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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
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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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External voluntary contributions on Theme 1, subthemes ii) and iii) from two Italian universities

1. Challenges of the Interaction between the Convention and other Branches of International Law, Including International Customary Law:

State Responsibility and Extraterritorial Application of the Convention

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A. OBSERVATIONS

i. State Responsibility in International Law

1. The law of state responsibility is made up of secondary rules indicating the consequences arising from the breach of rules of conduct, or primary rules.[1] The Draft Articles on Responsibility of States for Internationally Wrongful, adopted by the International Law Commission in 2001 (ILC Draft Articles), codify customary rules of international law concerning the responsibility of states for their internationally wrongful acts.[2]

2. The ILC Draft Articles affirm that every internationally wrongful act of a state entails its international responsibility (Art. 1); and that an internationally wrongful act exists when conduct consisting of an act or omission is attributable to a state *and* constitutes a breach of an international obligation owed by that state (Art. 2). The issue of attribution is therefore to be distinguished from the characterization of the conduct as being wrongful. The former's concern is to establish that there is an act of the state for the purposes of responsibility, the latter regards omissive or commissive conducts at variance with an international obligation.

3. Art. 55 of the ILC Draft Articles states that "these Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".[3]

4. Human rights law – as part of international law international law[4] – is mainly composed of primary rules giving rise to material obligations. Customary international rules on state responsibility therefore apply to international human rights law, unless otherwise provided.[5]

5. In the context of human rights law, human rights treaties mainly regulate the relationship between states and individuals under their jurisdiction. In many human rights

[1] James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press2002) 16.
[2] International Law Commission*, Draft Articles on Responsibility of States for Internationally Wrongful Acts,* Yearbook of the International Law Commission (2001, Vol II, Part Two).
[3] *Ibidem*, Art. 55.
[4] See Bruno Simma, Dirk Pulkowski 'Of Planets and the Universe: Self-Contained Regimes in International Law" (2006) 17 European Journal of International Law 483-529, 524 ff.
[5] Stefano Brugnatelli, 'Human Rights Judicial and Semi-Judicial Bodies and Customary International Law on State Responsibility', in Nerina Boschiero and others (eds.), *International Courts and the Development of International Law* (Springer 2013) 477.

treaties, this relationship is traditionally framed in the requirement that the individuals to which a state ought to secure human rights must fall within the state's 'jurisdiction' and/or 'territory'.

6. Some instruments contain jurisdictional or territorial clauses with different wording to establish their applicability, while others do not contain any explicit provision to this end, indicating where and over whom specifically the treaties are to be applied. At the universal level, Art. 2(1) of the International Covenant on Civil and Political Rights includes both a jurisdictional and a territorial clause requiring the State Party to respect and ensure to "all individuals within its territory and subject to its jurisdiction" the rights guaranteed therein,[6] while the Convention on the Rights of the Child refers to "each child within their jurisdiction" (Art. 2(1)).[7] The Convention against Torture (CAT) takes a different approach, requiring a State Party to prevent torture "in any territory under its jurisdiction".[8]

7. Other treaties, however, such as the International Covenant on Economic, Social and Cultural Rights or the Convention on the Elimination of All Forms of Discrimination against Women, do not contain a general provision limiting the scope of obligations either *ratione personae* or *ratione loci*. At the regional level, the American Convention on Human Rights refers to "all persons subject to their jurisdiction' (Art. 1(1)).[9]

8. The European Convention on Human Rights and Fundamental Freedoms (ECHR) does not contain any provision derogating from the general regime on responsibility of states. No *lex specialis* is explicitly provided in the text of the Convention. It follows that when the European Court of Human Rights (ECtHR) assesses the breach of one of the primary rules of the Convention, the relevant secondary rules are those contained in the ILC Draft Articles.

9. Furthermore, the European Court of Human Rights (ECtHR) underscored that the ECHR is to be interpreted in accordance with the general rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT), Art. 31(3)(c), and that "[t]he Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part".[10] Accordingly, what holds in general international law regarding the exercise by states of territorial, quasi-territorial, and personal jurisdiction, equally applies to state responsibility and jurisdiction in human rights law.

[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[7] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[8] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987)1465 UNTS 85
[9] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).
[10] *Banković and Others v Belgium and Others*, (Judgment) Application No. 52207/99 (12 December 2001), para 57 [*Banković and Others v Belgium and Others*]; *Al-Adsani v UK* (Judgment) Application No. 35763/97 (21 November 2001), para 55.

ii. Notion of Jurisdiction in the Sense of Art. 1 of the Convention and the Notions of Territorial Control and Effective Control

10. Art. 1 of the ECHR states that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention".[11]

11. Under Art. 1, jurisdiction is a threshold criterion which sets the limits to the applicability of the Convention, being the condition necessary for the contracting state to be held liable for acts and omissions under the Convention.[12]

12. The term "jurisdiction" is not elaborated further by the Convention, with the consequence that persistent questions surround the circumstances under which a state's actions carried out outside its territory may still come under the jurisdiction of a contracting party.

13. As noted by Judge Ch. Rozakis, former Vice-President of the Court, the term "was not elaborated and defined by the Convention's drafters", with the consequence that ECHR's bodies "through their case-law have undertaken the labour not only of giving flesh to general, undefined terms, but also of adaptation them to the realities of an ever-changing European society".[13]

14. According to the ECtHR, jurisdiction is to be intended in conformity with public international law.[14] In its broadest sense, jurisdiction is often understood as closely connected to the notion of sovereignty under general international law. The usual meaning of the term concerns the scope of competence or power of a state to regulate the conduct of physical and legal persons (jurisdiction to prescribe), and to enforce such rights and duties (jurisdiction to enforce). As to possible bases of the exercise of jurisdiction, the principle of territoriality is the primary one in international law.

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[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

[12] See *Ilaşcu and Others v Moldova and Russia* (Judgment) Application No. 48787/99 (8 July 2004), para 31 [*Ilaşcu and Others v Moldova and Russia*]; *Al-Skeini and Others v the United Kingdom* (GC Judgment) Application No. 55721/07 (7 July 2011), para 130 [*Al-Skeini and Others v the United Kingdom*].

[13] Christos Rozakis, 'The Territorial Scope of Human Rights obligations: The Case of the European Convention on Human Rights' in Venice Commission, *The Status of International Treaties on Human Rights* (2006), 57.

[14] *Nada v Switzerland* (GC Judgment) Application No. 10593/08 (12 September 2012), para 119; *Assanidze v Georgia* (Judgment) Application No. 71503/01 (8 April 2004), para 137 [*Assanidze v Georgia*]; *Gentilhomme and Others v France*, (Judgment) Applications No. 48205/99, 48207/99, and 48209/99 (14 May 2002), para 20. In the Lotus case, the Permanent Court of International Justice (PCIJ) – the predecessor to the International Court of Justice (ICJ) – stated that "[F]ailing the existence of a permissive rule to the contrary – [a State] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." Permanent Court of International Justice, S.S. 'Lotus' (*France v Turkey*), PCIJ Reports, Series A, No. 10 (1927), para 45.

15. The 2001 leading ECtHR decision on the *Bankovic* case affirmed that the state's jurisdiction as referred to by Art. 1 is "primarily territorial".[15] Art. 56.1 of the ECHR allows States Parties to make at any time declarations extending the scope of the Convention to any territories for whose international relations they are responsible. Should they so do, Art. 56.4 allows them to accept the competence of the Court to receive and examine individual applications in relation to such territories.

16. Yet the ECHR's wording "within their jurisdiction" rather than "within their territory" might imply that the ECHR contracting parties' obligations extend beyond their territory.[16] The judicial interpretation of the concept of "jurisdiction" provided by the ECtHR has not always been consistent. As Lord Rodger of Earlsferry commented in *Al-Skeini v Secretary of State for Defence*, a case which raised the question whether British military action in Basra extended the Convention to Iraqi citizens, "what is meant by 'within their jurisdiction' in article 1 is a question of law and the body whose function it is to answer that question definitively is the European Court of Human Rights […]. The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court".[17]

17. In keeping with the essentially territorial notion of jurisdiction, the ECtHR has affirmed that, in exceptional circumstances, the acts of the Contracting states performed, or producing effects, outside their territories can still fall under Art. 1 of the ECHR. Such exceptional circumstances have been recognized by the ECtHR in two categories of cases:

[15] *Banković and Others v Belgium and Others*, para 59. *Al-Dulimi and Montana Management Inc. v Switzerland* (Judgment), Application No. 5809/08 (26 November 2013), para 89; *Abdul Wahab Khan v the United Kingdom* (Judgment) Application No. 11987/11 (28 January 2014), para 25 [*A. W. Khan v the United Kingdom*]; See also See also *Collected Edition of the Travaux préparatoires of the European Convention on Human Rights* (Brill Nijhoff Vol III) 260; See Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 87.

[16] The wording of the ECHR differs from the text of the International Covenant on Civil and Political Rights, whose Art. 2(1) affirms that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant". "Territory" and "jurisdiction" have been interpreted by the Human Rights Committee in a disjunctive way, meaning 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" (Human Rights Committee, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004), para 10.
In the case of *Alejandre, Costa, de la Peña and Morales* (Cuba) (Report No. 86/99, Case 11589, 29 September 1999, para 23), the Interamerican Commission stated that "[i]n terms of its competence *ratione loci*, clearly the Commission is competent with respect to human rights violations that occur within the territory of OAS [Organisation of American States] member States, whether or not they are Parties to the Convention. It should be specified, however, that under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member State have violated human rights protected in the inter-American system, even when the events take place outside the territory of that State. In fact, […][a]lthough this usually refers to persons who are within the territory of a State, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a State but subject to the control of another State, generally through the actions of that State's agents abroad."

[17] England's House of Lords held in Al-Skeini and Others v Secretary of State for Defence [2007] UKHL 26, paras 65 and 67 (Lord Rodger's judgment).

when a State exercises effective overall control over a given territory and/or its population,[18] and when a person is within the exclusive authority and/or control of a State's agent (so called "personal model of jurisdiction").[19]

18. In his concurring opinion in *Assanidze*, Judge Loukis Loucaides defined jurisdiction as the actual authority of the state, amounting to "the possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Party or outside that territory. Therefore, a High Contracting Party is accountable under the Convention to everyone directly affected by any exercise of authority by such Party in any part of the world. Such authority may take different forms and may be legal or illegal. […] The usual form is governmental authority within a High Contracting Party's own territory, but it may extend to authority in the form of overall control of another territory even though that control is illegal. […]. It may also extend to authority in the form of the exercise of domination or effective influence through political, financial, military or other substantial support of a government of another State". […] [20]

19. In the same case, Judge Loucaides added that "the test should always be whether the person who claims to be within the "jurisdiction" of a High Contracting Party to the Convention, in respect of a particular act, can show that the act in question was the result of the exercise of authority by the State concerned. Any other interpretation excluding responsibility of a High Contracting Party for acts resulting from the exercise of its State authority would lead to the absurd proposition that the Convention lays down obligations to respect human rights only within the territory under the lawful or unlawful physical control of such Party and that outside that context, leaving aside certain exceptional circumstances (the existence of which would be decided on a case-by-case basis), the State Party concerned may act with impunity contrary to the standards of behaviour set out in the Convention. I believe that a reasonable interpretation of the provisions of the Convention in the light of its object must lead to the conclusion that the Convention provides a code of behaviour for all High Contracting Parties whenever they act in the exercise of their State authority with consequences for individuals".[21]

20. On the one hand, some acts that take place on the territory of a State Party are not attributable to it, e.g. in case of acts associated with international organizations, or when the perpetrator benefits from a form of immunity under international law. This is fully in line with general international law. On the other, the case law of the ECtHR shows that the scope of application of the ECHR can go beyond the territory of the contracting parties. The Court recognized that extra-territorial acts constitute an exercise of jurisdiction when the state exercises "effective control" over a certain area, or when it exercises "authority and control" over a person or group of persons.

[18] See *Loizidou v Turkey* (Admissibility) Application No. 15318/89 (23 February 1995).
[19] *Issa and Others v Turkey* (Judgment) Application No. 31821/96 (16 November 2004), para 74 [*Issa and Others v Turkey*]; *Öcalan v Turkey*, (GC Judgment) Application No.46221/99 (12 May 2005), para 91 [*Öcalan v Turkey*]; *Saadoon and Mufdhi v United Kingdom* (Judgment) Application No. 61498/08 (30 June 2009), para 88; *Al-Skeini and Others v the United Kingdom*, para 150; *Al-Jedda v United Kingdom* (GC Judgment) Application No. 27021/08 (7 July 2011), paras 74 ff.
[20] *Assanidze v Georgia*, Concurring Opinion of Judge Loucaides, 52.
[21] *Ibidem*, 52.

21. Building upon case-law, scholars have identified three different interpretations of the concept of effective control.[22] The first one concerns effective control over a geographic area, with the presumption of State involvement. Here, the Court tends to derive a legal consequence from a presumption of fact. The most frequent example is that of a Contracting Party which, through the massive deployment of armed force, is presumed to exercise effective control over a territory. In the *Loizidou* case, with reference to the occupation of Northern Cyprus by Turkey, the Court observed that "a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it in practice exercises effective control of an area situated outside its national territory", and stressed that "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 force, or through a subordinate legal administration".[23] This approach was confirmed in *Cyprus v Turkey*, where Turkey was held liable for human rights violations committed in the territory over which it had "effective overall control".[24]

22. The second interpretation of effective control concerns the evidence of state involvement beyond a reasonable doubt or, at least, based on concrete evidence.[25] In this case the concept of effective control is not concerned with control over a territory, but with the conduct of an individual within a third State. The Court would be authorized to assess conducts adopted by a Contracting Party to the detriment of the rights of a foreign citizen within a third State, regardless of whether that Contracting State exercised effective control over the territory where the unlawful acts occurred. In the *Issa* case, the Court declined its jurisdiction on the application promoted by a number of Iraqi citizens who reported the violation of their fundamental rights by the Turkish armed force during a military operation in the northern part of Iraq.[26] The case is relevant as, while declining its jurisdiction, the Court acknowledged that, at the time of the facts, Turkey exercised effective control over that portion of Iraqi territory. Indeed, the rejection of the application of the Iraqi citizens was due to the lack of evidence relating to the direct involvement of the Turkish military in the alleged violation of applicants' rights.

23. It is to note that the extra-territorial jurisdiction of the Court remains tied to the exercise of effective control over a foreign territory, even when the analysis focuses on the control exercised towards an individual. The difference lies in the (higher or lower) degree of effective control exercised over a territory, a circumstance which, conversely, affects the applicants' burden of proof. While, under the first interpretation, due to the full-extent exercise of effective control over a territory achieved by means of the massive deployment of military forces, the contracting party is assumed to exercise effective control also towards the entire population living therein, the second interpretation rejects this presumption and demands the individuals to convincingly prove that a specific violation may be attributed to a contracting party. Therefore, while in the first case the exercise of effective control is both a

[22] See Raffaella Nigro, 'The Notion of "Jurisdiction" in Article 1: Future Scenarios for the Extra-territorial Application of the European Convention on Human Rights' (2011) Italian Yearbook of International Law 11-30, 15 [Nigro, *The Notion*].
[23] *Loizidou v Turkey* (Judgment) Application No. 15318/89 (18 December 1996), para 52. See also *Chiragov and Others v Armenia* (Judgment) Application No. 13216/05 (16 June 2015), paras 168 ff [*Chiragov and Others v Armenia*].
[24] *Cyprus v Turkey* (Judgment) Application No. 25781/94 (10 May 2001), paras 77-78.
[25] See Nigro, *The Notion*, 16.
[26] *Issa and Others v Turkey*, para 80.

necessary and sufficient condition for the Contracting Party's responsibility to arise, the second interpretation requires a further element to ground the Court's jurisdiction, namely the proof that the alleged breach may actually be attributed to a Contracting Party.[27]

24. Finally, the third interpretation concerns the hypothesis of a legitimate government which is temporarily deprived of effective control, but still capable of affecting the enjoyment of the rights protected by the Convention. Here the State is not held responsible for a conduct adopted within a third State, but rather for a breach of the ECHR occurred in a portion of its own territory (on which it temporarily lacks effective control). In the *Ilaşcu* case, involving the situation of the Transnistrian strip in the state of Moldova, the Court observed that the mere lack of control over a territory does not exempt a State Party from complying with its obligation under the ECHR.[28] The concept of jurisdiction as interpreted here seems to detach from that of territory. Indeed, in the same *Ilaşcu* case, the Courts specified that "such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory".[29] In short, in such a scenario the Contracting Party may be held responsible only for a breach of its positive obligations to protects individuals under their jurisdiction, failing to act with due diligence in order to ensure the respect of the ECHR rights.

iii. Case Law of the ECHR

25. An overview of the case law of the ECtR might be useful to analyse its approach to the concept of jurisdiction.

26. As to the leading case *Bancovic*, the critical issue there was whether the extraterritorial activities of air strikes by NATO could trigger the application of the ECHR for NATO countries. The Grand Chamber rejected the "cause-and-effect" concept of jurisdiction proposed by the claimants,[30] and affirmed that "in keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention".[31]

27. According to the Court, "the Convention is a multilateral treaty operating, subject to Article 56.2 of the Convention, in an essentially regional context and notably in the legal space (*contexte juridique*) of the Contracting States. The [Federal Republic of Yugoslavia] 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

[27] In the same vein see *Isaak v Turkey* (Judgment) Application No. 44587/98 (28 September 2006), were the Court stated: "a State may also be held accountable for a violation of the Convention rights and Freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State", para 19. See also *Al-Skeini and Others v the United Kingdom*, para 136 and *Öcalan v Turkey*, para 91.
[28] *Ilaşcu and Others v Moldova and Russia*, para 333.
[29] *Ibidem*.
[30] *Banković and Others v Belgium and Others*, para 75.
[31] *Ibidem*, para 67.

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".[32]

28. Invoking the traditional basis for extraterritorial jurisdiction in international law, the Court identified four categories of exceptions to territorial jurisdiction: (i) Extradition or expulsion cases: cases involving the extradition or expulsion of an individual from a member State's territory which give rise to concerns about possible mistreatment or death in the receiving country under Art. 2 or 3 or, in extreme cases, the conditions of detention or trial under Art. 5 or 6; (ii) Extraterritorial effects cases: cases where the acts of state authorities produced effects or were performed outside their own territory; (iii) Effective control cases: cases when as a consequence of military action (lawful or unlawful) a Contracting Party exercised effective control of an area outside its national territory; and (iv) Consular or diplomatic cases, and flag jurisdiction cases: cases involving the activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.[33]

29. *Banković* defined these above-mentioned exceptions narrowly. It confined extradition and expulsion cases to instances where the applicant is within the member State's territory and challenging the effects of his transfer abroad. The 'effective control' cases cited in *Banković* requires a high threshold and a significant and detailed factual basis to show the presence of 'effective control'.[34]

30. In 2004, the ECthR in *Issa* dealt with the alleged killings of Iraqi shepherds by Turkish soldiers. Here the Court adopted a more flexible interpretation of control, relying on the decisions of other international bodies such as the Inter-American Commission of Human Rights and the Human Rights Committee. The Court focused on the activity of the contracting state, rather than on the requirement that the victim should be within its jurisdiction. "Accountability in such situations', the Court concluded, 'stems from the fact that art 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[35] In the reasoning of *Issa*, jurisdiction is not primarily territorial; a state is bound by the Convention wherever it acts, and its obligations abroad are no different from its obligations at home. This premise is diametrically opposed to the Court's conclusions in *Banković*, where the Court declared that '[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States', and that 'the desirability of avoiding a gap or vacuum in human rights protection' is a valid basis for jurisdiction only within the 'espace juridique' of the Convention.[36] The impression arising from the ECtHR's decision in *Issa* is that the Court treats jurisdiction and state responsibility indistinctively.

31. In 2005, in *Ocalan v Turkey*,[37] the ECtHR seemed to broaden the scope of Art. 1 to encompass almost any instance where a state exercises authority or control over an

[32] *Ibidem*, para 80.
[33] *Ibidem*, para 68-73.
[34] *Ibidem*, para 73.
[35] *Ibidem*, para 71.
[36] *Ibidem*, para 80.
[37] *Öcalan v Turkey*.

individual outside its own territory in a way which involves Convention rights. Abdullah Öcalan, a Turkish citizen, founded the Kurdish Workers' Party (PKK), a Kurdish liberation group and terrorist organization responsible for a number of armed attacks which killed hundreds in Turkey. After expulsion from Syria in 1998, Öcalan fled to Kenya, where Greek diplomats initially gave him safe harbour at the Greek embassy. The Kenyan government then ordered Öcalan to be removed from the country, and Kenyan officials facilitated Öcalan's capture by Turkish security officers at Nairobi airport. Turkish officers arrested Öcalan and flew to Turkey, where he was tried and convicted. Öcalan then filed an application with the European Court, claiming that Turkey's highly irregular extradition process amounted to kidnapping, and that his treatment at the hands of Turkish security officials on the aeroplane flight back to Turkey amounted to cruel, inhuman, and degrading treatment.[38]

32. In its judgment, the Grand Chamber of the ECtHR held that "[i]t is common ground 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 […] even though in this instance Turkey exercised its authority outside its territory".[39]

33. The Court suggests that the scope of the Convention is flexible, potentially conferring jurisdiction whenever a state exercises effective control over a person outside its own borders. Yet this was precisely the argument the applicants advanced and the Grand Chamber rejected in *Banković*.

34. In 2009, the ECtHR in *Al-Saadoon* held that the UK government should prohibit the transfer of the applicants in Iraq, over whom it exercised "exclusive control", to the Iraqi authorities. In this case, the Court found that "given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction".[40]

35. In the *Medvedyev* case from 2010,[41] a Cambodia-registered ship was intercepted on the high seas by a French frigate for the purpose of implementing anti-drug measures under the agreement with the Cambodian government. Later, crew members brought an action against France, arguing that they suffered the deprivation of liberty while being detained on the Winner by French authorities. Here, the Grand Chamber held that: "as this was a case of France having exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention".[42]

[38] *Ibidem*, paras 13-60.
[39] *Ibidem*, para 91.
[40] *Al-Saadoon and Mufdhi v The United Kingdom*, (Admissibility) Application No.61498/08 (30 June 2009), para 88.
[41] *Medvedyev and Others v France* (GC Judgment) Application No. 3394/03 (29 March 2010) [*Medvedyev and Others v France*].
[42] *Ibidem*, para 67.

36. In 2011, the Grand Chamber of the ECtHR in *Al-Skeini* attempted to clarify the issue of jurisdiction under Art. 1 of the ECHR.[43] It confirmed that jurisdiction under Art. 1 of the ECHR is "primarily territorial".[44] The Court also recognized a number of exceptional circumstances outside of territorial boundaries, which could give rise to the establishment of jurisdiction. The Court acknowledged two critical exceptional categories: "state agent authority and control" and "effective control over an area".[45] Under the title of "State agent authority and control", the Court recognized 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 Art. 1 jurisdiction. This principle has been applied where an individual is taken into the custody of state agents abroad".[46] The Court affirmed that, "[w]hat is decisive in such cases is the exercise of physical power and control over the person in question",[47] and that the exceptions "must be determined with reference to the particular facts".[48]

37. The Grand Chamber rejected this argument and pointed out that the ECHR should not be interpreted in isolation, but as far as possible in conformity with other rules of international law.[49]

38. In *A. W. Khan v the United Kingdom*,[50] which concerned a Pakistani student in the United Kingdom whose residence permit had been cancelled on account of alleged Islamist activities and who had left the country voluntarily but appealed the decision of exclusion before the British courts. Having been unsuccessful, he turned to the ECtHR, complaining of violations of Artt. 2, 3, 5, 6 and 8 of the ECHR regarding the right to life, the prohibition of torture, the right to liberty, the right to a fair trial and the right to respect for private and family life.

39. The Court examined whether the applicant had been placed under the jurisdiction of the United Kingdom and consequently fell under the Court's jurisdiction. It found that, having returned to Pakistan, he had not, and therefore ruled that the application was inadmissible.[51] In its decision, the Court pointed out that the jurisdiction of a state was mainly territorial. Two principal exceptions to the principle had been recognised, however: "State agent authority" and "effective control over an area" by another state. In the present case, the applicant had voluntarily returned to Pakistan, so neither exception applied, in particular because the applicant did not complain of measures taken by the British diplomatic or consular authorities in Pakistan and because he was able to live freely in his country without any interference from British authorities.[52]

40. In the cases *Chiragov and Others v Armenia* and *Sargsyan v Azerbayan* the key question was whether the respondent states exercised jurisdiction in the meaning of Art. 1

[43] *Al-Skeini and Others v the United Kingdom*.
[44] *Ibidem*, para 131.
[45] *Ibidem*, paras 133–40.
[46] *Ibidem*, para 136.
[47] *Ibidem*.
[48] *Ibidem*, para 131.
[49] *Ibidem*, para 77.
[50] *A. W. Khan v the United Kingdom*.
[51] *Ibidem*, para 24.
[52] *Ibidem*, para 25.

ECHR. Both judgments constitute equally inducements for analysing the concept of state jurisdiction in the ECHR and its relationship with state responsibility. The Court held the contracting parties responsible for a breach of the ECHR occurred within a third states whenever the Contracting Parties were deemed to exercise a certain degree of "effective control" on the foreign territory. The Court recognized that when it is possible to demonstrate that the Contracting Party temporarily exercised an effective control over a portion of territory within a third state, that territory, for the purposes of the ECHR, shall be considered subject to the jurisdiction of that Contracting Party.[53] The Court explicitly endorsed the *Issa*, *Al-Saadoon* and *Medvedyev* decisions; all three cases share the fact that states exercised 'total', 'full' or 'exclusive' control over persons and places.

B. Analysis of Challenges

i. Jurisdiction and the Special Features of International Human Rights Law

41. The scope of jurisdiction under Art. 1 is perhaps the most fundamental question for the Convention system. There is no denying in that "jurisdiction" in human rights law has a different purpose from "jurisdiction" in public international law. Whilst the objective of the traditional notion of state jurisdiction is to protect state sovereignty by delineating their spheres of activity, jurisdiction in the context of human rights law defines the applicability of human rights obligations.[54]

42. Under general international law, the determination of state responsibility for states' international wrongful conduct is based on an assessment of the activity attributable to that state in relation to its international obligations, irrespective of whether this act was performed within or outside the territory of that state. But state responsibility under conventional human rights law is not simply assessed in terms of the acts or omissions of state parties, as can be the case in other bodies of law, such as the law on diplomatic relations or international maritime law. Under human rights law a further assessment is introduced in international practice, which is the relationship between the state and the affected individual, based on the requirement that the alleged victim must be within the jurisdiction of that state. In view of the practice of human rights bodies, in particular the ECtHR, before establishing that an act or omission can give rise to state responsibility it would need to be established whether the act or omission falls within the jurisdiction of state and whether the state complies with the relevant treaty obligations.

43. The degree to which the Convention regulates extraterritorial acts of its signatories defines the identity of the Convention. If jurisdiction is effectively limited to European territory, the Convention is a primarily regional instrument; if jurisdiction extends to a wide range of extraterritorial acts by signatories, the Convention is instead a global system for protecting human rights. The degree to which the Convention is concerned with extraterritorial acts also defines its relationship with other international systems and the

[53] *Chiragov and Others v Armenia*, para 186, speaking of "highly integrat[ion] in virtually all important matters" between Armenia and Nagorno-Karabakh; *Sargsyan v Azerbaijan* (GC Judgment) Application No. 40167/06 (16 June 2015), para 76.

[54] A.Klug and T.Howe,'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 98.

remedies available to individual victims of human rights violations. This is not only exactly the kind of question that only the Court can answer, but also the kind of question that requires the Court to provide clear and workable guidance to national courts.

44. The main challenge remains that jurisdiction under human rights law is not about whether a state is entitled to act, but primarily about delineating as appropriately as possible the pool of persons to which a state ought to secure human rights.

ii. Extraterritorial Jurisdiction and Immigration

45. One of the phenomena that has recently raised major problems with reference to the need of striking a balance between the pursuit of states' interests and the protection of human rights is immigration.

46. In times when Southern Europe is witnessing waves of people fleeing Libya and others regions of North Africa the issue of illegal sea migrants has become an impelling one. For a number of years states have sought to preventing asylum seekers or illicit migrants from reaching their territory, through the policy of "interception".[55] The question then arises whether and to what extent the ECHR'S provisions apply to immigrants trying to reach Europe on boats, and at which point they fall subject to the jurisdictions of States Parties to the Convention.

47. It is therefore not surprising that the Court has had the occasion to rule several times on the violations of the ECHR following the implementation by states of immigration policies allegedly at variance with human rights law. In this regard, the Council of Europe has recently published a specific handbook aimed at illustrating the actual scope of the ECHR provisions when it comes to immigration and protection of immigrants' rights.[56]

48. Among the various issues with which the Court will be bound to struggle, it is worth mentioning both the concept of extra-territorial jurisdiction and the related "escape policy" which member States seem to have been undertaking in the latest years. It is in fact understandable that states' organs tend to approach immigrants firstly outside their national territory, either in the context of a rescue operation or precisely because they intend to prevent them from entering the country. This has led to the so-called phenomenon of "externalization of border control" which can in turn take place under three different scenarios: the first one concerns states' practice to intercept immigrants before they reach the national territory. In this case the interception is carried out by state's organs (normally those belonging to internal security services) and occurs outside the borders of the state, either in the so-called "buffer zones", or within neighbouring states or even in areas not subject to national jurisdiction (as, for instance, on the high seas). This practice obviously raises questions related to the applicability of the obligations provided by the ECHR in a

[55] This term refers to "measures applied by states outside their national boundaries which prevent, interrupt or stop the movement of people without the necessary immigration documentation from crossing the borders by land, sea or air". See Executive Committee Standing Committee, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendation for a Comprehensive Approach*, UN Doc. EC/50/SC/ CRP.17 (9 June 2000), para 10.

[56] Yannis Ktistakis, *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter – A Handbook for Legal Practitioners* (Council of Europe Publishing 2011).

similar situation. In this regard, the Court had already specified the actual scope of states' obligations by broadly interpreting the concept of jurisdiction laid down in Art. 1.

49. In *Medvedyev*[57] the Court ruled that France violated Art. 5(1) of the ECHR against some drug smugglers hiding inside a ship (the "*Winner*") flying Cambodian flag.[58] In particular, the "*Winner"* was intercepted by a French frigate on the high seas (off the coast of Cape Verde) in the context of an international investigation on drug trafficking. The smugglers were then taken under the guard of French authorities and confined to their cabins for the following 13 days, namely the time needed to head back to the port of Brest. They subsequently complained of having suffered an unlawful detention by the French authorities and, once exhausted all the internal remedies, filed an application with the Court. Despite the fact that the complained conducts took place on the high seas and aboard a ship flying Cambodian flag, the Court applied the test of "effective control" and found it held jurisdiction to assess the case.[59]

50. More recently, in *N.A. and N.T. v Spain*,[60] the Court established its jurisdiction on an unlawful *refoulement* of two immigrants (one from Mali and the other from Côte d'Ivoire) carried out by the Spanish authorities in the areas surrounding the Spanish exclave of Melilla. Spain argued that the Court had no jurisdiction, since the *refoulement* occurred outside the Spanish territory. Again, the Court applies the test of "effective control" to verify if, at the time of the *refoulement*, the conduct could be attributed to Spain. Moreover, the Court emphasized that under this test it was not necessary to further inquire whether the place where the *refoulemen*t actually took place was in Morocco or Spain since, for the purposes of Art. 1 of the ECHR, it was sufficient to ascertain that the "effective control" over the immigrants was exercised by the Spanish authorities.[61]

51. Italy, also due to its geographical location, is not new to this type of claim. Already in *Xhavara*,[62] the Court acknowledged Italy's potential responsibility for a breach of the ECHR with reference to a conduct occurred on the high seas. In the case at stake, attempts by the Italian *Guardia costiera* to stop and inspect a ship flying Albanese flag and suspected to carry on board illegal immigrants resulted in the collision between the two ships and the drowning of more than fifty people. The Court found that Italy, as the flag state of the patrol ship, was responsible for the human rights violations caused to the illegal immigrants. However, the Court dismissed the case in consideration of other competence grounds.

52. A recent case that has fostered the doctrinal debate on the relationship between the actual scope of Art. 1 and immigration is *Hirsi Jamaa*,[63] where Italy was found in breach of Art. 4 of the ECHR (*Prohibition of collective expulsion of aliens*). In particular, the Italian authorities intercepted on the high seas a ship carrying more than fifty immigrants from Eritrea and Somalia and, after having taken them on board, headed to the Libyan coasts,

[57] *Medvedyev and Others v France*, para 68.
[58] However, the Court eventually ruled that the 13 days detention without judicial oversight was justified by the "wholly exceptional circumstances of the case", *ibidem*.
[59] *Ibidem*, para 67.
[60] *N.D. and N.T. v Spain* (Judgment) Applications No. 8675/15 and 8697/15 (October 2017).
[61] *Ibidem*, paras 54-55.
[62] *Xhavara and Others v Italy and Albania* (Judgment) Application No. 39473/98 (11 January 2000).
[63] *Hirsi Jamaa and Others v Italy* (GC Judgment) Application No. 27765/09 (22 February 2012).

disembarking those immigrants there, in accordance with a bilateral treaty on "partnership and cooperation" at that time in force between Italy and Libya. The immigrants then filed an application with the Court, which confirmed its jurisdiction, stating that, since the events took place entirely aboard Italian ships, Italy exercised full *de jure* and *de facto* control over the immigrants and had therefore to be held accountable for the alleged breach of the ECHR.[64]

53. The cases here briefly outlined illustrate the difficulties that states face in the effort to regulate migration flows in accordance with ECHR standards. They also highlight the judicial policy on immigration of the Court, which is to extend, as far as possible, the applicability of the ECHR, even where the existence of an "effective control" over the immigrants by the state is at least doubtful; a policy which is likely to elicit counter-productive effects. The above-mentioned difficulties have in fact led some states to circumvent the obligations provided by the ECHR by enlarging the process of externalisation of their borders, so to "neutralize" the jurisdiction of the Court. This has been done in two ways. The first one corresponds to the above mentioned second scenario and entails a direct regulation over migration flows by state authorities, but within third countries. As has been tellingly described in the literature: "[it] consists of moving the border outward and creating a "metaphorical" border in a third State through which a Member State can implement its border control *directly* in the third State".[65] In short: states may well enter into specific agreement with third states (normally states which immigrants are bound to pass through) to allow their officers to "assist" the local authorities in managing immigration issues.

54. In such a scenario, lacking a specific precedent, the doctrine points out that states' responsibility under the ECHR shall not be excluded *a priori*. In fact, although dislocated within a third state, states continue to exercise direct (*rectius*: effective) control through their authorities *in loco*. As *Al-Skeini* shows, the jurisdiction of the Court can be established also over conducts occurred in third states, and thus within a competing jurisdiction.[66] However, especially when states' officers only discharge an advisory role, it becomes extremely demanding for the applicant to prove (and for the Court to ascertain) whether and to what extent states actually exercise effective control over the territory or the immigrants who complain a breach of the ECHR in their treatment. In the absence of any kind of legally based presumption (as the one descending from the military occupation of a portion of territory), the applicant will have in fact to demonstrate that such violation is directly attributable to member State's authorities and that it has been carried out under their effective control, and not only upon their advice or indication.

55. Finally, under the third scenario border control externalisation is at its full extent and member States' responsibility for a breach of the ECHR provisions (or customary human rights law, for that matter) occurred within a third state cannot be invoked before the Court. In these cases, the relocation of member States' borders take place "indirectly" through the conclusion of specific agreement with third states. The control is here indirect, for is driven by member States' policies but is implemented by third states' authorities. Member States cannot therefore be held accountable for any of those violations, since they do not exercise control (let alone effective control) over the territory or the persons involved, although they

[64] *Ibidem*, paras 79-82.
[65] Frank Mcnamara, 'Member States Responsibility for Migration Control within Third States – Externalisation Revisited' (2013) 15 European Journal of Migration and Law, 327.
[66] *Al-Skeini and Others v the United Kingdom*, para 130 ff.

do might be held responsible in layman's terms. Clearly, this latter way of circumventing the Court's control on the management of migration flows is totally at odds with the very purpose of the ECHR. This may create political tensions within the very Council of Europe.

56. As recent as 11 October 2017, Nils Muiznieks, the current Council of Europe's Commissioner for Human Rights, has for instance asked Italy for information about the agreement concluded by the latter with the Libyan Government(s), following which the departures of immigrants from the Libyan coasts have dropped dramatically. Indeed, the inhuman and degrading conditions under which migrants are detained by the Libyan "authorities" are public domain, having been exposed by numerous media and NGOs and addressed even by the UN's Security Council.

57. To conclude, the protection of immigrant rights under member States' jurisdiction is one of the most complex challenges that the Court will face in the near future. This short excursus on immigration and extra-territorial jurisdiction was intended to foster the debate on the relevant judicial policies adopted by the Court which, in full compliance with the spirit of the ECHR, seem to be aimed at ensuring the widest protection of immigrants' rights. This, however, has triggered the escape of member States from the jurisdiction of the Court by means of a direct or indirect "externalisation" of border control. As the recent case of the agreement on the containment of migratory flows between Italy and Libya shows, the Court's immigration policy risks ultimately to frustrate its very scope, namely to guarantee, as far as possible, those rights owned by all human being, from the citizens of the First World, to the immigrants from the poorest countries.

C) Possible Responses

i. Interpreting 'Jurisdiction' to Reflect Public International Law

58. The meaning(s) of extraterritorial application of the Convention, as an international treaty, should be within a general framework of jurisdictional analysis in public international law. This does not deny the notion of extraterritorial jurisdiction per se; yet extraterritorial jurisdiction has to be adequately grounded in international law. It follows that general principles of international law may seem to provide the most obvious guidance in interpreting the meaning of 'jurisdiction' under Art. 1.

59. One approach to interpreting 'jurisdiction' under Art. 1 would be to import the recognized exceptions justifying extraterritorial jurisdiction under public international law: (1) nationality, (2) passive personality, (3) the protective principle, and (4) universal jurisdiction.

60. The Court should embrace public international law when defining jurisdiction, as the purpose of the Convention and the Court is to integrate its associated body of law into the international legal system. By deferring to customary definitions of jurisdiction under international law, the Court would be fulfilling its proper role as part of an evolving, complementary international legal system, with public international law as the unifying source of norms. By developing public international law in the European Convention context, the Court would avoid detaching itself from general international law.

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2. Interaction between the resolutions of the Security Council and the European Convention on Human Rights

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61. While conflicts between international norms have always existed, the increasing fragmentation of international law has multiplied and deepened these clashes. The flourishing of self-contained or autonomous legal regimes at the international and regional levels, guided by different aims and principles and accompanied by their own decision-making and monitoring bodies, arguably poses a threat to the unity and coherence of international law.

62. The present contribution focuses on the potentially conflicting relationship between the resolutions of the UN Security Council (UNSC), entrusted by the UN Charter with the "primary responsibility for the maintenance of international peace and security", and the European Convention on Human Rights (ECHR). The collision between the obligations deriving from these sets of norms might materialise in various areas: to date, the UNSC resolutions that have posed the greatest challenges in terms of compatibility with ECHR obligations are those establishing peace-keeping operations or the administration of territories and those imposing targeted sanctions on individuals.

63. Before turning to the analysis of the case-law of the European Court of Human Rights (ECtHR) on the matter, the normative framework to deal with a potential conflict between UNSC resolutions and the ECHR will be outlined: to this end, particular attention will be paid to the peculiar nature and effects of Article 103 of the UN Charter within the international legal system. The approach taken by the ECtHR in resolving apparent contradictions between the Convention and UNSC resolutions will then be analysed in this light; reference to the jurisprudence of the Court of Justice of the European Union (CJEU) and to that of domestic courts might be made when appropriate. Finally, the contribution will highlight the challenges raised and put forward possible solutions to them.

a) Observations

64. International law is commonly described as a horizontal and non-hierarchical legal system, whereby *inter alia* customary law can be derogated from by treaty law and vice versa. The common principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali* apply. Furthermore, Article 30 of the Vienna Convention on the law of treaties (VCLT, most provisions of which are considered customary law) enshrines additional rules concerning successive multilateral treaties encompassing incompatible obligations. When not all parties to the first treaty are also parties to the successive one, States that are parties to both incompatible treaties remain bound by them and will thus incur in international responsibility. However, Article 30 itself opens with the caveat that the rules contained therein are "subject to Article 103 of the Charter of the United Nations".

i. The primacy of the Charter of the United Nations

65. Article 103 of the UN Charter reads as follows: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

66. Thus, Article 103 establishes the primacy of the obligations deriving from the UN Charter over the obligations deriving from any other international treaty. There is not unanimous agreement on the nature of this provision and, relatedly, on its exact legal consequences: those who identify Article 103 as a hierarchy norm, or even a constitutional one, tend to consider treaty obligations contrary to UN Charter obligations radically null and void. According to a more nuanced view, Article 103 is a norm of conflict, which merely suspends the contrasting obligations, to the extent that and as long as they conflict with UN Charter obligations, but does not make them invalid. Either way, treaty obligations clashing with UN Charter ones are set aside.

67. Reference to the "obligations of the Members under the Charter" is widely interpreted as including obligations stemming from the acts of UN bodies, including decisions of the UNSC. Indeed, Article 25 of the Charter compels Member States to "accept and carry out the decisions of the Security Council": such an obligation clearly falls within the scope of application of Article 103.[67] While this clause is normally understood to cover binding acts of UN bodies, "authorisations" adopted by the UNSC in the framework of Chapter VII of the Charter shall also be included, as they constitute – for how the UN system of collective security has evolved – the main instrument at the disposal of the UNSC to pursue its fundamental aim of maintaining and restoring international peace and security.[68] Ensuring the effectiveness of the UNSC action in this area is of paramount importance and justifies a reading of Article 103 which extends to this particular kind of acts.

68. Whereas Article 103 refers to obligations under "international agreements", it is widely accepted that UN Charter obligations also prevail over customary law.[69] There exists, nonetheless, a limit to the operation of Article 103 – i.e., *jus cogens.* A *jus cogens* norm or peremptory norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (Article 53 VCLT). That peremptory norms restrict the application of Article 103 has been argued, among others, by Judge Lauterpacht in his separate opinion to *Genocide Convention*: "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*".[70] The authoritative opinion of Judge Lauterpacht has

[67] Cf. International Court of Justice 1992, *Montreal Convention*, para. 42. Cf. also International Law Commission (ILC) 2006, para. 331.
[68] This position is expressed, among others, by House of Lords 2007, *Al-Jedda*, para. 33. In the literature, cf. Kolb 2004; and Frowein and Krisch 2002: 729.
[69] ILC 2006, paras. 344-345.
[70] ICJ 1993, *Genocide Convention*, para. 100.

been referred to explicitly by the House of Lords in the *Al-Jedda* case to hold that *jus cogens* only could trump the application of Article 103 (see below). A similar conclusion was reached by the Swiss Federal Court in the *Nada* case (see below) and by the then Court of First Instance of the EU in *Kadi I*,[71] as well as by the Appeals Chamber of the ICTY in *Tadić*.[72]

69. While neither the VCLT nor other international instruments identify peremptory rules, reflection by scholars and elaboration by national and international courts have resulted in a list of norms which appear to be deemed non-derogable by the international community: these include the prohibition of aggression, as well as of slavery, genocide, apartheid and racial discrimination, torture; the principle of self-determination; and the fundamental principles of international humanitarian law.[73] While there is by now broad agreement on this list, State and judicial practice is limited: reference to *jus cogens* is most frequently made in international and domestic courts' *obiter dicta* and separate opinions and, in any event, no treaty (or UNSC resolution) has been declared invalid for being contrary to *jus cogens* norms.[74] Also, in the absence of generally supported criteria to identify peremptory norms, doubts persist as to the inclusion of other rules in the *jus cogens* category.

70. In the area of human rights, some have argued that *jus cogens* is comprised of those human rights that are non-derogable by States even in times of emergency: however, instruments such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights contain long catalogues of non-derogable rights, including the right to a name and the prohibition of civil imprisonment, which are certainly not considered peremptory by the international community as a whole.

71. Aside from the identification of non-derogable rights as *jus cogens* norms, the fact that these rights should draw the line of the Council's permitted action is argued autonomously, by maintaining that if these rights act as limits for States in times of emergency, they should also act as limits for the UNSC when intervening to safeguard international peace and security. Such an approach seems however to disregard the distinct ad crucial importance of the maintenance and restoration of international peace and security and to ignore Article 103. In any case, the "common core" of non-derogable rights (i.e., those that are identified as non-derogable by the main human rights instruments, including the ECHR) are limited to the above-mentioned *jus cogens* human rights norms: the rights engaged by most complaints lodged against UNSC restrictive measures – i.e., the rights to property, to respect for private and family life, and to a fair trial – are therefore not included.

72. In looking for other potential human rights limitations to the content and implementation of UNSC resolutions, it has been argued that, since the UNSC "shall act in accordance with the Purposes and Principles of the United Nations" (Article 24 of the Charter) and these also include respect for human rights and fundamental freedoms (Articles 1(3) and 55), any determination by this organ which infringes upon these norms shall be considered *ultra vires* and thus invalid. It is however clear that leaving the assessment of UNSC decisions' substantive compliance with the Charter principles to Member States would jeopardise the action of the Council and, ultimately, international peace and security;

[71] Court of First Instance (EU) 2005, *Kadi I*, paras. 226 *et seqq*..
[72] ICTY 1999, *Tadić*, para. 296.
[73] A list is included in ILC 2001, Commentary to Article 26.
[74] Cassese 2005: 209.

an assessment of formal compliance with the powers and procedures laid down in the Charter might only be accepted.[75] This conclusion is supported by the jurisprudence of the International Court of Justice, which has itself exercised significant self-restraint in the review of UN organs' acts and long held that "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned"[76] and that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[77] This is all the more true for resolutions adopted by the UNSC under Chapter VII, in light of the wide discretion retained by the Council in determining the existence of a threat to or a breach of the peace or an act of aggression, and in deciding what measures to adopt. Finally, with regard to human rights, the provisions of the Charter appear extremely vague and could at most act as guidelines, whereas it would be hard to derive specific constraints on the action of the UNSC therefrom.

73. *Jus cogens* thus gives rise to the only substantive limitations to the operation of Article 103 that can be argued convincingly.

ii. Case-law of the European Court of Human Rights

74. A brief overview of the most significant judgments of the ECtHR concerning the interaction between UNSC resolutions and the ECHR is outlined below.

α) Behrami and Behrami v. France and Saramati v. France, Germany and Norway (Grand Chamber, 2 May 2007)

75. The two cases concerned facts occurred in Kosovo after UNSC Resolution 1244 (1999) was adopted establishing an international security presence (KFOR) and an international civil presence carrying out interim administrative functions (UNMIK) on the territory. More specifically, the applicants in the *Behrami* case complained, under Article 2 ECHR, about the serious injuries sustained and the death of a next-of-kin as a consequence of the detonation of bombs dropped by NATO, which French KFOR troops were allegedly mandated to mark and defuse. On the other hand, Mr Saramati complained under Articles 5 and 6 for his extra-judicial detention by KFOR forces (whose commanders were Norwegian and French).

76. The ECtHR preliminarily examined the admissibility of the complaints *ratione personae*, in light of the defendant States' contribution to the civil and security missions in Kosovo (para. 71). The Court first of all ascertained that UNMIK was in charge of de-mining, whereas the issuance of detention orders was the responsibility of KFOR (paras. 123-127). It then proceeded to examine whether the contested acts and omissions of KFOR and UNMIK should be attributed to the defendant States or to the UN and concluded that this latter was the case, as UNSC Resolution 1244 was adopted within the framework of Chapter VII of the

[75] This is the explicit position of the Swiss Federal Court in the *Nada* case. In the literature, cf. Delbrück 1994: 413-414.
[76] ICJ 1971, *Namibia*, paras. 87 *et seqq.*.
[77] ICJ 1962, *Certain Expenses*: 168.

UN Charter, the UNSC retained "ultimate authority and control" over KFOR,[78] and UNMIK was to be considered a subsidiary UN organ.

77. The Court noted, in this respect, that the UN is an international organisation with distinct legal personality and that it is not a party to the ECHR. The ECtHR then highlighted additional differences that, in its opinion, distinguished the *Behrami* and *Saramati* cases from its *Bosphorus* precedent: "in the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities" (para. 151). Most of all, the UN is identified as a unique organisation, namely one with "universal jurisdiction fulfilling its imperative collective security objective" (*ibid*.). The importance of the UN mandate to maintain international peace and security, for which primary responsibility is entrusted to the UNSC, appears to be a crucial element to exclude the Court's scrutiny.

78. While Article 103 was only incidentally mentioned, and the potential conflict between ECHR-protected rights and UNSC resolutions not examined, since the ECtHR excluded its competence *ab origine*, the judgment established a clear hierarchy in the face of "the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII" (para. 148). Voluntary acts of Member States, such as the contribution of troops to UNSC missions, were also covered, insofar as they appear critical for the achievement of that aim and the exercise of those powers (para. 149).

β) Al-Jedda v. the United Kingdom (Grand Chamber, 7 July 2011)

79. The facts of *Al-Jedda* resembled those of *Saramati*: the applicant complained about his prolonged detention in a facility run by British forces in Iraq, without any charges brought against him or any evidence disclosed. According to the House of Lords, nonetheless, the two cases differed on important aspects: in particular, "the Multinational Force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq" (para. 24). These elements led the Lords to conclude that the UN did not exercise effective control over UK troops, and their acts could not therefore be attributed to the international organisation. The House of Lords thereafter found that a conflict indeed existed between UNSC Resolution 1546 and Article 5(1) ECHR, and that – in such an instance – Article 103 made UNSC resolutions prevail (para. 39), while stating that the UK "must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention" (*ibid*.).

80. The ECtHR agreed with the House of Lords on the facts and held, on these bases, that the acts and omissions of the Multinational Force were attributable to the troop-contributing States (para. 84). Once ascertained the jurisdiction of the UK over the applicant, the ECtHR set out to consider whether the obligations imposed on the UK by UNSC resolutions 1511 and 1546 conflicted with those deriving from Article 5 ECHR.

[78] The elaboration and use of the "ultimate authority and control" test, in contrast with the "effective control" test endorsed among others by the ILC, has been criticised: cf. Gaja 2009, para. 26. In *Al-Jedda*, the ECtHR applied both tests cumulatively.

81. The Court noted, first of all, that the promotion of respect for human rights also features among UN main purposes; it further made reference to Article 24(2) of the UN Charter. The Court derived a presumption therefrom that the UNSC does not require Member States to violate human rights: it follows that "in the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most *in harmony* with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that *clear and explicit language* would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law" (para. 102; emphases added).

82. Such a clear language could not be found by the ECtHR in UNSC Resolution 1546: according to the Court, internment – let alone indefinite internment without charges – was not explicitly mentioned in the Resolution, but only included in the US Secretary of State's letter, annexed to the Resolution, as one of the "broad range of tasks" that the Multinational Force could carry out (para. 105). In noting, further, that the Preamble of the Resolution referred to respect of international law and that the UN Secretary-General and the UN Assistance Mission for Iraq complained about the use of internment made by the Multinational Force, the ECtHR concluded that "in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention" (paras. 105-109). It went on to establish a violation of Article 5(1) and award damages to the applicant.

γ) Nada v. Switzerland (Grand Chamber, 12 September 2012)

83. In the case at hand, the ECtHR was called upon to scrutinise the alleged violation of ECHR rights of a person subjected to UNSC individual targeted sanctions. Mr Nada, an Italian and Egyptian businessman, lived in Campione d'Italia, an Italian enclave of 1.6 sq. km in Swiss territory. In November 2001, the applicant's name was included in the UN Sanctions Committee's list of persons and entities associated with Al-Qaeda or the Taliban regime; since May 2002, he was subjected to an entry-and-transit ban and forbidden to leave Campione. The Swiss Federal Court had dismissed the applicant's complaint by maintaining that the UNSC resolutions at issue did not leave a margin of appreciation to Member States; that Switzerland could not discontinue the imposition of sanctions on its own initiative; and that, in light of Article 103 UN Charter, Switzerland's obligations under UNSC resolutions prevailed over those flowing from the ECHR (with the sole limit of *jus cogens* obligations, which were not however found to be engaged in the case considered). The applicant was delisted in September 2009.

84. The ECtHR found, at the outset, to be competent *ratione personae*, on the ground that the UNSC resolutions in question required implementation by States, so that the restrictive measures adopted against the applicant shall be attributed to Switzerland and not to the UN. As regards the merits of the complaint, the ECtHR first examined the alleged violation of Article 8 ECHR and held that while the interference with the applicant's right to respect for his private and family life had a legal basis and a legitimate aim, it was not necessary in a democratic society. The premise to such conclusion was the consideration

that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions" of the UNSC (para. 180). The Court further noted that, even though investigations against Mr Nada by Swiss authorities were closed in May 2005, Switzerland did not notify the UNSC Sanctions Committee until September 2009, thus supposedly unduly prolonging the application of restrictive measures against the applicant. Furthermore, according to the ECtHR, Switzerland did not take into sufficient account the "very specific situation" of the applicant, with particular regard to his health issues and his residence in an enclave, thereby excessively restricting his freedom of movement (para. 195). In the opinion of the Court, the margin of appreciation left to Switzerland in the implementation of the UNSC resolutions "should have allowed some alleviation of the sanctions regime […] without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions" (*ibid*.). The ECtHR added that this finding made it unnecessary for the Court to rule on the relationship between UN Charter obligations and ECHR obligations: "the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent" (para. 197).

85. As to the alleged violation of Article 13 ECHR, the ECtHR explicitly referred to *Kadi I*, as decided by the CJEU,[79] to hold that compliance with UNSC resolutions does not forbid any judicial review of the domestic measures implementing the resolutions. It therefore found a violation of Article 13 ECHR, whereas it dismissed the complaint raised under Article 5 ECHR.

δ) Al-Dulimi and Montana Management Inc. v. Switzerland (Second Section, 26 November 2013, and Grand Chamber, 21 June 2016)

86. Mr Al-Dulimi was considered the head of finance for the Iraqi secret services under the Saddam Hussein regime. His assets and those of his company in Switzerland had been frozen since 1990, when economic sanctions against Iraq were decided by the UNSC; following new UNSC resolutions in 2003, proceedings were commenced in Switzerland for the confiscation of the same assets. The applicants unsuccessfully challenged their listing before the relevant UN Sanctions Committee; they also appealed domestically against the confiscation procedure, but the Swiss Federal Court established the prevalence of the obligations flowing from UNSC resolutions, as respect for the right to fair trial cannot be included among *jus cogens* norms and no room for manoeuvre was afforded to Switzerland in the implementation of the sanctions.

87. As in *Nada*, the Chamber affirmed its jurisdiction based on the attributability of the restrictive measures to the Swiss Government. After acknowledging the lack of discretion left to States in the implementation of their UNSC obligations, the Court applied the *Bosphorus* "equivalent protection" test and found that the protection afforded to the applicants by the UN system, notwithstanding recent reforms, was not equivalent to that required under the ECHR (paras. 114-121). By finding that no means of judicial review were available to the applicants, either at the UN or at the national levels, the Court held that "the very essence of their right of access to a court was impaired", and established a violation of Article 6 ECHR (paras. 134-135).

[79] CJEU 2008, *Kadi I.*

88. The Swiss Government asked for a referral to the Grand Chamber, which equally found a violation of Article 6 ECHR, but through a different approach. The Grand Chamber accepted that a limitation to the right of access to a court was in place, and that such a limitation pursued a legitimate aim. In examining whether the restriction on the applicants' rights was also proportionate, the Court referred to Article 103, but found that a conflict between UN Charter obligations and ECHR obligations did not exist in the case at hand (as was the case in *Al-Jedda* and *Nada*). The presumption set out in *Al-Jedda* was reiterated and the Court held in this respect that nothing in the relevant UNSC resolutions explicitly prevented Member States from allowing their courts to review national implementing measures (para. 143). In light of this and of the seriousness of the restrictions imposed, UNSC resolutions "must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided" (para. 146). In the opinion of the Court, by applying the (allegedly circumscribed) arbitrariness test, a fair balance can be struck between respect for human rights and international peace and security. As a result, States Parties would violate the Convention if they implemented the restrictive measures "without first ensuring – or being able to ensure – that the listing is not arbitrary" (para. 147). By not allowing such a scrutiny, Switzerland did not demonstrate that it took "all possible measures to adapt the sanctions regime to the individual situation of the applicants" and thus violated Article 6(1) ECHR.

b) Analysis of the challenges

89. Confronted with potential conflicts between UN Charter obligations and ECHR obligations, the ECtHR has adopted a harmonisation approach by which it aims – through interpretive means – to reconcile these obligations and avoid any clash. In practice, such an approach led the ECtHR to find that the UK and Switzerland were not implementing UNSC resolutions *stricto sensu* when they respectively detained Mr Al-Jedda without charges and denied Mr Al-Dulimi a national judicial review of the sanctions imposed on him, as these measures were not explicitly laid down in the UNSC resolutions at stake. In *Nada*, the absence of normative conflict was argued on the basis of an alleged room for discretion that Switzerland did not make use of when implementing the relevant UNSC resolution.

90. The harmonisation approach has several advantages. It is in keeping with the "strong presumption against normative conflict" which characterises international law,[80] and thus promotes its unity and coherence. It complies with the long-held principle that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law" – i.e. the embeddedness of the ECHR in the international legal system, in contrast with the autonomy of the EU legal order as affirmed by the CJEU. The harmonisation approach also suits the presumption that the UNSC would not deliberately violate a *jus cogens* norm,[81] and would adopt a clear language when requesting Member States to breach fundamental rights (cf. ECtHR in *Al-Jedda*). Finally, it prevents States from incurring in international responsibility by breaching either one of their obligations.

[80] ILC 2006, para. 37.
[81] ICJ 1993, *Genocide Convention*, para. 102.

91. However, systemic integration of conflicting obligations is not always possible. Nonetheless, with a view to giving precedence to human rights, the Court has until now avoided to apply the appropriate conflict-solution norm – i.e., Article 103 UN Charter. While in *Al-Jedda* the absence of a clear-cut obligation of internment in the text of the UNSC resolution could arguably allow for a harmonious interpretation of the UNSC instrument and the ECHR, this does not appear to be the case in *Nada*, nor (especially) in *Al-Dulimi*. In both instances, the Court put forward an interpretation of the relevant UNSC resolutions that stretches their letter and context with a view to reconciling irreducibly opposing obligations. While recognising that the imposition of travel bans and asset freezes by the UNSC inevitably restricts human rights and is intended to prevail over Member States' obligations in this area (*Nada*, para. 172), the Court identified doubtful room for manoeuvre for States in the implementation of the restrictive measures (*Nada*) or derived the possibility of national judicial review regarding the listing and imposition of sanctions from the absence of an explicit prohibition in the UNSC resolution (*Al-Dulimi (Grand Chamber)*). These findings run contrary to the ordinary meaning of the relevant resolutions (which *inter alia* referred to the adoption of the prescribed measures "without delay"), and to the interpretation given to them by the UNSC, other UN organs and UN Member States. The UNSC has clearly intended to create a centralised system of individual restrictive measures, whereby the listing and delisting of natural and legal persons are carried out exclusively by the bodies designated by the UNSC, in accordance with the procedures laid down by the UNSC itself. Exemptions from the sanctions regime are also regulated by UNSC resolutions, which contain exhaustive lists of grounds. A decentralised, State-based judicial review, as well as a national margin of appreciation in the implementation of the sanctions, are excluded by the need to ensure that sanctions are effectively and uniformly applied in all Member States.

92. Significantly, doubts about the actual discretion left to States in the implementation of UNSC resolutions, as well as about the room for national judicial review, were expressed by various judges of the ECtHR in their concurring and dissenting opinions (Judges Bratza and Malinverni in *Nada*, Judges Sajó and Lorenzen in *Al-Dulimi (Second Chamber)*, Judges Keller and Nussberger in *Al-Dulimi (Grand Chamber)*), as well as by the majority in one case (*Al-Dulimi (Second Section)*). This adds further uncertainties to the stance of the Court on the issue of potential conflict between ECHR and UNSC obligations.

93. By striving to harmonise apparently incompatible obligations, the ECtHR has never dealt with the impact of Article 103 UN Charter on States' ECHR obligations. After denying the existence of a conflict between UN Charter and ECHR obligations, the Court explicitly stated, on multiple occasions, that it did not find it necessary to rule on the issue of the primacy of UN Charter obligations and the effects of Article 103 on the ECHR. When it did recognise a conflict (*Al-Dulimi (Second Section)*), it did not take the rule into consideration. This is notwithstanding Article 103 is considered by the international community a cornerstone of the international legal order and acquires special significance when collective security is at stake, as is the case with UNSC resolutions adopted under Chapter VII. Such a crucial issue has nonetheless been left open by the ECtHR.

94. Another related issue which has not been dealt with consistently by the ECtHR is the operation of the concept of "equivalent protection". Fully developed by the Court in *Bosphorus* and thereafter applied to several cases mainly involving the European Union, the equivalent protection test implies that, as long as an international organisation is considered

to ensure a protection of human rights comparable to that of the ECHR, the presumption exists "that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation" (*Bosphorus*, paras. 155-156). In *Al-Dulimi (Second Section)*, once recognised the existence of a normative conflict, the Court found the equivalent protection test to be applicable, and established a violation of Article 6(1) after rebutting the presumption at issue. A similar approach was endorsed by Judges Pinto de Albuquerque and Keller in their concurring opinions to *Al-Dulimi (Grand Chamber)*. However, it is doubtful that the equivalent protection test can be applied to the UN, as in this case it is for Article 103 to resolve possible normative conflicts: there is therefore no need for the *Bosphorus* presumption (cf. the opinions of Judges Sicilianos and Nussberger to *Al-Dulimi (Grand Chamber))*.

c) Possible responses

95. As mentioned, while the harmonisation/systemic integration approach appears in general well-suited to deal with conflicts between international obligations, its application cannot come at the cost of a subversion of basic rules of treaty interpretation, according to which a treaty (but the rule can be extended to UNSC resolutions) "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31 VCLT). When there is no room for the harmonisation of two opposing obligations, the existence of a normative conflict shall be recognised and, if a UNSC resolution is involved, precedence shall be granted to the obligations flowing from this instrument, in compliance with Article 103 UN Charter. This provision is specifically designed to resolve normative conflicts in such instances: it ensures that the fundamental aims of the Charter are not impaired (particularly that of the maintenance and restoration of international peace and security), that States do not incur in international responsibility when some obligations (namely, UN Charter ones) are considered overriding by the international community, and that the consistency of the international legal system is preserved.

96. On the contrary, by insisting on a harmonious interpretation which is not reflected in the text of the UNSC resolutions or in their understanding by the UNSC and UN Member States, the ECtHR would in fact bypass Article 103 to make human rights obligations prevail. Far from avoiding a normative conflict, the ECtHR would put States parties to the ECHR before a dilemma: either contravening ECHR provisions as interpreted by the ECtHR or violating UNSC resolutions. However, this should not be an issue of successive incompatible treaties nor of States' international responsibility, as there exists a clear conflict-solution rule which stipulates the primacy of UN Charter obligations. As mentioned, a substantive limit applies to the precedence of UN Charter obligations – that is, compliance with *jus cogens* norms. However, notwithstanding an incipient trend towards considering the fundamental tenets of the right to a fair trial *jus cogens*, neither this right nor the rights to respect for private and family life and to property are currently accepted by the international community as a whole as norms from which no derogation is possible. The primacy of the obligations flowing from UNSC resolutions imposing targeted sanctions cannot therefore be contested convincingly at present.

97. It is in any case important that the ECtHR deals with the Article 103 issue and gives clear indications to States as to how they should act when confronted with conflicting

obligations deriving from the ECHR and from UNSC resolutions which leave no discretion to States. Due to the increasing number of UNSC resolutions imposing targeted sanctions, and their increasingly specific language, clarifications on this point are of the utmost urgency.

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