DH-SYSC-II(2018)24rev (extracts)

29 May 2019

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

(extracts and Member States' comments)

Note: It is recalled that the DH-SYSC-II, in its 5th (5–8 February 2019) and 6th meeting (22–24 May 2019), further examined the revised draft chapter of Theme 1, subtheme ii) on State responsibility and extraterritorial application of the European Convention on Human Rights (document DH-SYSC-II(2018)24rev). At the end of the 6th meeting, the DH-SYSC-II had amended and provisionally adopted[1] paragraphs 1 to 50 included and 52 to 92 included of the revised draft chapter of Theme 1 subtheme ii).[2]

The Group decided that the remaining paragraphs of this draft chapter (paragraph 51 and paragraphs 93 to 103) shall be examined at its 7th and last meeting in September 2019. To that end, it asked the Secretariat to prepare a separate document containing both the versions of paragraph 51 and paragraphs 93 to 103 included of Theme 1 subtheme ii) as submitted to the DH-SYSC-II in document DH-SYSC-II(2018)24rev and the written comments already submitted by the Member States' delegations on these paragraphs before and during the 6th meeting.

According to the revised planning of the DH-SYSC-II (see DH-SYSC-II(2019)R6, Appendix III), the participants in the DH-SYSC-II meetings are invited to send written comments on these paragraphs (as well as written comments on the entire draft Report on the place of the European Convention on Human Rights in the European and international legal order which is to be circulated by 8 July 2019[3]) until 21 August 2019.

---

[1] Provisional adoption means that the Group has examined the text of the draft chapter paragraph by paragraph and made amendments both on the content and on the form of the text. The text may be updated in case the European Court of Human Rights delivered new important judgments prior to the final adoption of the entire future report in 2019, and in order to harmonise the entire text of the future report and take into account possible orientations given by the CDDH.

[2] The latest version of the revised draft chapter of Theme 1, subtheme ii), including the amendments made not only at the 5th meeting of the DH-SYSC-II (document DH-SYSC-II(2018)24rev), but also those made at the 6th meeting of the DH-SYSC-II (document DH-SYSC-II(2018)24rev2), will be distributed at a later stage.

[3] In respect of the provisionally adopted text of the draft Report, only written comments on the form of the text or regarding updates of the case law are expected.

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

(…)

A. Jurisdiction and extra-territorial application of the European Convention on Human Rights

(…)

Challenges and possible solutions

(…)

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".[4] 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.[5] 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.

Commented [DVA1]: Original version.

[51. Several other [important] decisions further ~~defined~~ developed 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 but also to the "effective control and decisive influence" over the separatist administration [footnote: *Ilascu* and Catan] or the "military, political, financial and other support" [footnote: Chiragov]. ~~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".[6] 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"~~ necessary in this group of cases in order for the acts to come within the respondent States'

Commented [DVA2]: Last version discussed in the 6th DH-SYSC-II meeting and not adopted.

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

jurisdiction.] [to be discussed…]

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".[8] 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.[9] 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.

[51. Des questionnements similaires ont pu survenir à l'occasion de ~~P~~plusieurs décisions importantes ~~ont défini~~venues définir plus précisément le champ de la « juridiction » des États lorsque ceux-ci contrôlaient effectivement une région, en particulier dans les situations où ce contrôle était exercé non pas directement, mais par l'intermédiaire d'une administration subordonnée. Ainsi, ~~D~~dans plusieurs affaires concernant la création, sur le territoire d'un État contractant, d'une entité qui n'est pas reconnue par la communauté internationale en tant qu'État souverain, avec l'appui de l'État défendeur, la Cour n'a pas seulement tenu compte de la force de la présence militaire de l'État dans la région. Dans *Catan*, en particulier, il a souligné que l'État défendeur exerçait un « un contrôle effectif et une influence décisive » sur l'administration séparatiste, dont l'existence a été maintenue « que grâce à l'appui militaire, économique et politique de la Russie »[10]. De même, dans l'affaire *Chiragov*, la Cour a constaté que non seulement le soutien militaire de l'État défendeur restait déterminant pour le maintien du contrôle sur les territoires en question, mais aussi que la « République du Haut-Karabakh » – dont l'armée et l'administration et celles d'Arménie se sont avérées être très intégrées – a survécu « grâce à l'appui militaire, politique, financier et autre » que leur apporte l'Arménie.[11] Aucune action directe de l'État défendeur en ce qui concerne l'acte contesté n'a donc été jugée nécessaire dans ce groupe d'affaires pour que les faits relèvent de la juridiction de l'État défendeur.]

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

Commented [DVA3]: ARMENIA / ARMENIE:

In similar vein [see comment on § 43: Firstly, I cannot remember any discussion that would have led to the present changes to the former Para 27/67 of the sub-theme. I have also consulted our expert in the CDDH, who did not recall such a reflection in the Steering Committee, either.], we would like to request to remove the reference to the case "Chiragov v. Armenia" in Para 51 (*two last sentences, starting with "Similarly, in Chiragov, …"*).

Commented [SE4]: FRANCE

Commented [SE5]: GEORGIA / GEORGIE

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

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

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

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

[10] *Catan et autres c. République de Moldova et Russie* [GC], nos 43370/04 et 2 autres, § 122, CEDH 2012 (extraits).

[11] *Chiragov et autres c. Arménie* [GC], no 13216/05, §§ 180, 185 et 186, CEDH 2015.

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".[12] 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.[13] 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.]

[51. Several ~~important~~ subsequent decisions ~~further defined~~ expanded the scope of the States' jurisdiction even further, to cases 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*, even though no direct involvement of the respondent was established~~,~~ ~~in particular, it emphasised~~ the Court nevertheless~~,~~ ~~that~~ attributed responsibility on the basis 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".[14] In *Ilascu* the Court did not even require effective control, considering "decisive influence" to be a sufficient requirement for responsibility. Thus the threshold of State responsibility as viewed by the ECtHR was substantially decreased. 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.[15] 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.]

Commented [I6]: RUSSIA / RUSSIE (22/05/2019)

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

B. The application of the international law of State responsibility by the European Court of 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.[16] 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.

Commented [DVA7]: Original version.

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.[17] 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.

Commented [SE8]: FRANCE:

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

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.[18] 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.

Commented [SE9]: GEORGIA / GEORGIE

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.[19] 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.

Commented [SE10]: UK

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 law[20] and after the applicant and the third-party interveners had argued that the

Commented [DVA11]: Original version.

[16] 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.

[17] 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.

~~[18] 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.~~

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,[21] the Court stated that it would "examine the complaints and the extent to which the events complained 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-law"[22] 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.[23]

95. Il apparaît ainsi que la Cour applique ses propres principes en prenant en compte les règles pertinentes du droit international et en les appliquant, comme elle le fait habituellement, en étant consciente du caractère particulier de la Convention en tant que traité relatif aux droits de l'homme[24]. Ainsi, en se référant à la différence entre les règles de juridiction et d'attribution d'un comportement à un État afin que celui-ci puisse être tenu pour responsable de ce comportement en vertu du droit international, la Cour a expliqué que « les critères permettant d'établir l'existence de la « juridiction » au sens de l'article 1 de la Convention n'ont jamais été assimilés aux critères permettant d'établir la responsabilité d'un Etat concernant un fait internationalement illicite au regard du droit international ».[25] Et le seuil ainsi développé pour conclure à l'existence de la juridiction de l'Etat au sens de l'article 1 apparaît moins élevé que celui du droit de la responsabilité de l'État.

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.

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

96. ~~Despite the fact that the Court's methodological approach is not entirely clear, a~~A comparison of the Court's case law showed that in a large number of decisions, the Court's

Commented [DVA12]: Original version.

Commented [SE13]: FRANCE

Commented [MF14]: Partie reprise du §53 et 54

Commented [MF15]: Partie reprise du §53 et 54 en modifiant un peu la formulation

Commented [DVA16]: Original version.

Commented [SE17]: FRANCE

Commented [SE18]: GEORGIA / GEORGIE

[19] 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.

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

[21] Ibid., §§ 446-449.

[22] Ibid., § 459.

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

[24] Comparer l'arrêt *Banković et autres c. Belgique et autres* (dec.) [GC], n° 52207/99, § 57, CEDH 2001-XII. Voir également Robert Spano, *Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law*, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, p. 43-47.

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

approach ~~does not differ from that under~~remains harmonious with the ARSIWA rules while maintaining the object and spirit of the Convention as a normative multilateral treaty.

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.

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

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

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

Commented [SE19]: NETHERLANDS / PAYS-BAS:

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

Commented [DVA20]: Original version.

Commented [SE21]: FRANCE

Commented [SE22]: GEORGIA / GEORGIE

Commented [SE23]: NETHERLANDS / PAYS-BAS

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 would be welcomed if the Court in its future judgements would give a ~~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.

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 (which was nevertheless higher than the "effective authority" or "decisive influence" thresholds employed by the ECtHR). 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.

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.[26]

98. Ainsi, ~~D~~dans les ~~deux autres~~ affaires ~~développées plus haut,~~ *El-Masri* et *Al Nashiri c. Pologne*, évoquées précédemment, il est difficile de cerner quelles règles la Cour applique exactement en matière de responsabilité de l'Etat et, en particulier, si son raisonnement revenait à attribuer le comportement d'un Etat tiers à l'Etat défendeur[27].

[26] 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.

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

Commented [SE24]: Rationale: This chapter is the chapter with challenges and possible solutions. To regret something is not directed to a solution.

Commented [I25]: RUSSIA / RUSSIE (22/05/2019)

Commented [SE26]: UK

Commented [SE27]: See comment on §§ 70-71 above: We also had an additional point in relation to paras 70-71 and 97 and the reference to the apparent difference in the caselaw between the ICJ and the ICTY, where we think that the ICJ caselaw if more significant for the general international law of State responsibility (not least as the ICTY jurisprudence was not dealing with the question attribution for the purposes of establishing responsibility).

Commented [DVA28]: Original version.

Commented [DVA29]: FRANCE

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"[28], 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.[29]

Commented [DVA30]: Original version.

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"[30], which may be read as implying the attribution of the conduct of a third State to the respondent 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.[31]

Commented [SE31]: NETHERLANDS / PAYS-BAS

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 might have been necessary in the circumstances of the case to prevent it from occurring"[32], 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"[33], 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.

Commented [DVA32]: Original version.

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 might have been necessary in the circumstances of the case to prevent it from occurring"[34], 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"[35], which in turn may be read as referring to the breach of an own positive

[28] Ibid., § 206.
[29] Ibid., § 452.
[30] Ibid., § 206.
[31] Ibid., § 452.
[32] Ibid., § 211.
[33] Ibid., § 517.
[34] Ibid., § 211.
[35] Ibid., § 517.

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*.[36] 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.

101. ~~Au final~~Par ailleurs, une autre conclusion qui peut être tirée de la jurisprudence de la Cour, consiste à dire qu'elle ne fait pas toujours clairement la distinction entre, d'une part, la « juridiction » au sens de l'article 1 de la CEDH, et l'attribution d'un comportement selon le droit de la responsabilité des Etats de l'autre. Comme vu auparavant, la Cour a expressément reconnu qu'il y a une distinction conceptuelle entre les deux, par exemple dans son arrêt dans l'affaire *Jaloud*[37]. Elle a aussi constaté que la question de la juridiction précède celle de l'attribution. La reconnaissance, en théorie, que l'attribution et la juridiction sont deux choses différentes n'a pas toujours été clairement reflété dans les arrêts de la Cour. Par exemple, dans l'affaire *Ilaşcu*, il n'est pas évident de savoir si la Cour a fait une distinction claire entre l'attribution du comportement d'un côté, et la question de savoir si la Russie avait exercé sa juridiction sur le requérant au sens de l'article 1 de la CEDH de l'autre.

101. Finally, ~~another conclusion that can be drawn from the case law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. A~~as shown above, the Court, for instance in its judgment in the *Jaloud case*,[38] has ~~expressly~~ acknowledged that there is a conceptual distinction between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand.~~the two, for instance in its judgment in the *Jaloud case*.~~[39] 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.

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

Commented [SE33]: NETHERLANDS / PAYS-BAS:

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

Commented [DVA34]: Original version.

Commented [DVA35]: FRANCE

Commented [SE36]: GEORGIA / GEORGIE

Commented [SE37]: NETHERLANDS / PAYS-BAS

[36] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.
[37] *Jaloud c. Pays-Bas* [GC], n° 47708/08, §§ 112 et suiv. and 154 et suiv., CEDH 2014.
[38] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.

distinction between the two, for instance in its judgment in the *Jaloud case.*[40] 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.

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.*[41] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. It has been argued that the Court conflated the two. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a lower threshold than, the "direction or control" criterion used by the ARSIWA.

Commented [SE38]: RUSSIA / RUSSIE (22/05/2019)

101. Finally, another conclusion that can be drawn from the case law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. As shown above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in its judgment in the *Jaloud case.*[42] 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.

Commented [SE39]: UK

[101bis.] Pour autant, malgré le fait que l'approche méthodologique de la Cour ne soit pas toujours complètement claire, l'analyse globale de sa jurisprudence montre que dans un grand nombre de décisions, l'approche de la Cour ne diffère pas de celle prévue par les règles des AREFII.

Commented [SE40]: FRANCE

Commented [MF41]: Suggestion de dire: dans la majorité

Commented [MF42]: §96 déplacé ici car cela parait plus logique

[101 bis.] Apparent inconsistencies in the ECtHR's interpretation of "jurisdiction" make it difficult for a High Contracting Party to the ECHR to determine whether the Court will consider a person to be within its jurisdiction. Inconsistent and insufficiently reasoned case law of the ECtHR will result in unpredictability and uncertainty among the States as to how their actions might be qualified by the ECtHR. Providing legal certainty is central to the

Commented [SE43]: RUSSIA / RUSSIE (22/05/2019)

~~[39] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.~~

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

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

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

legitimacy of the ECtHR and the maintenance of its effectiveness and authority as an independent and competent judicial institution, which is authorised to control proper fulfillment of obligations of the States under the Convention and effectively guarantee the rights of those within their jurisdiction.

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.

Commented [DVA44]: Original version.

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

Commented [SE45]: FRANCE

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 would give in its judgements a more detailed reasoning ~~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.

Commented [SE46]: NETHERLANDS / PAYS-BAS

102. In view of the foregoing, and in order to avoid a risk of fragmentation of the international legal order, as well as in the interest of preserving the authority of the Court's decisions, it would be desirable if the Court ~~gave more explanations as to whether and in how far it considered the~~more consistently applied relevant rules of general international law, including those codified in ARSIWA ~~rules relevant and applicable~~, in cases concerning attribution of conduct to the respondent State before it.

Commented [I47]: RUSSIA / RUSSIE (22/05/2019)

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.

Commented [DVA48]: Original version.

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

Commented [DVA49]: France.