is not entirely clear, 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 the ARSIWA rules.

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.

98. In another two cases described above, *El-Masri* and *Al Nashiri v. Poland*, it is difficult to discern which rules exactly the Court applied in respect of State responsibility and, in particular, whether or not the Court's reasoning amounted to attributing to the respondent States the conduct of a third State.¹⁴²

99. As regards the question raised in *El-Masri* of whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team was imputable to the respondent State, the Court finds, on the one hand, that "... the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities"¹⁴³, which may be read as implying the attribution of the conduct of a third State. A similar statement was made in *Al Nashiri* in respect of the respondent State's responsibility for the applicant's treatment and detention by foreign officials on its territory.¹⁴⁴

100. However, the Court further found in *El-Masri* that the respondent State "... must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that

¹⁴⁰ Ibid., § 459.

¹⁴¹ Compare *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 57, ECHR 2001-XII.

¹⁴² See for the difficulties in interpreting the Court's conclusions on the issues relating to State responsibility in *El-Masri* the speech of Helen Keller, *The Court's Dilution of Hard International Law: Justified by Human Rights Values?*, at the [Seminar organised for the launching of the work of the DH-SYSC-II](#), co-organised by PluriCourts and the Council of Europe, Strasbourg, 29-30 March 2017; and the speech of Rick Lawson, *State responsibility and extraterritorial application of the ECHR*, at the DH-SYSC-II meeting on 3 April 2018, document DH-SYSC-II(2018)12.

¹⁴³ Ibid., § 206.

¹⁴⁴ Ibid., § 452.

might have been necessary in the circumstances of the case to prevent it from occurring”¹⁴⁵, which implies that the respondent State was held responsible for its own conduct. In *Al Nashiri*, the Court further found that “under Article 1 of the Convention, taken together with Article 3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment”¹⁴⁶, which in turn may be read as referring to the breach of an own positive obligation by the respondent State. In *Nasr and Ghali v. Italy*, which refers to both *El-Masri* and *Al Nashiri*, the Court then appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents.

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 show above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in its judgment in the *Jaloud case*.¹⁴⁷ 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.

102. In view of the foregoing, and in order to avoid a risk of fragmentation of the international legal order, it would be desirable if the Court gave more explanations as to whether and in how far it considered the ARSIWA rules relevant and applicable in cases concerning attribution of conduct to the respondent State before it.

103. More generally, in cases covering situations of extraterritoriality, which usually concern politically sensitive areas including questions of national security, a clear methodology and precise interpretation of the applicable rules is of utmost importance in order to guarantee legal certainty.

¹⁴⁵ *Ibid.*, § 211.

¹⁴⁶ *Ibid.*, § 517.

¹⁴⁷ *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.