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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

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

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Contribution for the preparation of the draft chapter of Theme 1, subtheme ii): State responsibility and extraterritorial application of the Convention /

Contribution à la préparation du projet de chapitre du Thème 1, sous-thème ii): Responsabilité des Etats et extraterritorialité de la Convention

(as written by Contributor Mr Marten ZWANENBURG in view of the preparation of the draft chapter of Theme 1, subtheme ii) by the co-Rapporteurs) /

(tel que rédigée par le Contributeur M. Marten ZWANENBURG en vue de la préparation du projet de chapitre du Thème 1, sous-thème ii) par les co-Rapporteurs)

REPORT TO DRAFTING GROUP II ON THE FOLLOW-UP TO THE CDDH REPORT ON THE LONGER-TERM FUTURE OF THE SYSTEM OF THE CONVENTION (DH-SYSC-II)

STATE RESPONSIBILITY AND EXTRATERRITORIAL APPLICATION OF THE CONVENTION

Marten Zwanenburg

1. INTRODUCTION

1.1 Background to the report

This contribution was prepared at the request of drafting group II on the follow-up to the CDDH report on the longer-term future of the system of the Convention (DH-SYSC-II).

In preparing the report, the contributor was guided by the agreed approach by DH-SYSC-II on its report as a whole, as well as specific instructions given by DH-SYSC-II to the contributors and rapporteurs. These include:[1]

(i) The necessity to adopt a pragmatic approach throughout the work;
(ii) The objective that, based on observations, an analysis of the challenges is presented as well as possible responses;
(iii) The work of the Rapporteurs and Contributors should maintain a neutral character in order to reflect the content of the discussions and contributions of the Group;
(iv) The report should aim to identify discrepancies between the interpretation and the methodology of the Court and other international bodies that may undermine the authority of the Court and to formulate proposals to minimize fragmentation in the international legal order and enhance the authority of the Convention system;
(v) The work should be kept updated with any new relevant case law until the report is finalised by the Group at the end of its mandate;
(vi) The draft outline of the report agreed by DH-SYSC-II at its second meeting.

The contributor was also guided by the aim of the work in its entirety as expressed by DH-SYSC-II, namely the preservation of the efficiency of the Convention system against risks of fragmentation of the European and international legal space in the field of human rights protection, stemming from diverging interpretations.[2]

This aim must be seen against the relevant paragraphs of the CDDH report on the longer-term future of the system of the European Convention on Human Rights (ECHR or Convention). In particular, paragraph 186 of the report states:

> Concerns have however been raised as to the question whether the Court always achieves an interpretation of the Convention which is in harmony with other provisions of international law. Those concerns have been expressed by certain member States, by some members of the Court in separate opinions, and in academia. While

[1] Report of the 2nd meeting of DH-SYSC-II, DH-SYC-II(2017)R2, 7 October 2017, in particular paras. 2, 8 and 14.
[2] Ibid., para. 13.

> acknowledging that the interpretation of the Convention is a prerogative of the Court itself, the CDDH noted that an interpretation of the Convention which is at odds with other instruments of public international law (such as international humanitarian law) could have a detrimental effect on the authority of the Court's case law and the effectiveness of the Convention system as a whole.[3]

The topic of the present report is closely related to the topic of the method used by the European Court of Human Rights (Court or ECtHR) for the interpretation of the ECHR. As the latter is the subject of a separate report, it is not addressed in any detail in the present report. Nevertheless, for a proper understanding of the issues it will be necessary to refer to this methodology from time to time in the present report.

The contributor is grateful to Ms. Elora Scheij and Ms. Sanne van den Heuvel for their assistance in preparing the report.

1.2 Methodology

On the basis of the mandate as discussed above, the contributor adopted the following methodology.

The basis of the report is an analysis of case law of the Court that is relevant to the notion of jurisdiction in the sense of article 1 of the convention and the notions of territorial control and effective control, as well as state responsibility. This analysis is not exhaustive, in the sense that it discusses all the cases that are relevant. Rather, it aims to identify the broad principles of the approach taken by the Court when confronted with the question whether there was jurisdiction in the sense of Article 1 in a particular case and with questions of state responsibility. Identifying these broad principles will facilitate the identification of discrepancies between the interpretation and the methodology of the Court and other international bodies, and possible responses thereto.

The nature of the present report and its size do not allow for an in-depth comparative analysis.[4] In particular, it was necessary to make a selection among "other international bodies". This selection was made on the basis of the following criteria:

(i) Does the body have recognized specific expertise with respect to the subject matter;
(ii) Does the body deal specifically with the subject matter of state responsibility, or a notion of "jurisdiction" that is comparable to that notion as it is used in Article 1 ECHR;
(iii) Was the body referred to in input received from members of DH-SYSC-II for this report.

The following material was used in drafting this report:

(i) Proceedings of the seminar organized in March 2017 for the launching of the work of the DH-SYSC-II, co-organised by PluriCourts and the Council of Europe;

[3] CDDH, The Longer-term Future of the System of the European Convention on Human Rights, Report of the Steering Committee for Human Rights (CDDH), adopted on 11 December 2015, para. 186 (footnotes ommitted).
[4] This was recognized by several delegations during the second meeting of DH-SYSC-II in September 2017.

(ii) Views expressed during a brainstorming session during the second meeting of SYSC-II in September 2017;
(iii) Case law of the ECtHR;
(iv) The work of the International Law Commission (ILC) on the international responsibility of States, and on the international responsibility of International Organizations;
(v) Case law of the International Court of Justice (ICJ);
(vi) Case law, General Comments, Views, and Decisions of the Inter-American Commission of Human Rights (IACommHR), the United Nations Human Rights Committee (HRC), and the Committee on the Rights of the Child (CRC);
(vii) Academic literature.

It was noted by several members of SYSC-II that General Comments do not have the same weight as case law, since they are to some extent recommendations. It appears to be generally accepted that General Comments adopted by monitoring bodies have no legally binding effect.[5] As to the General Comments of the HRC, it is relevant to note that in 1995, the chairman of the Committee expressed the view that "[t]he Committee's interpretations as set out in its general comments were not strictly binding, although it hoped that the comments carried a certain weight and authority."[6] It may be noted that the ICJ has stated that it believes it should ascribe great weight to case law of the Human Rights Committee, including General Comments.[7]

1.3 Structure

The report is structured as follows. After this introductory chapter, Chapter 2 deals with the notion of jurisdiction in the sense of Article 1 of the Convention and the notions of territorial control and effective control, focusing on extraterritorial application of the ECHR.[8] The first section of this chapter discusses the notion of jurisdiction under general international law. This is followed by an analysis of case law of the ECtHR concerning the issue of jurisdiction in the sense of Article 1 ECHR. Next, a comparison is made with the approach of other international bodies to jurisdiction in the context of human rights treaties. The challenges arising from the case law of the ECtHR are then analysed. Chapter 3 deals with the issue of state responsibility. After some observations on state responsibility under general international law, case law of the ECtHR relevant to state responsibility is discussed, focusing on the issue of attribution. This is followed by a comparison to the approach of other courts and institutions, and an analysis of challenges arising from the case law of the ECtHR.

This report does not discuss possible responses to the challenges. The contributor considered that suggestions for such responses should be based on input from the members of DH-SYSC-II. The analysis of the challenges in this report may be of assistance to the members in formulating such input.

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[5] See in the literature e.g. N. Ando, 'General Comments/Recommendations', 2008 *Max Planck Encyclopedia of Public International law* online edition; E. Klein & D. Kretzmer, 'The UN Human Rights Committee: The General Comments – The Evolution of an Autonomous Monitoring Instrument', (2015) 58 *German Yearbook of International Law*, 204; I. Bantekas & L. Oette, *International Human Rights Law and Practice* (2016), 211.
[6] Human Rights Committee (HRC), UN Doc. CCPR/C/SR.1406 (1995), 2.
[7] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Merits, Judgment of 30 November 2010, [2010] ICJ Rep. 639, at 663-664, para. 66.
[8] The draft outline of the report agreed by DH-SYSC-II at its second meeting included state responsibility as the first topic. The ECtHR has held that the question of jurisdiction precedes that of attribution. As a consequence, a logical order is to discuss jurisdiction before state responsibility in this report.

2. NOTION OF JURISDICTION IN THE SENSE OF ARTICLE 1 OF THE CONVENTION AND THE NOTIONS OF TERRITORIAL CONTROL AND EFFECTIVE CONTROL

2.1 Jurisdiction under general international law

Under general international law, the notion of jurisdiction refers, in its broadest sense, to a State's lawful power to act and hence to its power to decide whether and, if so, how to act, whether by legislative, executive, or judicial means.[9] The notion is closely connected to State sovereignty. On the one hand, jurisdiction is considered to be an aspect that flows from sovereignty. On the other hand, one State's jurisdiction is limited by the sovereignty of other States. The connection to sovereignty helps explain why the starting point in general international law is that jurisdiction is territorial.[10] A distinction is generally made between prescriptive, judicial and enforcement jurisdiction. Prescriptive, sometimes also called legislative, jurisdiction refers to the power that a State exercises by establishing rules. Judicial jurisdiction refers to a State establishing procedures for identifying breaches of the rules and the precise consequences thereof. Enforcement jurisdiction refers to a State forcibly imposing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules.[11]

Article 1 ECHR provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The use of the word "jurisdiction" in this article might be understood as suggesting that it has the same meaning as it does in general international law. This is however not necessarily the case. The concept of "jurisdiction" has a different purpose in general international law and in Article 1 ECHR.[12] In the former, it is concerned with setting out the limits on the domestic legal order of states, so that they do not infringe upon the sovereignty of others. In this way, the notion of jurisdiction determines whether a claim by a state to regulate some conduct is lawful or unlawful. In the latter, the term serves to set limits on the reach of the Convention: it defines the persons who enjoy the rights and freedoms set out in the Convention. This notion of jurisdiction is not concerned with whether the exercise of jurisdiction was lawful or not. As the ECtHR stated in *Loizidou v. Turkey* when discussing the notion of "jurisdiction" in Article 1:

> 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.[13]

The purpose of the notion of "jurisdiction" in Article 1 ECHR also helps explain why the ECtHR has held that the question of the exercise of jurisdiction precedes the question of attribution under state responsibility. The first question that needs to be answered is whether

[9] B. Oxman, 'Jurisdiction of States', 2007 *Max Planck Encyclopedia of Public International Law* online edition, para. 1.1.
[10] I. Brownlie, *Principles of Public International Law*, 1998, 301.
[11] Oxman, *supra* note 9, para. 3.3.
[12] See in more detail M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 2011, 21-30.
[13] *Loizidou v. Turkey* [GC], 18 December 1996, § 62, *Reports* 1996-VI.

the ECHR was applicable to the person claiming to be a victim of a violation of the Convention in the first place. Only once that question is answered in the positive, does the question arise whether the conduct allegedly violating that person's rights under the ECHR can be considered as conduct of the respondent State, and whether it was in breach of an international obligation owed by that State. These two questions need to be answered for there to be an internationally wrongful act of the State, or in other words, for the State to be internationally responsible.[14]

The next paragraph will discuss how the ECtHR has dealt with the notion of jurisdiction in Article 1, including the relationship between that notion and the notion of jurisdiction under general international law. It wil focus on the extraterritorial exercise of jurisdiction. It will be seen that the Court has, despite the difference in character and purpose described above, at times suggested a parallel between or even commonality of the notions of jurisdiction in general international law and in Article 1 ECHR.

2.2 Case law of the European Court of Human Rights

2.2.1 Introduction

The case law of the ECHR organs, the former European Commission on Human Rights and the ECtHR, which deals with the issue of jurisdiction is extensive. This report will not discuss the case law of the Commission, as it can be considered to have been superseded by subsequent jurisprudence of the Court, especially after the Commission ceased to exist.[15]

With respect to the case law of the ECtHR, it is beyond the ambit of this report to discuss every relevant case, or even the majority of relevant cases, in detail. Rather, the discussion will attempt to give an overview of the approach the Court has taken to the issue of the jurisdiction. The focus in this discussion will be on cases dealing with extraterritorial jurisdiction. It is in particular with regard to these cases that individual judges and commentators have identified discrepancies between the interpretation and the methodology of the Court and other international bodies.

To structure the discussion, it would be helpful to classify cases in different categories. One could try to make a classification of one's own. This is the approach taken in the fact sheet on the "Extraterritorial jurisdiction of States Parties to the European Convention on Human Rights" published by the Press Unit of the Court.[16] Such a classification would however by definition be arbitrary, as it is not one made by the Court itself in its case law.

For that reason, another approach will be taken. The starting point of the discussion will be the decision of the Court in the *Banković* case.[17] This is because in particular in this case the Court made some more fundamental observations on the meaning of "jurisdiction." It also purported to give a categorization of cases in which it had previously found jurisdiction to exist. The discussion will then continue with the judgment of the Court in *Al-Skeini and*

[14] See further para. 3.1, *infra*.
[15] For an overview of relevant case law by the Commission, see inter alia M. Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights', (2012) 30 Netherlands Quarterly of Human Rights, 137.
[16] Available at: www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf.
[17] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII.

Others v. the United Kingdom.[18] The reason is that in this judgment, the Court purported to give such a classification of its previous case law itself. After discussing the *Banković* decision and the *Al-Skeini* judgment, some observations will be made on how the Court's holdings in these cases relate to each other, and to other case law after these cases were decided.

2.2.2 *Banković*

The *Banković* case concerned the bombing of a radio and television tower in Belgrade by NATO during Operation Allied Force in 1999. The respondent States argued that they did not exercise jurisdiction in the sense of Article 1 ECHR over the applicants or their family members who were killed in the attack. Against this background the Court noted:

> that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States ("the extra-territorial act"). It considers that the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States.[19]

It then discussed the applicable rules of interpretation, recalling that the Convention must be interpreted in the light of the rules set out in the Vienna Convention on the Law of Traties of 1969.[20]

In this context, it referred to four elements:

i) The need to ascertain the ordinary meaning to be given to the phrase "within their jurisdiction" in its context and in the light of the object and purpose of the Convention;
ii) It also stated that it would consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation";
iii) It also referred to "any relevant rules of international law applicable in the relations between the parties". More generally, the Court recalled in this context that:

> the principles underlying the Convention cannot be interpreted and applied in a vacuum. 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).

iv) Finally, the Court recalled that the travaux préparatoires can also be consulted with a view to confirming any meaning resulting from the application of Article 31 of the Vienna Convention 1969 or to determining the meaning when the interpretation under Article 31 of the Vienna Convention 1969 leaves the meaning

[18] *Al-Skeini and Others. v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.
[19] *Banković and Others v. Belgium and Others*, *supra* note 17, § 54.
[20] Ibid., § 55.

> "ambiguous or obscure" or leads to a result which is "manifestly absurd or unreasonable" (Article 32).

The Court then proceeded to apply these interpretative techniques to the word "jurisdiction" in Article 1 ECHR.

Discussing the "ordinary meaning" of the relevant term in Article 1 of the Convention the Court stated that it was:

> satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (Mann, "The Doctrine of Jurisdiction in International Law", RdC, 1964, Vol. 1; Mann, "The Doctrine of Jurisdiction in International Law, Twenty Years Later", RdC, 1984, Vol. 1; Bernhardt, Encyclopaedia of Public International Law, Edition 1997, Vol. 3, pp. 55-59 "Jurisdiction of States" and Edition 1995, Vol. 2, pp. 337-343 "Extra-territorial Effects of Administrative, Judicial and Legislative Acts"; Oppenheim's International Law, 9th Edition 1992 (Jennings and Watts), Vol. 1, § 137; P.M. Dupuy, Droit International Public, 4th Edition 1998, p. 61; and Brownlie, Principles of International Law, 5th Edition 1998, pp. 287, 301 and 312-314).
> 60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence (Higgins, Problems and Process (1994), at p. 73; and Nguyen Quoc Dinh, Droit International Public, 6th Edition 1999 (Daillier and Pellet), p. 500). In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (Bernhardt, cited above, Vol. 3 at p. 59 and Vol. 2 at pp. 338-340; Oppenheim, cited above, at § 137; P.M. Dupuy, cited above, at pp. 64-65; Brownlie, cited above, at p. 313; Cassese, International Law, 2001, p. 89; and, most recently, the "Report on the Preferential Treatment of National Minorities by their Kin-States" adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001).
> 61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.

The Court found this interpretation to be supported by State practice in the application of the Convention. That practice, in particular the lack of derogations, was 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. Finally, the Court found clear confirmation of this essentially territorial notion of jurisdiction in the travaux préparatoires of the ECHR.[21]

The Court then gave an overview of extra-territorial acts recognized as constituting an exercise of jurisdiction in its case law, concluding that:

> the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[22]
>
> Additionally, the Court notes that other recognised instances of the extra-territorial exercise of

[21] Ibid., § 63.
[22] Ibid., § 71.

> jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.[23]

The Court then applied the above the situation of the applicants in the case. It found that:

> the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.
> The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction". Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view 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 and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words "within their jurisdiction" in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 (see § 25 above).

In this context, the Court also referred to what it referred to as the "espace juridique" of the ECHR, as follows:

> the Convention is a multi-lateral treaty operating […] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[24]

The Court concluded that there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States. [25]

2.2.3 *Al-Skeini*

The case of *Al-Skeini* was concerned with the deaths of the applicants' six close relatives in Basrah in 2003 while the UK was an occupying power: three of the victims were shot dead or shot and fatally wounded by British soldiers; one was shot and fatally wounded during an exchange of fire between a British patrol and unknown gunmen; one was beaten by British soldiers and then forced into a river, where he drowned; and one died at a British military base, with 93 injuries identified on his body.[26]

The respondent Government contended that five of the six applicants did not fall within its

[23] Ibid., § 73.
[24] Ibid., § 80.
[25] Ibid., § 82.
[26] ECtHR, press release, 7 July 2011, ECHR 095 (2011).

jurisdiction.[27] The Court started by setting out general principles relevant to jurisdiction. In this discussion, it repeated that a State's jurisdictional competence under Article 1 is primarily territorial. Acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases.

The Court then purported to give an overview of exceptional cirsumstances recognized to date in its case law as capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. It identified two principal categories: a) State agent authority and b) effective control over an area.

It is useful to cite the entire section the Court devoted to the first category, as follows:

> (β) State agent authority and control
> 133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see Drozd and Janousek, cited above, § 91; Loizidou (preliminary objections), cited above, § 62; Loizidou v. Turkey (merits), 18 December 1996, § 52, Reports of Judgments and Decisions 1996-VI; and Banković and Others, cited above, § 69). The statement of principle, as it appears in Drozd and Janousek and the other cases just cited, is very broad: the Court states merely that the Contracting Party's responsibility "can be involved" in these circumstances. It is necessary to examine the Court's case-law to identify the defining principles.
> 134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (see Banković and Others, cited above, § 73; see also X. v. Germany, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158; X. v. the United Kingdom, no. 7547/76, Commission decision of 15 December 1977, DR 12, p. 73; and M. v. Denmark, no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193).
> 135. Secondly, the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (see Banković and Others, cited above, § 71). Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see Drozd and Janousek, cited above; Gentilhomme and Others v. France, nos. 48205/99, 48207/99 and 48209/99, 14 May 2002; and X. and Y. v. Switzerland, nos. 7289/75 and 7349/76, Commission decision of 14 July 1977, DR 9, p. 57).
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> 136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in Öcalan (cited above, § 91), the Court held that "directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory". In Issa and Others (cited above), the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In Al-Saadoon and Mufdhi v. the United Kingdom ((dec.), no. 61498/08, §§ 86-89, 30 June 2009), the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in Medvedyev and Others v. France ([GC], no. 3394/03, § 67,

[27] *Al-Skeini and Others. v. the United Kingdom*, *supra* note 18, § 118.

ECHR 2010), the Court held that the applicants were within French jurisdiction for the purposes of Article 1 of the Convention by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.
137. It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare Banković and Others, cited above, § 75).

With respect to category of "effective control over an area", the Court held:

(γ) Effective control over an area

138. Another 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 (see Loizidou (preliminary objections), cited above, § 62; Cyprus v. Turkey, cited above, § 76; Banković and Others, cited above, § 70; Ilaşcu and Others, cited above, §§ 314-16; and Loizidou (merits), cited above, § 52). 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 (see Cyprus v. Turkey, cited above, §§ 76-77).
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).
140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements", to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see Loizidou (preliminary objections), cited above, §§ 86-89, and Quark Fishing Ltd, cited above).

The Court then addressed the argument put forward by the UK that it had no jurisdiction because Iraq fell outside the "espace juridique" of the Convention:

(δ) The legal space ("espace juridique") of the Convention
141. The Convention is a constitutional instrument of European public order (see Loizidou (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see Soering, cited above, § 86).
142. The Court 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).

On this basis, the Court determined whether the applicants fell within the UK's jurisdiction, holding that:

> 143. In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court takes as its starting-point that, on 20 March 2003, the United Kingdom together with the United States of America and their Coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States of America and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 89 above).
> 144. As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States of America to the President of the United Nations Security Council (see paragraph 11 above), the United States of America and the United Kingdom, having displaced the previous regime, created the CPA "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States of America and the United Kingdom through the CPA was the provision of security in Iraq, including the maintenance of civil law and order. The letter further stated that "[t]he United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall, inter alia, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters".
> 145. In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the CPA declared that it would "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability" (see paragraph 12 above).
> 146. The contents of the letter of 8 May 2003 were noted by the Security Council in Resolution 1483, adopted on 22 May 2003. This Resolution gave further recognition to the security role which had been assumed by the United States of America and the United Kingdom when, in paragraph 4, it called upon the Occupying Powers "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability" (see paragraph 14 above).
> 147. During this period, the United Kingdom had command of the military division Multinational Division (South-East), which included the province of Al-Basra, where the applicants' relatives died. From 1 May 2003 onwards the British forces in Al-Basra took responsibility for maintaining security and supporting the civil administration. Among the United Kingdom's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations (see paragraph 21 above).
> 148. In July 2003 the Governing Council of Iraq was established. The CPA remained in power, although it was required to consult with the Governing Council (see paragraph 15 above). In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council underscored the temporary nature of the exercise by the CPA of the authorities and responsibilities set out in Resolution 1483. It also authorised "a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" (see paragraph 16 above). United Nations Security Council Resolution 1546, adopted on 8 June 2004, endorsed "the formation of a sovereign interim government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq" (see paragraph 18 above). In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the interim Iraqi government from the CPA, which then ceased to exist (see paragraph 19 above).
> (iii) Conclusion as regards jurisdiction

> 149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised 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 United Kingdom for the purposes of Article 1 of the Convention.
> 150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on 8 May 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basra City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.

The Court in its judgment in *Al-Skeini* suggests that its interpretation of "jurisdiction" and its categorization is consistent with and neatly encompasses its earlier case-law, including its decision in *Banković*. On reading the two, however, there are certain important differences, real or at least apparent. These include:

(i) Attenuation of link between lawful and actual exercise of powers

Although the Court retained the link between "jurisdiction" in the sense of Article 1 ECHR and the notion of jurisdiction in general international law, which is concerned with the *lawful* exercise of powers by the State, it seems to have attenuated this link. The focus is more on the actual exercise of powers by the State rather than whether that exercise is lawful.[28]

(ii) "Espace juridique"

The Court's reference to "espace juridique" in *Banković* was understood by many national judges and commentators, as well as at least one State Party to the ECHR, as limiting the scope of "jurisdiction" to the territory of High Contracting Parties to the ECHR. In paragraph 142 of its judgment in *Al-Skeini*, the Court distances itself from this interpretation. It may be noted that the case law it refers to in this context post-dates its decision in *Banković*.

(iii) "Public powers"

The Court appears to have changed the context in which it finds the exercise of "public powers" relevant. In *Banković*, it referred to the "exercise of all or some of the public powers normally to be exercised by that Government" in the context of effective control over

[28] See P.F. Laval, 'À propos de la Juridiction Extraterritoriale de l' Etat: Observations sur l'Arrêt Al-Skeini de la Cour Européenne des Droits de l'Homme du 7 Juillet 2011', (2012) 116 Revue Générale de Droit International Public 61, at 78.

territory.[29] In *Al-Skeini* on the other hand it referred to this exercise as a relevant factor in the context of state agent authority and control over individuals.[30]

(iv) "Use of force"

The Court in *Al-Skeini* describes as one of the subcategories of "State agent authority or control" the use of force, in certain circumstances. It states that this principle has been applied where an individual is taken into the custody of State agents abroad. It does not make clear in which other factual circumstaces it applies, and in particular whether the use of weapons would qualify. If it does, the Court's judgment is difficult to reconcile with its decision in *Banković*, in which it did not accept that the use of bombs established jurisdiction.

(v) "Dividing and tailoring"

In paragraph 75 of its decision in *Banković* 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 1 of this Convention' can be divided and tailored in accordance with the particular circumstances of territorial jurisdiction". This appears difficult to reconcile with the Court's statement in paragraph 137 its *Al-Skeini* judgment, which does allow for such dividing and tailoring.

2.2.4 Case law after the Al-Skeini judgment

In *Al-Skeini*, the Court suggested that it set out an overview of the categories of factual situations in which jurisdiction exists. Since then, the Court has decided a number of other cases in which the issue of jurisdiction played an important role. The pronouncements of the Court on jurisdiction in some of those cases raises questions regarding the relationship with what the Court said in *Al-Skeini*. The following discussion provides certain examples.

In its judgment in *Hirsi Jamaa and Others v. Italy*, the Court concluded that the applicants "were under the continuous and exclusive de jure and de facto control of the Italian authorities."[31] 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 is subject to the exclusive jurisdiction of the State of the flag it is flying. This basis for finding jurisdiction was not part of the categories referred to by the Court in its *Al-Skeini* judgment.[32] More generally, it is not quite clear how the emphasis on *de jure* control relates to the emphasis that the court placed in its judgment in *Al-Skeini* on the importance of factual control over individuals for the purpose of establishing jurisdiction.

In its judgment in *Jaloud v. the Netherlands*, the Court concluded that the respondent State had jurisdiction over the applicant 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

[29] *Banković and Others v. Belgium and Others*, *supra* note 17, § 71.
[30] *Al-Skeini and Others. v. the United Kingdom*, *supra* note 18, § 135.
[31] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 81, ECHR 2012.
[32] Although the Court did refer to it in its decision in *Banković and Others v. Belgium and Others*.

> 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.[33]

This finding raises the question whether the Court was applying the "State agent authority" test or the "effective control over an area" test, or formulating a new test. If the former, it is unclear what role the existence of the checkpoint played. It has been suggested by commentators that this was intended as factor limiting the application of the "State agent authority" test,[34] but the Court does not make clear whether this was indeed the intention and if so, how the limitation operates.

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

It may also be noted that one of the elements in the Court's discussion in *Jaloud* of whether the applicant was within the jurisdiction of that State was:

> 151. That being so, the Court cannot find that the Netherlands troops were placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State (compare, mutatis mutandis, Article 6 of the International Law Commission's Articles on State Responsibility, see paragraph 98 98 above; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, § 406, paragraph 97 above)).

This reference to what appears to be a question of attribution in the discussion on jurisdiction, which is another question, is surprising. This is particularly so since the Court discusses the question of attribution elsewhere in the judgment, underlining that these are different issues:

> The Court reiterates 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 general international law (see Catan, cited above, § 115).[35]

The case of *N.D. and N.T. v. Spain* concerned applicants who had tried to pass the border post between Marocco and the Spanish enclave Mellila. With respect to the question of jurisdiction the Court held that it was unnecessary to determine whether the border post was

[33] *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014.
[34] See e.g. A. Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problems, New Solutions?', (2014) 53 *The Military Law and the Law of War Review*, 287.
[35] *Jaloud v. the Netherlands*, *supra* note 33, § 154.

on Spanish territory:

> Elle se borne à rappeler, comme elle l'a déjà établi par le passé, que, dès lors qu'il y a contrôle sur autrui, il s'agit dans ces cas d'un contrôle de jure exercé par l'État en question sur les individus concernés (Hirsi Jamaa, précité, § 77), c'est-à-dire d'un contrôle effectif des autorités de cet État, que celles-ci soient à l'intérieur du territoire de l'État ou sur ses frontières terrestres. De l'avis de la Cour, à partir du moment où les requérants étaient descendus des clôtures frontalières, ils se trouvaient sous le contrôle continu et exclusif, au moins de facto, des autorités espagnoles. Aucune spéculation concernant les compétences, les fonctions et l'action des forces de l'ordre espagnoles sur la nature et le but de leur intervention ne saurait conduire la Cour à une autre conclusion.[36]

The reference to "de jure" control in this statement raises questions. The Court refers in this context to its judgment in *Hirsi Jamaa*. In that judgment it deduced *de jure* control from the status of the respondent State as flag State of a ship, but in this case there was no ship involved. It may be that the Court intended to infer that border control installations can be assimilated to ships, but it does not say so explicitly.

2.3 Comparison with the approach of other international bodies and analysis of the challenges

2.3.1 Comparison with the approach of other international bodies

When comparing approaches to jurisdiction taken by the ECtHR and other international bodies, it is important to remember that the object of these approaches has been different. The ECtHR interprets Article 1 ECHR. Other international bodies have interpreted provisions on the scope of application of other regional or international human rights treaties, but not Article 1 ECHR. Comparing these approaches may thus, to a certain extent, be comparing apples and oranges.

Related to the the previous point is the point that other regional and international human rights instruments that contain a provision on their scope of application are formulated differently than Article 1 ECHR, or do not contain such a provision at all. For example, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) contains the obligation for a State Party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant."

At the same time, this does not preclude the ECtHR from looking at the interpretative methodology used by other bodies, even though the object of interpretation may be different. Indeed, the Court itself has suggested that the case law of other bodies is relevant to its interpretation of article 1 by referring to such case law. An example is the judgment in *Issa v. Turkey*, in which the Court referred to a decision by the IACommHR and views of the HRC.[37]

The ICJ considered the application of Article 2 ICCPR in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory*, and in the case concerning *Armed Activities on the Territory of the Congo* between the Democratic Republic of Congo and Uganda. In its judgment in the latter case, it simply considered that

[36] *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, § 54, 3 October 2017.
[37] *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004. See also *Isaak and Others v. Turkey* (dec.), no. 44587/98, 28 September 2006.

the ICCPR was applicable extraterritorially without elaborating why this was so. In the *Wall Advisory Opinion*, the ICJ did elaborate on the interpretation of Article 2. It referred to four elements to support its conclusion that the ICCPR applied to persons outside the territory of Israel:

(i) A reference to a general notion of jurisdiction which is primarily territorial but with exceptions;
(ii) The object and purpose of the ICCPR;
(iii) The practice of the HRC;
(iv) The travaux préparatories of the ICCPR.

It may be noted that there is a remarkable similarity between the interpretative techniques used by the ICJ and those used by the ECtHR in the *Banković* decision and *Al-Skeini* judgment, as discussed above. It appears that using these techniques, the ICJ arrived at a broader scope of application of the ICCPR based on its Article 2 than the ECtHR did for the ECHR based on Article 1 of that convention.

This is confirmed by the practice of the HRC, to which the ICJ referred. The HRC has not set out in any detail the interpretative techniques it uses in interpreting Article 2 ICCPR. In its views in various cases brought under the Optional Protocol to the ICCPR, the HRC has adopted a broad interpretation of Article 2. In *Lopez Burgos v. Uruguay* it found that:

> it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[38]

On this basis the HRC held that it was not barred from considering allegations concerning ill-treatment and subsequent abduction by Uruguyan agents in Argentina. The HRC drew a similar conclusion in the case of a Uruguayan national abducted from Brazil by Uruguayan agents.[39]

In General Comment 31 on Article 2, the HRC states that:

> 10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

The HRC interprets "within the power or effective control" broadly, an interpretation which essentially appears to correspond to whether a person has been affected by conduct of the State. Thus, in its views in *Montero v. Uruguay* it held that there was jurisdiction on the basis of the non-issuance of a passport by Uruguayan authorities in Germany.[40] In its Concluding

[38] HRC, Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), para. 12.2.
[39] HRC, Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/1979, U.N. Doc. CCPR/C/OP/1 at 92 (1984).
[40] HRC, Mabel Pereira Montero v. Uruguay, Communication No. 106/1981, U.N. Doc. Supp. No. 40 (A/38/40) at 186 (1983). Other comparable findings were made by the Commission in HRC, Ibrahima Gueye et al. v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989), para. 9.4. For other more recent pronouncements see: HRC, Loubna El Ghar v. Libyan Arab Jamahiriya, Communication No. 1107/2002, U.N. Doc. CCPR/C/82/D/1107/2002 (2004) (concerning the refusal of the Libyan consular authorities in

Observations on the second periodic report of Israel, it:

> reiterates that, in the current circumstances, 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 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.[41]

In Concluding Observations on reports of several States Parties, the HRC has suggested that persons affected by extraterritorial surveillance activities fall within the jurisdiction of the surveilling State.[42]

The American Declaration of Human Rights does not contain a jurisdictional clause like Article 1 ECHR, and will therefore not be discussed here. The American Convention on Human Rights contains a provision that is similar to the one set out in the ECHR, covering all persons "subject to [the] jurisdiction" of the State parties. The jurisprudence of the IACommHR adopts a broad approach under which a State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents that produce effects or are undertaken outside that state's own territory. In a line of cases the IACommHR has had regard to relevant European jurisprudence and held that jurisdiction is a notion linked to authority and effective control, and not merely to territorial boundaries, and that the focus should rather be on whether the State has 'authority and control' over the person. Like the HRC, the IACommHR appears to have interpreted the notion of authority and effective control broadly, essentially coinciding with the question whether the victim was affected by conduct of the State. Thus, in *Victor Saldaño v Argentina* it held that:

> The Commission concludes that the claims filed refer to the alleged violation of the rights of a person who is not subject to Argentine jurisdiction under the terms of Article 1(1). As has been recognized by the petitioner herself, the alleged violation of Articles 4, 8, and 25 of the American Convention are not the consequence of acts or omissions of the organs or agents of that State.[43]

The IACommHR stated that this interpretation finds support in the decisions of the European Court and Commission of Human Rights that have interpreted the scope and meaning of Article 1 ECHR. It referred in particular to the Commission's views in *Cyprus v. Turkey*, which were based on the language of Article 1, the object of this article, and the purpose of the Convention as a whole.[44] In a footnote, the IACommHR also refers to other case law of the European Commission and Court, including *Loizidou v. Turkey*. The IACommHR thus appears to have purposely used similar interpretative techniques as the ECtHR, arriving at a broad interpretation of "jurisdiction".

Article 2 of the Convention on the Rights of the Child requires States Parties to respect and

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Morocco to issue a passport to a Libyan citizen residing in Morocco); and HRC, Munaf v Romania, Communication No. 1539/2006, U.N. Doc CCPR/C/96/D/1539/2006 (concerning the transfer of an Iraqi-American national from the Romanian embassy in Baghdad to the multinational forces in Iraq).

[41] HRC, Concluding Observations on the second periodic report of Israel, CCPR/CO/78/ISR (21 August 2003), para. 11.

[42] See e.g. HRC, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4 (23 April 2014), para. 22; HRC, Observations finales concernant le cinquième rapport périodique de la France, CCPR/C/FRA/CO/5, 17 August 2015, para. 12.

[43] Inter-American Commission on Human Rights (IACommHR), *Victor Saldaño v. Argentina*, Report No. 38/99, 11 March 1999, para. 23.

[44] Ibid., para. 18.

ensure rights to "each child within their jurisdiction." The ICJ in its judgment in *Armed Activities on the Territory of the Congo* recalled its findings in the *Wall Opinion* and went on to find that the Convention was applicable extraterritorially without elaborating on why this was so.

The Committee for the Rights of the Child, in its General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights stated that:

> Under the Convention, States have the obligation to respect and ensure children's rights within their jurisdiction. The Convention does not limit a State's jurisdiction to "territory". In accordance with international law, the Committee has previously urged States to protect the rights of children who may be beyond their territorial borders. It has also emphasized that State obligations under the Convention and the Optional Protocols thereto apply to each child within a State's territory and to all children subject to a State's jurisdiction.[45]

The words "international law" appear to be a reference to general international law, thus linking the notion of jurisdiction under general international law to that in the Convention, in a similar way in which the ECtHR did this in *Banković*.

2.3.2 Analysis of the challenges

It may be the case that it is an inevitable result of the fact that the ECtHR expresses itself through decisions and judgments in individual cases that depend on the specific circumstances at hand, that it is difficult to see the "big picture".

This cannot obscure the fact that the discussion of the ECtHR's case law above demonstrates that its approach to the interpretation of "jurisdiction" in the sense of Article 1 ECHR does not appear to be consistent. In its judgment in *Al-Skeini*, the Court suggested that it was setting out a coherent overview of the bases for jurisdiction. A number of elements in that judgment are however difficult to reconcile with the Court's decision in *Banković*. Similarly, a number of elements in judgments subsequent to *Al-Skeini* appear to be difficult to reconcile with that judgment.

This inconsistency relates not only to the conclusions that the Court arrived at and to the broader principles concerning what constitutes jurisdiction, but also to the methodology used by the Court. In *Banković*, it relied strongly on an analogy between "jurisdiction" in the sense of Article 1 and the notion of jurisdiction in general international law that focuses on the lawfulness of the exercise of power by the State. From this, it deduced the principle that extraterritorial jurisdiction is exceptional. In *Al-Skeini* and a number of other cases, the Court appears to have attenuated this link and focused more on the actual exercise of power by the State, leading to a broader conception of jurisdiction in the sense of Article 1 ECHR. This may be the result of an increasing recognition that the purposes of the notion of jurisdiction in the ECHR and in general international law are different, and there is thus no specific need for the two to be aligned.[46] As was discussed in paragraph 2.1 above, the concept of "jurisdiction" in general international law is concerned with setting out the limits on the domestic legal order of states, whereas in Article 1 ECHR, it serves to set limits on the reach of the Convention. Because of this difference, if the Court interprets the notion differently in

[45] UN Committee on the Rights of the Child (CRC), *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, 17 April 2013, 6.
[46] See e.g. Milanovic, *supra* note 12, at 21-53.

the two contexts, this does not necessarily contribute to a fragmentation of international law. This would only be the case where the Court itself suggests that the interpretation of jurisdiction in Article 1 ECHR should be based on the interpretation of jurisdiction in general international law, and then departs from the latter. It is a matter of speculation whether the Court indeed intended to place less emphasis on a purported link between the two in its case law since *Al-Skeini*.

Other international bodies, specifically the ICJ, the HRC, the IACommHR and the CRC, appear to have used similar techniques as the ECtHR in interpreting the notion of "jurisdiction" as used in other human rights instruments. Indeed, the ECtHR has referred to case law of the HRC and the IACommHR in its interpretation of "jurisdiction". Interestingly, it appears that in doing so they arrived at a broader understanding of the term than the ECtHR.

In *Al-Skeini*, the Court suggested that its previous case law fit neatly into the categories of jurisdiction it set out. This has been questioned by commentators, as well as by judge Bonello in his concurring opinion, in which he stated that the Court's case law on Article 1 of the Convention has, so far, "been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies."[47] Similarly, Judge Motoc in her concurring opinion in *Jaloud* stated with respect to the Court's case law on Article 1 that that Article "remains one of the most problematic in terms of its application, and there are several contradictions in the manner in which the Court has interpreted it."[48]

Inconsistencies or apparent inconsistencies in the ECtHR's interpretation of "jurisdiction" make it difficult for High Contracting Parties to the ECHR to determine when the Court will consider a person to be within their jurisdiction. In other words, it detracts from legal certainty for those States. This appears to be reflected in a statement by the Russian Federation made at the Brussels Conference. That State's representative stated that "the execution of Court judgments would be carried out more efficiently, if the Court's case-law were in full compliance with the criteria of clarity, predictability and consistency." It also appears to be reflected in the Action Plan that was adopted by the Brussels Conference, which includes the consideration that "bearing in mind the jurisdiction of the Court to interpret and apply the Convention, the Conference underlines the importance of clear and consistent case law."[49]

Another conclusion that can be drawn from the case law of the ECtHR 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. The Court has expressly acknowledged that there is a conceptual distinction between the two, most recently in its jugdment in *Jaloud*. It has also held that the question of jurisdiction

[47] *Al-Skeini v. the United Kingdom*, *supra* note 18, concurring opinion of Judge Bonello, § 4.
[48] *Jaloud v. the Netherlands*, *supra* note 33, concurring opinion of Judge Motoc, § 2.
[49] High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, 27 March 2015, para. A (1), available at: www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

precedes that of attribution.[50] The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments, however. This led Judge Spielmann, joined by Judge Raimondi, in his concurring opinion in Jaloud to state that the Court's discussion of attribution in the context of jurisdiction is "ambiguous, subsidiary and incomprehensible."[51] The same criticism has been leveled by commentators, who have suggested various interpretations of what the Court intended.[52] The uncertainty concerning the Court's view on the relationship between attribution and jurisdiction adds to the lack of legal certainty for High Contracting Parties to the ECHR.

3. STATE RESPONSIBILITY

3.1. State responsibility under general international law

It is a general principle of international law that a breach of international law by a State entails its international responsibility. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State.

The most authoritative source on the law of State responsibility is the articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission (ILC) of the UN in 2001 (ARSIWA). Many of the articles are considered to constitute codification of existing customary international law, whereas others are regarded as progressive development of the law.

Article 2, which is generally considered a codification of existing international law, sets out the elements of an internationally wrongful act as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.

With respect to the element of attribution, the starting point in the articles is that a State is only responsible for its own conduct, also referred to as the principle of independent responsibility. The articles set out a number of rules for determining whether conduct of an individual or entity must be regarded as conduct of a particular State: these are the rules on attribution of conduct.

It is beyond the scope of this report to discuss specific rules of attribution in the ARSIWA. For the present purposes, the following is important.

The first and arguably main principle of attribution in the ARSIWA is set out in article 4,

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[50] See inter alia *Loizidou v. Turkey* (Preliminary objections) 23 March 1995, § 60-61, Series A no. 310; *Cyprus v. Turkey*, 10 May 2001, *Reports of Judgments and Decisions* 2001-IV, § 80-81 (Court leaves for merits question of attribution); *Al-Skeini v. the United Kingdom*, *supra* note 18, § 130.

[51] *Jaloud v. the Netherlands*, *supra* note 33, concurring opinion of Judge Spielmann, joined by Judge Raimondi, § 5.

[52] See inter alia Sari, *supra* note 34; J. Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*', (2015) 62 *Netherlands International law review* 407; F. Haijer & C. Ryngaert, 'Reflections on Jaloud v. the Netherlands: Jurisdictional Consequences', (2015) 19 *Journal of International Peacekeeping* 407.

which reads:

> *Article 4 Conduct of organs of a State*
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Another principle that plays an important role in practice is set out in article 8, which reads:

> *Article 8 Conduct directed or controlled by a State*
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The ARSIWA, in articles 16-18, also contain rules on the responsibility of a State in connection with act of another State. These articles deal with situations in which internationally wrongful conduct results from the collaboration of several States rather than of one State acting alone. These situations have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases.

In practice, article 16 is the most relevant of articles 16-18. It deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter.

The ILC in 2011 also adopted draft articles on the responsibility of international organizations (ARIO). These articles also contain a number of articles on the responsibility of States in connection with an internationally wrongful act of an international organization, and vice-versa.

Of particular relevance are articles 6 and 7, which read:

> *Article 6 Conduct of organs or agents of an international organization*
>
> 1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
> 2. The rules of the organization apply in the determination of the functions of its organs and agents.
>
> *Article 7 Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization*
>
> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Finally, it may be noted that both the ARSIWA (article 55) and ARIO (article 64) contain an article that makes clear that they operate in a residual way. They do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. Such special rules are also referred to as *lex specialis*. In its commentary to article 55, the ILC clarifies with regard to how they operate that:

> For the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation.[53]

The ECHR does not contain a 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 attribution. It may therefore seem logical that the Court would turn to the ILC articles as the *lex generalis*. It must however be remembered that those articles are concerned only with the responsibility of States toward other States and international organizations. They are not concerned with the responsibility of a state vis-à-vis individuals. Article 33 (2) of the ARSIWA makes clear that the articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States. Most of the cases dealt with by the ECtHR on the other hand deal precisely with individual applications. One may thus ask whether articles developed for application between States and international organizations are the appropriate framework to be applied.[54] Nevertheless, the ECtHR in its case law has frequently referred to the ARSIWA and the ARIO. The ECtHR has in the section on relevant international law in judgments specifically cited, inter alia, Articles 5, (Conduct of persons or entities exercising elements of governmental authority),[55] 6 (Conduct of organs placed at the disposal of a State by another State),[56] 7 (Excess of authority or contravention of instructions), 8 (Conduct of organs placed at the disposal of a State by another State),[57] Article 14 (Extension in time of the breach of an international obligation), Article 15 (Breach consisting of a composite act) and Article 16 (Aid or assistance in the commission of an internationally wrongful act). It has also referred expressly to Article 7 ARIO (which in the draft articles at that time was numbered as draft article 5).[58]

3.2 Case law of the European Court of Human Rights

3.2.1 Introduction: 3 broad categories

The ECtHR in its case law 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. In the cases in which it has done so, the respondent State normally raised the issue of attribution although on occasion the Court has inquired into attribution of its own accord.[59]

For the purposes of clarity and readability, it is useful to distinguish different categories involved in the underlying facts:

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[53] International Law Commission (ILC), Commentary on Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session**,** 140.
[54] This is a question that also appears to be raised in M. Evans, 'State Responsibility and the ECHR', in M. Fitzmaurice & D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), 139.
[55] *Kotov. v. Russia* [GC], no. 54522/00, 3 April 2012.
[56] *Banković and Others v. Belgium and Others*, *supra* note 17; *Jaloud v. the Netherlands*, *supra* note 33.
[57] *Jaloud v. the Netherlands*, *supra* note 33.
[58] *Banković and Others v. Belgium and Others*, *supra* note 17; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011.
[59] See e.g. *Stephens v. Malta (no. 1)*, no. 11956/07, § 45, 21 April 2004.

(i) Cases concerning questions of attribution in situations where only one state was involved in the underlying facts;
(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 organization were involved in the underlying facts.

3.2.2 Cases concerning questions of attribution in situations where only one state was involved

Cases dealing with conduct of persons or entities exercising elements of governmental authority

In the case of *Costello-Roberts v. the United Kingdom*, the facts complained of concerned corporal punishment administered to the applicant by an independent school that was not funded by the Government. Whilst conceding that the State exercised a limited degree of control and supervision over independent schools, such as the applicant's, the Government denied that they were directly responsible for every aspect of the way in which the schools were run; in particular, they assumed no function in matters of discipline. The Court found that accordingly, it must first be considered whether the facts complained of by the applicant are such as may engage the responsibility of the United Kingdom under the Convention.[60] In determining whether this was the case, the Court considered it relevant that the administration of discipline is part of the right to education, and that the fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two. The Court agreed with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.[61] On this basis, it held that the treatment complained of, although it was the act of a headmaster of an independent school, none the less was such as may engage the responsibility of the United Kingdom.[62]

In the case of *Kotov v. Russia*, the Court was concerned with attribution of conduct of a liquidator. In the judgment's section on relevant international law, the Court cited from the ILC commentary to article 5 ARSIWA. In the judgment it then applied this to the facts of the case, concluding that:

> It would appear that the liquidator, at the relevant time, enjoyed a considerable amount of operational and institutional independence, as State authorities did not have the power to give instructions to him and therefore could not directly interfere with the liquidation process as such. The State's involvement in the liquidation procedure resulted only from its role in establishing the legislative framework for such procedures, in defining the functions and the powers of the creditors' body and of the liquidator, and in overseeing observance of the rules. It follows that the liquidator did not act as a State agent. Consequently, the respondent State cannot be held directly responsible for his wrongful acts in the present case. The fact that a court was entitled to review the lawfulness of the liquidator's actions does not alter this analysis.[63]

It appears that in Costello-Roberts, the Court used looser criteria for attributing the conduct

[60] *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 25, Series A no. 247-C.
[61] Ibid., § 27.
[62] Ibid., § 28.
[63] Ibid., § 107.

of persons or entities exercising elements of governmental authority than those set out in article 5 ARSIWA. The Court appears to have dealt with the same question that article 5 does, but the Court did not mention it.[64] Although the ILC work on State responsibility was far from completed when the Court issued its judgment in 1993, the ILC had already provisionally adopted a draft article essentially similar to the current article 5 in 1974.[65]

The analysis by the Court in the *Kotov* case on the other hand is based expressly on article 5 ARSIWA and the ILC's commentary thereto. It has been submitted that in this case the Court "can be seen to belatedly attempt to reconcile its case law with ILC articles."[66]

Cases dealing with attribution of conduct of private individuals or non-state entities to a state

In *Loizidou v. Turkey*, the Court dealt with the question of whether the applicant fell within the jurisdiction of Turkey in the sense 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.[67]

The Court described the relevant standard for determining attribution as follows:

> As regards the question of imputability, the Court recalls in the first place that in its above-mentioned Loizidou judgment (preliminary objections) (pp. 23-24, para. 62) it stressed that under its established case-law the concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, 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.).[68]

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 was 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

[64] Presentation by J. Crawford during the conference on The European Convention on Human Rights and General International Law, organized by the European Society for International Law and the European Court of Human Rights, available at: www.esil-sedi.eu/node/904.
[65] See ILC, Report of the International Law Commission on the Work of its Twenty-Sixth Session, 6 May - 26 July 1974 Official Record of the General Assembly, Twenty-ninth session, Supplement No. 10, UN Doc. A/9610/Rev.1, 1974 YILC, Vol. II(1), at 277.
[66] Crawford, *supra* note 64.
[67] *Loizidou v. Turkey*, *supra* note 50, § 64.
[68] *Loizidou v. Turkey*, *supra* note *13* § 52

> the Convention therefore extends to the northern part of Cyprus.
> 57. It follows from the above considerations that the continuous denial of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) and is thus imputable to Turkey.[69]

In the case of *Ilaşcu and others v. Moldova and Russia*, the Court was concerned with conduct of the "Moldovan Republic of Transdienstria" (MRT) allegedly violating the ECHR. 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.

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

> 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.[70]

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.

In its discussion of State responsibility in *Loizidou* the Court appears to have found that all actions of the TRNC were attributable to Turkey. This is suggested by the Court labelling the TRNC as a local administration subordinate to Turkey and by the Court saying that Turkey's control over the area "entails her responsibility" for the policies and actions of the TRNC. This is how the test was seen by the former European Commission of Human Rights in the last of its reports on interstate applications by Cyprus against Turkey.[71] If this is the correct

[69] Ibid., § 56.
[70] *Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99, § 382, ECHR 2004-VII.
[71] See *Cyprus v. Turkey*, no. 25781/94, Commission report of 4 June 1999, § 98–102.

reading, this would constitute a fairly straightforward application by the Court of the principle of attribution 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 ILC commentary to this article refers to the Loizidou judgment in a footnote in its commentary to article 8.[72] It may be noted that in academic literature, alternative readings of the judgment have also been proposed.[73]

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.[74] With respect to the issue of attribution, it does not appear that the Court considered the MRT as an organ of the Russian Federation. As a consequence, article 8 ARSIWA was the relevant principle of attribution. 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 ILC.[75]

3.2.3 Cases concerning questions of attribution in situations in which more than one State was involved

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. These are typically cases in which two States act independently from each other and where the Court determines the responsibility of each of the Contracting States individually, by assessing the State's own conduct in relation to its Convention obligations.

Also in this regard *Ilaşcu* is a relevant example. In this case the Court held Moldova and Russia responsible, each for different acts or ommissions that the Court attributed to the State concerned. Those acts and ommissions contributed to one injury.

Other examples include the case of *Rantsev v. Cyprus and Russia*[76], and *Stojkovic v. France and Belgium*.[77] The approach of the Court in those cases, in which it was clear on whose behalf particular persons or entities were acting, is consistent with the principle of independent responsibility that underlies the ARSIWA.[78]

In a number of other cases, the ECtHR was confronted with conduct by a State organ that had

[72] ILC, Draft Articles on State 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 Euro- pean 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)."

[73] See in particular Milanovic, *supra* note 12, 46–51. Milanovic argues that the Court did not necessarily establish that all the acts of the TRNC were attributable to Turkey, but rather that Turkey, by virtue of its effecive overall control over northern Cyprus, had the positive obligation to prevent human rights violations, regardless of by whom they were committed.

[74] See *Ilaşcu and others v. Moldova and Russia, supra* note *70*, dissenting Opinion by Judge Kovler.

[75] Milanovic, *supra* note 12, at 49.

[76] *Rantsev v Cyprus and Russia*, no. 25965/04, ECHR 2010.

[77] *Stojkovic v France and Belgium*, no. 25303/08, 27 October 2011.

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

been placed at the disposal of another State. In these cases it was not clear from the outset to which State conduct of that organ must be attributed.

Illustrative of these cases is the Court's judgment in *Drozd and Janousek v France and Spain.* At issue in this case was the attribution of the conduct of French and Spanish judges carrying out judicial functions in Andorra. The applicants considered that the conduct of those judges was attributable to France and Spain. The respondent States rejected this claim, the Spanish government submitting that ""Neither France nor Spain may be considered as States responsible for the actions of the Andorran judicial authorities."[79]

On this point, the Court accepted the arguments of the respondent Governments. It held that:

> 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.[80]

In the case of *Xhavara and others v. Italy and Albania*, the ECtHR dealt with the consequences of a shipwreck caused by a collission between an Italian naval vessel and an Albanian ship carrying illegal migrants. The activities of the Italian Navy were the subject of an agreement between Italy and Albania which authorized Italy to board vessels in on the high seas and in Albanian territorial sea. The Court held that this agreement did not affect the attribution of the conduct of the Italian vessel:

> Le fait que l'Albanie est partie à la Convention italo-albanaise ne saurait, à lui seul, engager la responsabilité de cet Etat au regard de la Convention pour toute mesure adoptée par les autorités italiennes en exécution de l'accord international en question.[81]

This approach by the Court is in conformity with draft article 6 ARSIWA. Indeed, the ILC commentary to that article refers to the judgment in *Drozd* and the decision in *Xhavara* in support.[82]

In another category of cases, the ECtHR has attributed the conduct of one State to another.

The case of *Stephens v. Malta* was concerned with the arrest of the applicant by Spain on the basis of an extradition request by Malta. Although Malta did not raise an objection to being held accountable under the Convention for the facts alleged against it, the Court dealt with the attribution of the facts complained of on its own motion. It noted that although the applicant was under the control and authority of the Spanish authorities in the period between his arrest and detention in Spain and his release on bail, it could not be overlooked that the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the

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[79] *Drozd and Janousek v. France and Spain*, 26 June 1992*,* § 80, Series A no. 240.
[80] Ibid., § 96.
[81] *Xhavara and others v. Italy and Albania* (dec), no. 39473/98, at 5, 11 January 2001.
[82] ILC, Report of the International Law Commission on the work of its fifty-third session, 23 April-1 June and 2 July-10 August 2001, Official records of the General Assembly, Fifty-sixth session, Supplement No. 10, UN Doc. A/56/10, 2001 YILC, Vol II(2), at 45. The report also refers to *X and Y* v. *Switzerland* (dec.), nos. 7289/75 and 7349/76, 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402-406.

Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition.[83] It went on to find that:

> By setting in motion a request for the applicant's detention pending extradition, the responsibility lay with Malta to ensure that the arrest warrant and extradition request were valid as a matter of Maltese law, both substantive and procedural. In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested. It is to be noted that in the instant case the arrest warrant had been issued by a court which did not have the authority to do so, a technical irregularity which the Spanish court could not have been expected to notice when examining the request for the applicant's arrest and detention. Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain.[84]

In the case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, 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.

In the judgment's section on "relevant international law", the Court referred to "relevant parts" of the ARSIWA and cited Article 7 (Excess of authority or contravention of instructions), Article 14 (Extension in time of the breach of an international obligation), Article 15 (Breach consisting of a composite act) and Article 16 (Aid or assistance in the commission of an internationally wrongful act).

The applicant complained of violations of Article 3 and Article 5 ECHR. With regard to Article 3, he complained that the respondent State had been responsible for the ill-treatment to which he had been subjected while he was detained in the hotel and for the failure to prevent him from being subjected to "capture shock" treatment when transferred to the CIA rendition team at Skopje Airport. He further complained that the respondent State had been responsible for his ill-treatment during his detention in Afghanistan by having knowingly transferred him into the custody of US agents even though there had been substantial grounds for believing that there was a real risk of such ill-treatment.[85]

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 emphasized 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).[86]

It also held that the Former Yugoslav Republic of Macedonia must be considered directly responsible for ill-treatment by the US in the respondent State, since its agents actively

[83] *Stephens v. Malta, supra* note 59 § 51.
[84] Ibid., § 52.
[85] *El-Masri v. the Former Yugoslav Republic of Macedonia,* no. 39630/09, § 168, ECHR 2012.
[86] Ibid., § 206.

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.[87]

With regard to Article 5, the applicant claimed that the respondent State bore direct responsibility for his entire period of captivity, including in Afghanistan. He argued inter alia that "His prolonged disappearance during his subsequent detention in Afghanistan constituted a violation of Article 5, for which the Macedonian Government was responsible."[88] The Court held the respondent State responsible for the applicant's subsequent detention in Kabul. It referred in this regard to "attribution of responsibility" tot that State.[89] It considered that:

> 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).
>
> 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 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).[90]

The case of *Al-Nashiri v. Poland* 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. After this he was transferred several more times, ultimately ending up in Guantanamo Bay. The Court identified the issue of attribution as a relevant one, despite the fact that the respondent State did not raise it. Under the section in the judgment on "relevant international law", the Court made reference to draft articles 7, 14, 15, 16 ARSIWA.

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).[91]

As regards the State's responsibility for an applicant's removal from its territory, the Court held 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

[87] Ibid., § 211.
[88] Ibid., § 225.
[89] Ibid., § 215.
[90] *I*bid., § 239-240.
[91] A*l-Nashiri v. Poland*, no. 28761/11, § 452, 24 July 2014.

his destination.[92] It explained that:

> 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).[93]

The Court concluded that Poland, on account of its "acquiescence and connivance" in the US program 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). In this context it stated that the interrogations and, therefore, the torture inflicted on the applicant at the Stare Kiejkuty black site were the exclusive responsibility of the CIA and that it is unlikely that the Polish officials witnessed or knew exactly what happened inside the facility. However, Poland, for all practical purposes, facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring.

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.[94]

The Court considered these conclusions likewise valid in the context of the applicant's complaint under Article 5, and held that Poland's responsibility was engaged in respect of both his detention on its territory and his transfer from Poland.[95]

In the case of *Nasr v. Italy*, the Court was similarly confronted with a case of extraordinary rendition by the US, in this instance from Italy to Egypt. The applicant alleged that this occurred with assistance of Italian officials. The Government admitted that the US agents were assisted by one carabinieri, but argued that he had been acting in an individual capacity and not on behalf of Italy. For the rest, Italy denied involvement in the impugned conduct.[96]

In its discussion of relevant international law, the Court mentioned the same draft articles as it did in *El-Masri* and *Al-Nashiri*.[97] The Court discussed the alleged violations of Article 3 and 5 separately.

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

[92] Ibid., § 453.
[93] Ibid., § 457.
[94] Ibid., § 518.
[95] Ibid., § 518.
[96] *Nasr and Ghali v. Italy*, no. 44883/09, § 217 – 218, 23 February 2016.
[97] Ibid., § 185.

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], no 48787/99, § 318, CEDH 2004-VII : El Masri, précité, § 206 et Al Nashiri, précité, § 452).[98]

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

> 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).[99]

The Court thus appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents.

It appears to have extended this approach to the transfer of Nasr from Italy:

> Dans ces conditions, la Cour estime qu'en permettant aux autorités américaines d'enlever le requérant sur le territoire italien dans le cadre du programme de « remises extraordinaires », les autorités italiennes ont sciemment exposé l'intéressé à un risque réel de traitements contraires à l'article 3 de la Convention.[100]

With regard to Article 5, the Court recalled its conclusions on responsibility in the context of Article 3. It held that these conclusions were equally valid in the context of Article 5 and that:

> la responsabilité de l'Italie est engagée eu égard tant à son enlèvement qu'à l'ensemble de la détention consécutive à sa remise aux autorités américaines (El-Masri, précité, § 239 et Al Nashiri, précité, § 531).

Thus, at least in *El-Masri* and *Al-Nashiri*, the ECtHR does not appear to have followed the approach in the ARSIWA concerning the attribution of conduct (of a third State) to a State.

In the *Stephens* case, the Court attributed Spain's conduct to Malta on the basis of the fact that Spain followed up an extradition request on the basis of its treaty obligations. None of the draft articles appear to envisage this possibility. It may be that the ECtHR had in mind Article 17 ARSIWA (Direction and control exercised over the commission of an internationally wrongful act). The ILC commentary to that article makes clear however that mere execution of treaty obligations does not reach the threshold of "direction and control" in the sense of that article.

In *El-Masri*, the Court distinguished between acts committed on the respondent State's territory and the victim's transfer from that State to US agents. For acts committed in the Former Yugoslav Republic of Macedonia, the reference that the Court makes under "relevant international law" to that article and its statement that the Former Yugoslav Republic of Macedonia "actively facilitated the treatment" could be read as suggesting the Court applied

[98] Ibid., § 241.
[99] Ibid., § 289.
[100] Ibid., § 290.

article 16 ARSIWA. On closer analysis, however, this cannot be the case. The Court concluded by holding the respondent State directly responsible for the conduct of US agents, whereas article 16 is concerned with responsibility for a State's own conduct in connection with an internationally wrongful act of another State.[101] The Court states the relevant question as "whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State." If the ECtHR did purport to apply article 16, this also raises questions concerning the knowledge threshold used by the Court. Article 16 requires the complicit State to have had knowledge of the circumstances, or even to have the intention to facilitate an internationally wrongful act. It may be argued that the Court applied a lower standard.[102]

It is unclear which legal standard the Court used to hold the Former Yugoslav Republic of Macedonia responsible for the conduct of US agents, and whether this standard was one of those found in the ARSIWA. It may be noted that the factors stressed by the Court, namely the presence of officials of the respondent State and the fact that the acts were performed by foreign officials on its territory with the acquiescence or connivance of its authorities, appear difficult to associate with any particular principle of attribution of conduct in the ARSIWA. It has been submitted that by applying the criterion of "acquiescence or connivance", the Court substituted article 16 ARSIWA with an implausible verbal formula with very little internal argumentation and which broadens the rules on responsibility for violations on the territory of a State but not attributable to it.[103]

With respect to the transfer, it is noteworthy that the Court spoke of "attribution of responsibility" rather than "attribution of conduct." This suggests that it held the Former Yugoslav Republic of Macedonia responsible for conduct by the US after that transfer that was not attributable to the Former Yugoslav Republic of Macedonia. The reference by the Court under "relevant international law" to a number of ARSIWA articles could suggest that it was applying these, but none of the articles referred to provide for attribution of responsibility rather than of conduct. In any event the Court is ambiguous, because it also states that it must examine whether the applicant's subsequent detention in Kabul is imputable to the respondent State, which suggests that attribution of conduct is at stake.[104]

It may be noted that the Court emphasizes that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law, and that 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. The Court seems to suggest that this is relevant to attribution, but does not explain how.

In *Al-Nashiri*, the Court took a similar approach to the attribution of conduct of US agents in Poland as it did in *El-Masri*, referring in particular to the criterion of "acquiescence or connivance". This raises the same questions as were discussed above in the context of the latter judgment. It may be noted that in *Al-Nashiri*, unlike in *El-Masri*, the Court did not state

[101] See also Judge Keller, 'The Court's Dilution of Hard International Law: Justified by Human Rights Values?', speech at the Seminar on the Place of the Convention in the European and International Legal Order, co-organized by Pluricourts and the Council of Europe, 29-30 March 2017, 13, at 14.
[102] Keller, ibid.
[103] Crawford, *supra* note 64.
[104] *El-Masri v. the Former Yugoslav Republic of Macedonia*, *supra* note 85, § 235.

expressly that it held Poland responsible for the conduct of the US after his transfer from Poland (rather than for its own conduct, i.e. allowing the transfer). That it did so could nevertheless be inferred from its reference to the *El-Masri* judgment in paragraphs 518 and 531 of the judgment.

In *Nasr*, the Court appears to have held Italy responsible only for its own conduct in Italy. With respect to acts outside Italy however, in particular the detention of Nasr in Egypt, it is unclear whether it held the respondent State responsible for conduct of other States, thus attributing responsibility rather than conduct to Italy. If it did do so, it is unclear why it diverged from the ARSIWA and what precisely its views are on the rules relating to attribution.[105]

3.2.4 cases concerning attribution in situations in which one or more states and an international organization were involved

The question of whether particular conduct should be attributed to either a (member) State or the international organization, or to both, was addressed by the Court in the landmark cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* and *Al-Jedda v. the United Kingdom*. These concerned military operations authorized by the United Nations.

The cases of *Behrami* and *Saramati* concerned conduct by troops from High Contracting Parties to the ECHR that formed part of the NATO force in Kosovo (KFOR). The presence and activities of KFOR in Kosovo were authorized by the United Nations Security Council (UNSC) in resolution 1244. The applicants maintained, inter alia, that neither the acts nor the omissions of KFOR troops could be attributed to NATO or to the UN. They implied that this resulted in the conduct being attributable to the respondent States. This was disputed by the respondent States as well as a number of intervening States. The respondent States claimed that the acts of the national contingents in KFOR could not be imputed to a State but should rather be attributed to the UN.

The ECtHR ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of United Nations Mission in Kosovo (UNMIK) (failure to de-mine in *Behrami*) could be attributed to the UN. In the decision's section on "applicable law", the Court referred to the ARSIWA and to the ARIO. In particular, it referred to what was then draft article 5 of the ARIO (and ultimately became article 7) and to article 6 ARSIWA. It thus suggested that these were the relevant rules for determining attribution in this case.

With respect to the impugned action by KFOR, the criterion that the ECtHR used to determine attribution was "whether the UNSC retained ultimate authority and control so that operational command only was delegated." In its analysis, the Court focused on whether conduct by KFOR was in the exercise of powers that the UNSC lawfully delegated under Chapter VII of the UN Charter. It concluded that this was the case. Consequently, in "such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN."[106]

[105] V. Pergantis, 'Nasr. v. Italy', (2016) 110 *American Journal of International Law* 760.
[106] *Behrami and Behrami v; France and Saramati V. France, Germany and Norway,* no. 71412/01 78166/01, § 141, 2 May 2007.

With respect to impugned inaction by UNMIK, the ECtHR found that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, "attributable" to the UN in the same sense.

The ECtHR concluded that therefore the impugned action and inaction were, in principle, attributable to the UN. It recalled that the UN has a legal personality separate from that of its member states and that that organisation is not a Contracting Party to the Convention. In these circumstances, the Court concluded that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the Convention.

The reference in the decision's section on the "applicable law" referred to above could be read to imply that the ECtHR used the criterion set out in then draft article 5 (now 7) of the ARIO to determine attribution. The doctrine of lawful delegation of powers by the UNSC that was central to this determination however is in principle distinct from the issue of attribution under international law. As has been pointed out by commentators, the rules of attribution, and the rules of international responsibility in general, are secondary rules, which continue to apply in an identical fashion across multiple fields of primary rules unless a *lex specialis* is shown to exist. The delegation model, on the other hand, is a part of the institutional law of international organizations and has nothing to do with the law of responsibility. Its purpose is to determine whether an organ of an international organization can lawfully empower some other entity, according to the rules of its own internal law. It does not, and conceptually cannot, establish whether a state, or an international organization, or both, are responsible for a given act or not. An authorization by the Security Council may preclude the wrongfulness of an act by a state, but it cannot have an impact on attribution.[107] This begs the question whether the ECtHR was indeed applying the principle set out in article 7 ARIO, or whether it was applying another principle of its own making.

To the extent that the ECtHR did intend to apply the principle now set out in article 7 ARIO, the ILC has suggested that in doing so the Court misinterpreted that principle. In the commentary to article 7, as adopted by the ILC in 2011, it states:

> (10) The European Court of Human Rights considered, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, its jurisdiction *ratione personae* in relation to the conduct of forces placed in Kosovo at the disposal of the United Nations (United Nations Interim Administration Mission in Kosovo (UNMIK)) or authorized by the United Nations (Kosovo Force (KFOR)). The Court referred to the present work of the International Law Commission and in particular to the criterion of "effective control" that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether "the United Nations Security Council retained ultimate authority and control so that operational command only was delegated". While acknowledging "the effectiveness or unity of NATO command in *operational* matters" concerning KFOR, the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN within the meaning of the word outlined [in article 4 of the present articles]". One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.

[107] M. Milanovic & T. Papic, 'The European Court of Human Rights' Behrami and Saramati Decision and General International Law', (2009) 58 *International & Comparative Law Quarterly* 267.

Another criticism leveled at the decision in *Behrami and Saramati*, primarily in academic literature, is that the Court stopped after its decision that the conduct alleged to have violated the ECHR was attributable to the UN. The Court did not engage with the question whether this conduct could also be attributed to one or more respondent States. In other words, it did not consider the possibility of multiple attribution of that conduct or of responsibility of one or more respondent States in connection with the conduct of the UN.[108]

The approach set out in *Behrami and Saramati* has been followed by the Court in a number of other cases. These include *Kasumaj v. Greece*, *Gajić v. Germany*, and *Berić and others v. Bosnia and Herzegovina*.

The case of *Al-Jedda v. the United Kingdom* concerned the detention of an Iraqi national by UK troops forming part of a multinational force in Iraq.

In the judgment's section entitled "relevant international law materials", the Court makes reference to "relevant materials of the International Law Commission". Under this heading, it refers to then draft article 5 of the ARIO (now article 7), and the draft commentary thereto.

The ECtHR held that when examining whether the applicant's detention was attributable to the UK or the UN, it is necessary to examine the particular facts of the case. These include the terms of the United Nations Security Council resolutions which formed the framework for the security regime in Iraq during the period in question.[109]

The Court proceeded to look at UNSC resolutions, in particular resolutions 1511 and 1546 in which it authorized the presence and activities of a multinational force in Iraq. It did not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multinational Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of member States to contribute personnel. The unified command structure over the Force, established from the start of the invasion by the United States of America and the United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States of America and the United Kingdom, through the CPA which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States of America was requested to report periodically to the Security Council about the activities of the Multinational Force, the United Nations did not, thereby, assume any degree of control over either the Force or any other of the executive functions of the CPA. With respect to resolution 1546, the ECtHR found that "There is no indication in Resolution 1546 that the Security Council intended to assume any greater degree of control or command over the Multinational Force than it had exercised previously." On this basis, it concluded that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as

[108] See e.g. C. Bell, 'Reassessing Multiple Attribution: Reassessing the International Law Commission and the Behrami and Saramati Decision', (2010) 42 *New York University Journal of International Law and Politics* 501; A. Sari, 'Autonomy, Attribution and Accountablity: Reflections on the Behrami Case', in R. Collins & N.D. White (Eds.), *International Organisations and the Idea of Autonomy* (2011) 257; K. Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', (2008) 19 *European Journal of International Law* 509.

[109] *Al-Jedda v. the United Kingdom*, no. 27021/08, § 76, ECHR 2011 (footnoted omitted).

regards security in Kosovo in 1999.[110]

The Court then went on to state that:

> 84. It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations.

Finally, the ECtHR concluded that the internment of the applicant was attributable to the UK.[111]

The ECtHR in its judgment appears to state that the test to be applied to attribute conduct of the UK troops is the one enunciated in article 7 ARIO, which the Court itself describes as an "effective control" test. Thus, the Court appears to embrace article 7 ARIO and to distance itself from the "ultimate authority and control" test set out in *Behrami and Saramati*. When drawing its conclusion from the facts, however, the Court refers to both tests without making clear which one applies and why. This, as well as the focus on UNSC resolutions in the reasoning of the Court, suggest that it did not dispose of the "ultimate authority and control" test set out in *Behrami and Saramati*. In contrast to that decision, however, the *Al-Jedda* judgment does appear to accept the possibility that conduct can be attributed to both an international organization and a State. This is suggested by the Court's finding that as a result of resolution 1511 the acts of soldiers within the Multinational Force did not "became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations."

In brief, it appears that the ECtHR has used different tests in cases concerning attribution in situations in which one or more States and an international organization were involved. One of these tests, the "ultimate authority and control" test, is incompatible with the ILC articles on attribution. It remains unclear whether the Court has now abandoned this test in favour of the test in article 7 ARIO.[112]

3.3 Comparison to the approach of other courts and institutions and analysis of the challenges

3.3.1 Comparison to the approach of other courts and institutions

As became clear in section 3.1, the ILC ARSIWA and ARIO are authoritative sources on the rules of attribution, even if not all of the articles that deal with attribution are accepted as reflecting customary international law. In para. 3.2 it was demonstrated that the ECtHR appears to have departed from the ARSIWA and ARIO in a number of ways. This is also

[110] Ibid. § 83.
[111] Ibid. § 86.
[112] See e.g. F. Messineo, 'Things Could only Get Better: *Al-Jedda* beyond *Behrami'*, (2011) 50 Military Law and the Law of War Review 321, at 337.

clear from the reaction of the ILC itself to some of the Court's case law. In particular, the ILC distanced itself from the "ultimate authority and control" test developed by the Court in *Behrami and Saramati*.[113]

The ICJ has generally taken a similar approach to attribution as the ILC articles, and has indeed referred explicitly in approbation to those articles. In the *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) case, the ICJ was faced with the question whether conduct of the Congo Liberation Movement was attributable to Uganda. To answer this question, the ICJ applied articles 4, 5 and 8 ARSIWA.[114]

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* case, the ICJ was faced with the question whether the conduct of the Bosnian-Serb forces could be attributed to Serbia and Montenegro. In this context the ICJ stated that the rule on attribution of conduct of state organs, "which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility."[115]

With respect to the question of whether the conduct of certain paramilitary forces could be attributed to Serbia and Montenegro as that of "de facto" organs, the ICJ held, with reference to its judgment in the Nicaragua case that

> according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.[116]

Although it can be argued that article 4 ARSIWA is formulated broadly enough to accommodate this kind of attribution on the basis of "de facto" organ status, it is notable that the ILC commentary does not refer to "de facto" organs as such nor to the finding of the ICJ in Nicaragua.

The ICJ distinguished the question of "de facto" organ status from the question of attribution on the basis of "direction or control". Concerning the latter, it held that "On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility."[117]

The ICJ also made reference to article 16 ARSIWA, which in its view 'reflect[s] a customary rule', without applying that rule as such. This was because the ICJ was concerned with aid or assistance to non-state actors, while article 16 is concerned with aid or assistance to a State.

Finally, in this case the ICJ rejected an argument by Bosnia and Herzegovina that, due to the particular nature of the crime of genocide, the applicable rules of attribution were different

[113] Draft Articles on the Responsibility of International Organizations, with Commentaries, YILC 2011, Vol. II (Part Two) Commentary to Article 7, paras. 10-11.
[114] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Merits, Judgment of 10 December 2005, [2005] ICJ Rep. 168, § 160.
[115] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro),* Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43 § 385.
[116] Ibid., § 392.
[117] Ibid., § 398.

from those under the general customary international law of State responsibility. The ICJ held that:

> the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in [Military and Paramilitary Activities]. The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis.[118]

The reference to *lex specialis* can be seen as referring to article 55 ARSIWA, although the ICJ does not expressly refer to that article.

Other international bodies monitoring human rights have in some cases followed the approach taken by the ILC. In applying ICCPR the case law of the HRC with respect to State organs has been described as "orthodox".[119] The HRC also appears to have followed the approach in article 5 ARSIWA, without referring to that article or the work of the ILC more generally. On a number of occasions, it has concluded that a State "is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs".[120] In the context of an individual complaint by two Mexican nationals who were placed in a privatized Australian prison pending their extradition to Mexico, the HRC held that:

> the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant.[121]

Consequently, the HRC found that Australia was accountable under the ICCPR (and its Optional Protocol) for the treatment of inmates in the prison run by a private company.

In other respects the HRC has however departed from the approach in the ARSIWA. In Mohammed *Alzery v. Sweden* for example, it determined that "a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party".[122] This is a broader test of attribution than any of those found in the ILC articles, and appears similar to the "acquiescence or connivance" standard set out by the ECtHR in *El-Masri* and other cases. The HRC did not elaborate on the legal basis for this test, or refer to the ARSIWA.

In its General Comment No. 31, the HRC made a number of observations in relation to the regime under the ICCPR which, although not referring explicitly to the ARSIWA, in part

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[118] Ibid., § 401.
[119] D. McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights', in M. Fitzmaurice & D. Sarooshi (Eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), 161 at 172.
[120] HRC, *Communication No. 273/1989, B.d.B. et. al.v. The Netherlands (Decision of 30 March 1989, adopted at the thirty-fifth session),* U.N. GAOR, 44th Sess., Supp. No. 40 at 291, UN Doc. A/44/40 (29 September 1989); *accord* HRC, *Communication Nos. 298/1988 and 299/1988, G. and L. Lindgren and L. Holn and A. and B. Hord, E. and I. Lundquist,L. Radko and E. Stahl v. Sweden (views adopted on 9 November 1990 at the fortieth session),* U.N. GAOR, 46th Sess., Supp. No. 40 at 253**,** 260, UN Doc A/46/40 (10 October 1991).
[121] HRC, *Communication No. 1020/2001, Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia* (*Views underArticle 5**, Paragraph 4, of the Optional Protocol to the International Covenant on Civiland Political Rights,* U.N. Doc. CCPR/C/78/D/1020/2001 (29 August 2003), para 7.2.
[122] HRC, *Communication No. 1416/2005, Mohamed Alzery v. Sweden*, UN Doc. (10 November 2006,) CCPR/C/88/D/1416/2005, para. 11.6.

appear to be inspired by the approach adopted by the ILC in article 4. At the same time, the General Comment states that

> The principle that all individuals who may find themselves in the territory or subject to the jurisdiction of the State Party in principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[123]

This can be read as suggesting that the HRC considers that the conduct of such forces is per se attributable to the troop contributing state. If that is indeed how the statement must be read, it diverges from article 7 ARIO.

The IACtHR has also on occasion applied a looser test than set out in the ARSIWA. A notable case in this context is the case of the *Mapiripán Massacre*. In this case, the IACtHR used a looser test for attributing the conduct of paramilitary forces to Colombia than the one set out in article 8 ARSIWA. It held that:

> In the instant case, Colombia acknowledged the violation of international treaty obligations due to "the facts of July 1997" in Mapiripán, but it subsequently objected to attribution to the State of acts by the paramilitary who carried out said massacre. The Court notes that, while the acts that took place between July 15 and 20, 1997, in Mapiripán, were committed by members of paramilitary groups, the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance, expressed through several actions and omissions, of the Armed Forces of the State, including high officials of the latter. There is in fact no documentary evidence before this Court proving that the State directly conducted the massacre or that there was a dependent relationship between the Army and the paramilitary groups or a delegation of the public functions of the former to the latter. However, based on an analysis of the facts acknowledged by the State, it clearly follows that both the behavior of its own agents and that of the members of the paramilitary groups are attributable to the State insofar as they in fact acted in a situation and in areas that were under the control of the State.[124]

The IACtHR based this broad standard on the special character of human rights obligations due to the purposes of human rights treaties and obligations, holding that:

> While the American Convention itself explicitly refers to the rules of general International Law for its interpretation and application, the obligations set forth in Articles 1(1) and 2 of the Convention are ultimately the basis for the establishment of the international responsibility of a State for abridgments to the Convention. Thus, said instrument constitutes *lex specialis* regarding State responsibility, in view of its special nature as an international human rights treaty *vis-à-vis* general International Law. Therefore, attribution of international responsibility to the State, as well as the scope and effects of the acknowledgment made in the instant case, must take place in light of the Convention itself.[125]

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[123] HRC, General Comment 31, The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13, 26 May 2014, para. 10.

[124] Inter-American Court of Human Rights, *"Mapiripán Massacre" v. Colombia (Merits, Reparations, and Costs)* (2005), Series C No. 134, para. 120.

[125] Ibid., para. 107. See for a more detailed discussion L. Lixinski, 'Expansionism at the Service of the Unity of International Law', (2010) 21 *European Journal of International Law* 585. He states that the interpretation of human rights instruments has the primary aim of promoting the effective application (*effet utile*) of the instrument. This is in line with the idea that, human rights instruments having a different aspiration from many other international instruments, they deserve to be interpreted differently. As human rights instruments aim at law-making, rather than contractual arrangements between states, it is only to be expected that they will be interpreted in a different way, which will take into account the different purposes that this type of treaty is meant to serve.

3.3.2 Analysis of the challenges

On the basis of the discussion above, it is possible to draw some conclusions concerning the case law of the ECtHR on state responsibility, in particular on the issue of attribution.

The Court has sometimes followed the rules on attribution set out in the ARSIWA and ARIO. In other cases it has departed from those rules. The latter include cases that concerned attribution of conduct in situations covered by ILC articles considered to reflect customary international law. In other words, it appears that in these cases the Court departed from general international law.

Such departures can be seen in all three categories discussed in section 3.2 above, i.e.:

(i) Cases concerning questions of attribution in situations where only one state was involved in the underlying facts;
(i) Cases concerning questions of attribution in situations in which more than one state was involved in the underlying facts;
(ii) Cases concerning attribution in situations in which one or more states and an international organization were involved in the underlying facts.

Examples of where the ECtHR has departed from general international law are the use in *Costello-Roberts* of looser criteria for attributing the conduct of persons or entities exercising elements of governmental authority than those set out in article 5 ARSIWA; the "acquiescence or connivance" test introduced by the Court in the *El-Masri* case; and the "ultimate authority and control" test used by the Court in *Behrami and Saramati* which it did not clearly repudiate in *Al-Jedda*.

In a number of cases in which the ECtHR departed from general international law, it referred to specific ARSIWA or ARIO articles when listing relevant international law. This could be understood as the Court suggesting that it would apply those articles. As was seen, this was not always what the Court actually did.

The ECtHR is not the only human rights monitoring body to apply different standards of attribution than those included in the ILC articles. It was seen that the HRC and the IACtHR have also done so, sometimes in ways similar to the ECtHR. An example is the case of *Mohammed Alzery v. Sweden*, in which the HRC appears to have used a test of attribution that is similar to the ECtHR's "acquiescence or connivance" standard.

An important difference between the IACtHR on the one hand and the HRC and ECtHR on the other, is that the former has at least in one case explained why it deviated from general international law. In the case of the *Mapiripán Massacre* it held that such deviation is justified by the special character of human rights obligations due to the purposes of human rights treaties. It is a matter of speculation whether this has also been the driving force behind certain case law of the ECtHR, as the Court itself has not stated this. It is true that the Court has made more general statements suggesting that the nature of the ECHR as a human rights treaty may be a reason to not apply general international law,[126] but it has not expressly

[126] See in particular its statement in Bankovic that "The Court must 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." Bankovic, *supra* note 17 § 57.

linked this to the issue of attribution.

It has been suggested that article 55 ARSIWA may be relevant in the context of the ECHR.[127] This article reflects the fact that the ARSIWA operate in a residual way, and that where there are special rules of international law that conflict with the ARSIWA the former take precedence. According to the ILC in its commentary to article 55, for the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. The ECHR however does not include provisions that deal specifically with attribution. There is thus no clear *lex specialis* in the Convention in relation to attribution.[128]

As was explained in section 3.1, it may therefore seem logical that the Court would turn to the ILC articles as the *lex generalis*. It must however be remembered that those articles are concerned only with the responsibility of States toward other States and international organizations. Most of the cases dealt with by the ECtHR on the other hand deal with individual applications. One may thus ask whether articles developed for application between States and international organizations are the appropriate framework.[129] The ECtHR has suggested that the answer to that question is "yes", as it has frequently referred to the ARSIWA and the ARIO.

It may be noted that the cases discussed in the context of attribution in this report concern individual applications. It cannot be excluded that the Court would take a different approach in inter-state cases.

Based on the above, a challenge appears to be that the ECtHR deviates from general international law without doing so in a consistent way and without explaining the underlying reasoning for why it does so and how it does so. This creates uncertainty for High Contracting Parties to the ECHR, which are unclear as to the way in which the Court will interpret the rules on attribution in future cases and thus to the extent of their obligations under the ECHR. As Judge Crawford has stated, to secure long-term protection of human rights depends on the capacity to systematically explain case-by-case decisions in ways which can be accepted.[130]

Another conclusion that can be drawn from the case law of the ECtHR is that it does not always clearly distinguish between "jurisdiction" the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. This issue was discussed in more detail in chapter 2.

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[127] Presentation by Judge Motoc during the conference on The European Convention on Human Rights and General International Law, organized by the European Society for International Law and the European Court of Human Rights, available at: www.esil-sedi.eu/node/904.

[128] See M. Fink, 'The European Court of Human Rights and State Responsibility', in C. Binder & K. Lachmayer (Eds.), *The European Court of Human Rights and Public International Law: Fragmentation or Unity?*, (2014) 93 at 94.

[129] This is a question that also appears to be raised in M. Evans, 'State Responsibility and the ECHR', in M. Fitzmaurice & D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004) 139.

[130] Crawford, *supra* note 64.