COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DH-SYSC-II(2018)16

1 August 2018

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

_____

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

_____

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

_____

Revised draft chapter of Theme 1, subtheme ii):

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

(as written by co-Rapporteurs Mr Alexei ISPOLINOV and Mr Chanaka WICKREMASINGHE in view of the 4th DH-SYSC-II meeting, 25-28 September 2018)

DRAFT for discussion

Note: The present document contains both versions of the revised text submitted by the co-rapporteurs, namely a "clean" version of the revised text, followed by a version showing, with tracked changes, the amendments made to the initial version of the text discussed in the third meeting of the DH-SYSC-II in April 2018 (document DH-SYSC-II(2018)07). The paragraph numbering in the clean version has been slightly adapted so as to run consecutively.

STATE RESPONSIBILITY AND EXTRATERRITORIAL APPLICATION OF THE CONVENTION

1. This contribution was prepared at the request of the 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). The co-rapporteurs are grateful to the contributors for their valuable input. The co-rapporteurs also took into account the results of the Seminar on the place of the Convention in the European and international legal order organised in March 2017 for launching of the work of the DH-SYSC-II.

2. In considering the place of the Convention in the international legal order, a key focus of the court's caselaw and academic commentary has been on the core obligation contained in Article 1 of the Convention that State Parties shall secure to everyone within their "jurisdiction" the rights and freedoms set out in the Convention. The vast majority of cases concern challenges to the actions of a State within its territory and therefore the application of the notion of "jurisdiction" is clear, and does not require further interpretation. However there are two situations where a respondent State may dispute the question of jurisdiction: (a) where the respondent State denies that it was exercising "jurisdiction" on the basis that it was not responsible for the impugned act; or (b) where the respondent State acts outside its own territory, and therefore denies that its acts were an exercise of "jurisdiction". In such cases, there are extensive bodies of international law on the notions of international responsibility and State jurisdiction. The Court has the ability to draw on these bodies of law, when construing the obligation in Article 1, not least by its reliance on the international law rules of treaty interpretation and in particular Article 31(1)(c) of the Vienna Convention on the Law of Treaties.

3. The notion of "jurisdiction" in international law refers to the exercise of lawful power by a State to affect persons, property, and circumstances. Such may be exercised through legislative, executive, or judicial actions Legislative jurisdiction is exercised primarily in respect of persons, property and circumstances within the territory of the State, but can sometimes be exercised extraterritorially. [1]Enforcement jurisdiction (i.e. the powers of the courts and the executive actually to enforce the law) can only be exercised on the basis of territoriality (though international co-operation through measures such as extradition, mutual legal assistance, recognition and enforcement of judgments may contribute to the exercise of enforcement jurisdiction). But the notion of 'jurisdiction' in human rights treaties refers to the jurisdiction of a state, not to the jurisdiction of a court.

4. The notion of State responsibility in international law addresses the identification of an internationally wrongful act and the consequences that flow from it. For these purposes an internationally wrongful act is an expression that covers both actions and omissions, and the wrongfulness or otherwise of such conduct is to be judged according to the requirements of the allegedly violated obligation. "every internationally wrongful act of a State entails the international responsibility of that State". Within this body of law the notion of "attribution" is

[1] As is well known the Harvard Draft on Jurisdiction identifies five principles for the exercise of legislative jurisdiction,namely

used to determine when there is a sufficiently close link between a certain conduct and a State so as to consider that conduct as an "act of the State"

Structure of the Report

A. The application of the international law of State responsibility by the ECtHR
Introduction
Caselaw of the Court
(i) Cases concerning questions of attribution of the actions of private or non-State actors to a State;
(ii) Cases concerning questions of attribution in situations in which more than one state was involved in the underlying facts;
(iii) Cases concerning attribution in situations in which one or more states and an international organization were involved in the underlying facts.
Discussion
B. Extraterritorial application of the ECHR
Introduction
The caselaw
(i) Bankovic
(ii) Caselaw leading to Al Skeini
(iii) The caselaw post-Al Skeini
Discussion

A. State Responsibility in International Law

Introduction

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

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

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

7. The Court has never expressly claimed that the regime of State responsibility under the Convention constitutes *lex specialis* except in respect of Article 41 concerning just

satisfaction ("bearing in mind the specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law"[2]).

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

Caselaw

9. In its caselaw, the ECtHR generally does not explicitly address the question of the attribution of the conduct that is alleged to have violated the ECHR to the respondent State. However in a relatively small number of cases (which very largely relate to extraterritorial jurisdiction) the issue of attribution has been addressed, usually when a Respondent State has raised it, although on occasion the Court has inquired into attribution of its own accord.[3]

10. For the purposes of this analysis, it is useful to distinguish different categories involved in the underlying facts:

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

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

11. The Court started to deal with the issues of jurisdiction and attribution well before most states of the Council of Europe joined ECHR (in cases Cyprus v Turkey (1975) Stocke (1989) and Loizidou (1996). In *Loizidou v. Turkey,*[4] 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.[5] The Court has described the relevant standard for determining

---

[2] ECtHR, *Cyprus v. Turkey*, Just satisfaction (Judgment), para

[3] See e.g. *Stephens v. Malta (no. 1)*, no. 11956/07, § 45, 21 April 2004.

[4] The case originated from the complaint of Cypriot national of Greek origin from Kyrenia in northern Cyprus who had moved to Nicosia after her marriage in 1972. She claimed to be the owner of several plots of land in Kyrenia claimed that since the invasion of Turkish forces in 1974, she had been prevented from returning to Kyrenia and the use of her property.

[5] *Loizidou v. Turkey*, *supra* note 50, § 64.

attribution as follows:

> "… the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory.
> The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (see the above-mentioned Loizidou judgment (preliminary objections), ibid.)."[6]

12. 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)."[7]

13. 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 by arresting the four Moldovans in 1992 and sentencing them a year later for "terrorist attacks" on the enclave´s citizens during a war between MRT and Moldova in 1991. 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.

14. 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."[8]

---

[6] *Loizidou v. Turkey*, *supra* note *13* § 52
[7] Ibid., § 56.
[8] *Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99, § 382, ECHR 2004-VII.

15. 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."

16. In its discussion of State responsibility in *Loizidou* the Court appears to have found that all actions of the TRNC were attributable to Turkey. If this is the correct 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.[9]

17. 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.[10] 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 significantly lower threshold than, the restrictive effective control approach, which classically requires evidence of factual control over specific conduct, which is favoured in the ICJ jurisprudence. .[11]

---

[9] 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 European Court of Human Rights: […] Loizidou v. Turkey, Merits, Eur. Court H.R., Reports, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310, p. 23, para. 62 (1995)."

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

[11] Se also in this respect the findings of the International Court of Justice in *Nicaragua v. USA* [1986] ICJ Rep. 14, at pp 62 and 64-5, paras 109 and 115; and also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep. 42, at pp. 207-211, paras 398-407

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

18. A number of judgments of the ECtHR have dealt with attribution of conduct in cases in which more than one State was involved in a single injury/ claim. These are typically cases in which two States act independently of each other and where the Court determines the responsibility of each Contracting State individually, by assessing the State's own conduct in relation to its Convention obligations. In this regard *Ilaşcu* is a relevant example. In this case the Court held Moldova and Russia responsible, each for different acts or omissions that the Court attributed to the State concerned. Those acts and omissions contributed to one injury/claim.

19. Other examples include the case of *Rantsev v. Cyprus and Russia*[12], and *Stojkovic v. France and Belgium*.[13] 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.[14]

20. In a number of other cases, the ECtHR was confronted with conduct by a State organ that had 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 (the applicants in this case complained of the unfairness of their trial in Andorra (which the Court held it had no jurisdiction to investigate) and of their detention in France,* At issue in this case was the attribution of the conduct of French and Spanish judges carrying out judicial functions in Andorra. On this point, the Court accepted the arguments of the respondent Governments. It held 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."[15]

21. In another category of cases, the ECtHR has attributed the conduct of one State to another. Thus in the case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, 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.

22. The Court held that the treatment suffered by the applicant at Skopje Airport at the hands

---

[12] *Rantsev v Cyprus and Russia*, no. 25965/04, ECHR 2010. The case concerned the death of Oxana Rantseva in Cyprus and was brought by her father. The Court dealt with this case from the angle of human trafficking.

[13] *Stojkovic v France and Belgium*, no. 25303/08, 27 October 2011. The case originated from the complaint of Mr. Boban Stojkovic detained in Bruges (Belgium) and then interrogated by the French official without presence of the lawyer

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

[15] Ibid., § 96.

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)."[16]

23. 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 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.[17]

24. The Court held the respondent State responsible for the applicant's subsequent detention in Kabul. It referred in this regard to "attribution of responsibility" to that State.[18] It considered that:

> "239. …The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004 (see, mutatis mutandis, Rantsev v. Cyprus and Russia, no. 25965/04, § 207, ECHR 2010).
>
> 240. Having regard to the above, the Court considers that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law (see paragraphs 95 and 100 above). The applicant's "enforced disappearance", although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity (see Varnava and Others, cited above, § 148). In this connection the Court would point out 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)."[19]

25. 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 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

[16] Ibid., § 206.
[17] Ibid., § 211.
[18] Ibid., § 215.
[19] *I*bid., § 239-240.

above, § 318; and El-Masri, cited above, § 206)."[20]

26. 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 his destination.[21] 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)."[22]

27. 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). This was so even despite findings that Poland was not directly involved in the interrogations (and, therefore, the torture inflicted in Poland), and that it was unlikely that the Polish officials witnessed or knew exactly what happened inside the facility, Poland's responsibility was based on having facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring.

28. 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.[23]

29. 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 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.[24]

30. 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* 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

---

[20] A*l-Nashiri v. Poland*, no. 28761/11, § 452, 24 July 2014.
[21] Ibid., § 453.
[22] Ibid., § 457.
[23] Ibid., § 518.
[24] *Nasr and Ghali v. Italy*, no. 44883/09, § 217 – 218, 23 February 2016.

[GC], no 48787/99, § 318, CEDH 2004-VII : El Masri, précité, § 206 et Al Nashiri, précité, § 452)."[25]

31. 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)."[26]

32. The Court thus appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents. The Court also appears to have extended this approach to the transfer of Nasr from Italy,[27] and in respect of his detention in Egypt.

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

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

34. 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 (in this case the Court dealt with responsibility to harm to children from unexploded cluster munitions in the part of Kosovo for which a multinational brigade led by France was responsible. The brigade was part of an international security force (KFOR) deployed pursuant to UN Security Council Resolution 1244.)* and *Al-Jedda v. the United Kingdom (the case concerned indefinite detention of a dual British/Iraqi citizen in a Basra facility run by British forces acting on the basis by UN Security Council resolution 1546.)* These concerned military operations authorized by the United Nations. These are considered in the section of the report on the relationship of the Convention with binding resolutions of the UN Security Council.

Discussion

35. According to legal commentators,[28] the case law of the Court demonstrates that the ECtHR has taken rather varied and uneven approach to the rules on attribution reflected in the ARSIWA, in some case following them expressly,[29] whilst in others it appears to have departed from those rules. The latter include cases related to attribution of conduct in situations that would be covered by the rules of customary international law as contained in

[25] Ibid., § 241.
[26] Ibid., § 289.
[27] Ibid., § 290.
[28] Jane M. Rooney" The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands"// Neth Int Law Rev 2015 vol.62 p.p.407–428 , Kristen Boon Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines// Melbourne Journal of International Law, Vol. 15, No. 2, 2014
[29] Eg. *Loizidou*

ARSIWA. In other words, it appears that in these cases the Court departed from general international law on State responsibility. It is interesting to note that in a number of cases in which the ECtHR departed from general international law, it did so despite having referred to specific ARSIWA articles when listing relevant provisions of international law. The citation of the ARSIWA Articles in this context could be understood as the Court suggesting that it would apply them. But in reality, this was not always what the Court actually did. This leads to a reasonable conclusion that on occasion the Court has sought *de facto* to create on a case-by case basis its own *lex specialis* regime of State responsibility under the Convention, whilst claiming at the same time that it follows the rules of general international law.

36. Such an approach could present a number of problems. The current case-law of the Court has developed the Convention to a point that is markedly different from the prevailing understanding and interpretation of the ECHR at the time when most of the States joined this treaty. This clearly needs careful and sensitive consideration given the consent-based underpinnings of Convention obligations in the international law of treaties. This situation is probably common to the development of the law by a number of international tribunals if we remember that any case law is subject to change, but equally it should be understood that some treaty-regimes are more sensitive than others and may require more diligent analysis.

37. An additional concern may arise where the ECtHR deviates from general international law without doing so in a consistent and coherent manner way.[30] This concern is compounded where explanation of the underlying reasoning for why and how it does so is also absent. This creates uncertainty for the Contracting Parties to the Convention, as they unable to predict the way in which the Court will interpret the rules on attribution in future cases and thus in practice they are left unaware of scope of their obligations under the ECHR (often matters of the greatest political and/or security sensitivity).

38. 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. The Court has expressly acknowledged that there is a conceptual distinction between the two, most recently in its judgment in the *Jaloud case.*[31] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. It has been argued that the Court conflated the two. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a lower threshold than, the "direction or control" criterion used by the ARSIWA.

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

[30] In this respect see the "Conclusions of the 'round table' on cooperation between the Russian Federation and the European court of Human Rights" of 20-121 January 2015, circulated in in the Committee of Ministers, DH-DD(2015)265, 6 March 2016.
[31] ECtHR, *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014.

judicial institution, which is authorised to control proper fulfillment of obligations of the States under the Convention and effectively guarantee the rights of those within their jurisdiction.

B. Extra-territorial Application of the European Convention on Human rights ("the Convention", ECHR)

Introduction

40. There are two Articles of the Convention relate to the scope of its territorial application. Article 1 of the Convention states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". At the same time Article 56 stipulates that "any State may declare that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible". A State making such a declaration may also (but is not obliged to) accept the competence of the Court to receive and examine individual applications in relation to such territories.

41. The drafting history of Articles 1 and 56 reveals that it was Article 56 (also called "colonial clause") which provoked more extensive debate. The colonial powers – the United Kingdom, France, Belgium and the Netherlands insisted on including it in the text of the Convention to make clear that the scope of the Convention was not to extend to dependent territories.

42. By contrast, Article 1 did not give rise to much debate. The first draft simply provided that the States "shall ensure the rights within their territories". Then the provision was slightly modified to say "ensure to all persons residing within their territories the rights…". The final version containing the wording "the States secure to everyone within their jurisdiction the rights" was not contentious.

43. The term "jurisdiction" is not elaborated further by the Convention. Interpretation of the term is one of the most pressing and still unresolved challenges both for the ECtHR and the States Parties to the Convention. The ECtHR decision in the Banković case (in this case the Court dealt with complaints of the victims of air strikes carried out by NATO forces against radio and television facilities in Belgrade on 23 April 1999). affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial". Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR contracting parties' obligations may potentially extend beyond their territory.

44. In the case of *Cyprus v. Turkey* the Court reiterated that:

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

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

The case law

Bankovic

46. In its case law the ECtHR has affirmed that the state's jurisdiction as referred to by Article 1 is "primarily territorial". In its Banković decision the Court found that "State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts like the case in question". The Court relied also on the travaux préparatoires of the Convention refusing to apply to Article 1 its own concept of the interpretation of the Convention as a "living instrument". The Court also refused to refer to the practice of other international human rights bodies.

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

48. The ECtHR noted four categories of extraterritorial jurisdiction in its caselaw, each of which should be "exceptional and require special justification":

> (i) Extradition or expulsion cases involving the extradition or expulsion of an individual from a Member State's territory which give rise to concerns about possible mistreatment or death in the receiving country under Articles 2 or 3 or, in extreme cases, the conditions of detention or trial under Articles 5 or 6;
>
> (ii) Extraterritorial effects cases where the acts of State authorities produced effects or were performed outside their own territory (based on the Drozd and Janousek judgment in which the "jurisdiction" of France or Spain was not in fact established);
>
> (iii) Effective control cases :where as a consequence of military action (lawful or unlawful) a Contracting Party exercises effective control of an area outside its national territory, (based on the line of ECtHR cases starting with Loizidou v. Turkey and Cyprus v. Turkey cases stemming from the occupation of the Northern Cyprus by the Turkish military forces); and
>
> (iv) Consular or diplomatic cases, and flag jurisdiction cases that involve activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.

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

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

The caselaw leading to Al Skeini

51. However, in post-Banković cases the ECtHR moved in a markedly different direction, seeking to develop a more extensive interpretation of Article 1 of the ECHR. In this string of cases the Court started to elaborate two models of extraterritorial jurisdiction: (i) when a State exercises effective overall control over a given territory of another State (even a small portion of the territory like a prison or military base) – the so-called "spatial" model; and (ii) when a person is within the exclusive authority and/or control of a State's agent – "personal model of jurisdiction". It appears that in all these cases the "control" exercised by a State implies, and means for the Court, that the responsibility of that State is engaged for any acts and omissions violating the Convention.

52. In its decision in *Issa* dealing with the alleged killings of Iraqi shepherds by Turkish soldiers on the territory of Iraq, the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory". The Court reached that conclusion relying on the very same decision of the Human Right Committee that it refused to apply in *Banković* case.

53. In its decision in *Pad and others v. Turkey*, the Court dealt with the applications of Iranian nationals that concerned death of their relatives killed by a Turkish military helicopter on the territory of Iran near the Turkish border. Following its reasoning in the *Issa* judgment the Court held that Turkey could potentially be liable under the personal model of jurisdiction in a clear departure from the *Banković* decision and despite striking resemblance of factual circumstances with the *Banković* case.

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

55. Nevertheless the Court reformulated its categorisation of the exceptions to the territorial scope of jurisdiction, as being:

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

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

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

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

57. Describing the spatial model of jurisdiction, the Court held that this "occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory." The Court added that "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". It went further by holding that

> "…The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and 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)."

The Court distinguished Article 56 of the Convention regarding unilateral declarations of the States on the applicability of the Convention to their dependent territories from the situation of "effective control" exercised by the State over a part of the territory of another State, holding that the effective control principle of jurisdiction does not replace the system of declarations under Article 56.

58. In relation to the *Al Skeini* applications, the Court found that in the relevant security operations the British forces were exercising "authority and control" such as to establish a jurisdictional link between the deceased and the UK for purposes of Article 1.

The caselaw since *Al-Skeini*

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

60. In its judgment in *Hirsi Jamaa and Others v. Italy*, where the Court dealt with complaints of Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya exposing them to a risk of ill-treatment).the Court concluded that the applicants "were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities." 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.

61. In its judgment in *Jaloud v. the Netherlands* (the case arose out of the shooting of young Iraqi citizen by Dutch troops at a checkpoint in Iraq) , 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 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."

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

63. 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."

64. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there has also been some expansion of the factors the Court will consider. In its judgment in the case of *Catan v Moldova and Russia* (the case concerned Moldovan nationals living in the Moldovan Republic of Transdniestria and complaining the MRT's prohibition of using Latin scripts in schools) in seeking to establish that the applicants were within Russia's jurisdiction for the purposes of Article 1, the Court looked beyond the question of the size of Russia's military deployment: placing its emphasis instead on the economic presence of the companies from Russia and even on "direct humanitarian aid". The Court outlined

> "106. 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 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.

> 107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see Loizidou (merits), cited above, §§ 16 and 56; Ilaşcu, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see Ilaşcu, cited above, §§ 388-394; Al-Skeini, cited above, § 139)…
>
> 122. The Court, therefore, maintains its findings in the Ilaşcu judgment (cited above), that during the period 2002-2004 the "MRT" was able to continue in existence, resisting Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, only because of Russian military, economic and political support. In these circumstances, the "MRT"'s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the "MRT" administration during the period of the schools' crisis."

65. In a series of further cases arising from the situation in Transdniestria the Court, basing itself on the findings it made in Ilascu in 2004 (see paras 45ff below) and without further inquiry into the circumstances of Russian involvement, has held the Russian Federation for all acts of the "MRT", including unlawful detentions, poor medical treatment in prisons and even confiscation of agricultural produce by MTR customs officials.

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

Its worth noting that the Court's approach in relation to the extraterritorial jurisdiction was accepted to certain extent by other international courts and tribunals in course of interpretation of the jurisdiction clause of other human rights treaties. The ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory where the ICJ in Para 111 held that the Covenant on Human Rights is applicable to the actions of authorities when they exercise their jurisdiction outside their territory. The Human Rights Committee also held that the Covenant applies to all actions of the Israeli authorities and their representatives in the occupied territory (despite the fact that a significant proportion of powers was transferred to the Palestinian Authority).[32] The Inter-American Commission of Human Rights interpreting the American Convention on human rights (a treaty modeled after the European Convention) invoked the same approach expanding its jurisdiction over the cases that involved the US military intervention in Grenada in 1983 in Panama in 1989, and the cases of indefinite detention of aliens by the US in camps outside the US, in Guantanamo Bay, Cuba. But is should also noted that exterritorial jurisdiction of human rights treaties was persistently objected such states as the USA, Israel, United Kingdom and Canada.

[32] See also Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10] (providing that states have the duty to guarantee and respect the International Covenant on Civil and Political Rights ('ICCPR') at home and abroad for individuals within their 'power or effective control'

Discussion

67. For many commentators the *Bankovic* judgment remains the clearest statement of principle on the extraterritorial application of the Convention.[33] It provides some important "bright lines" by way of guidance on the primarily territorial aspect of the Convention that permits only few exceptions that the Court hitherto had been slow to find. Firstly the Court's finding in *Bankovic* that the scope of "jurisdiction" for the purposes of Article 1 should not be the subject of evolutive interpretation. The risks of taking an evolutive approach to such a fundamental question as the territorial application of the Convention carries with it clear risks to the stability and predictability of the caselaw, giving rise to genuine difficulties for States in seeking to meet the Convention's requirements.

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

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

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

71. Similarly the potential breadth of the Court's sub-categories within "State agent authority and control" of (a) the exercise of public powers and (b) use of force/exercise of physical control are so broadly expressed that they potentially enlarge what is an exceptional basis for extraterritorial application of the Convention very broadly indeed, since almost any action

[33] see Marko Milanovic "Al-Skeini and Al-Jedda in Strasbourg"// The European Journal of International Law 2012 Vol. 23 no. 1

*

of a State official, and particularly one that involved some impact on individuals, could by definition be described as "an exercise of public powers". In other words this could potentially signal a reversal of the central proposition of Bankovic that the application of the Convention is primarily territorial, and examples of its extraterritorial are exceptional.

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

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

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

74. All of these developments have the potential to increase the range of uncertainty for States in being able predict the likely approach of the Court and thus seeking to meet their legal obligations under the Convention.

(version of the text with tracked changes)

STATE RESPONSIBILITY AND EXTRATERRITORIAL APPLICATION OF THE CONVENTION

1. This contribution was prepared at the request of the 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). The co-rapporteurs are grateful to the contributors for their valuable input. The co-rapporteurs also took into account the results of the Seminar on the place of the Convention in the European and international legal order organised in March 2017 for launching of the work of the DH-SYSC-II.

2. In considering the place of the Convention in the international legal order, a key focus of the court's caselaw and academic commentary has been on the core obligation contained in Article 1 of the Convention that State Parties shall secure to everyone within their "jurisdiction" the rights and freedoms set out in the Convention. The vast majority of cases concern challenges to the actions of a State within its territory and therefore the application of the notion of "jurisdiction" is clear, and does not require further interpretation. However there are two situations where a respondent State may dispute the question of jurisdiction: (a) where the respondent State denies that it was exercising "jurisdiction" on the basis that it was not responsible for the impugned act; or (b) where the respondent State acts outside its own territory, and therefore denies that its acts were an exercise of "jurisdiction". In such cases, there are extensive bodies of international law on the notions of international responsibility and State jurisdiction. The Court has the ability to draw on these bodies of law, when construing the obligation in Article 1, not least by its reliance on the international law rules of treaty interpretation and in particular Article 31(1)(c) of the Vienna Convention on the Law of Treaties.

~~**Structure of the report:**~~

~~**Definitions**~~

~~notions of jurisdiction, attribution and State responsibility in international law~~

3. The notion of "jurisdiction" in international law refers to the exercise of lawful power by~~of~~ a ~~s~~State to affect persons, property, and circumstances. ~~within its territory. It~~ Such may be exercised through legislative, executive, or judicial actions~~.~~ Legislative jurisdiction is exercised primarily in respect of persons, property and circumstances within the territory of the State, but can sometimes be exercised extraterritorially. [34]Enforcement jurisdiction (i.e. the powers of the courts and the executive actually to enforce the law) can only be exercised on the basis of territoriality (though international co-operation through measures such as extradition, mutual legal assistance, recognition and enforcement of judgments may contribute to the exercise of enforcement jurisdiction). But the notion of 'jurisdiction' in human rights treaties refers to the jurisdiction of a state, not to the jurisdiction of a court.

The ~~N~~notion of State responsibility in international law addresses the identification of an internationally wrongful act and the consequences that flow from it. ~~presumes that any~~ For these purposes an internationally wrongful act is an expression that covers both actions and omissions, and the wrongfulness or otherwise of such conduct is to be judged according to the requirements of the allegedly violated obligation. "every internationally wrongful act of a State entails the international responsibility of that State". Within this body of law t

~~T~~he notion of "attribution" is used to determine when there is a sufficiently close link between a certain conduct and a State so as to consider that conduct as an "act of the State"

~~A. Extraterritorial application of the ECHR~~

~~Introduction~~

[34] As is well known the Harvard Draft on Jurisdiction identifies five principles for the exercise of legislative jurisdiction,namely

~~The caselaw~~

~~*(i) Bankovic*~~

~~(ii) Caselaw leading to *Al Skeini*~~

~~(iii) The caselaw post *Al Skeini*~~

~~Discussion~~Structure of the Report

~~B.~~A. The application of the international law of State responsibility by the ECtHR

Introduction

Caselaw of the Court

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

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

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

Discussion

~~C~~B. Extraterritorial application of the ECHR

Introduction

The caselaw

(i) Bankovic

(ii) Caselaw leading to Al Skeini

(iii) The caselaw post-Al Skeini

Discussion

A. Extra-territorial Application of the European Convention on Human rights ("the Convention", ECHR)

Introduction

1. Article 1 of the Convention states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

2. At the same time Article 56 stipulates that "any State may declare that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible". A State making such a declaration may also (but is not obliged to) accept the competence of the Court to receive and examine individual applications in relation to such territories.

3. Drafting history of Articles 1 and 56 reveals that it was Article 56 (also called "colonial clause") which provoked more extensive debate. The colonial powers – the United Kingdom, France, Belgium and the Netherlands insisted on including it in the text of the Convention to make clear that the scope of the Convention was not to extend to dependent territories.

4. By contrast, Article 1 did not give rise to much debate. The first draft simply provided that the States "shall ensure the rights within their territories". Then the provision was slightly modified to say "ensure to all persons residing within their territories the rights…". The final version containing the wording "the States secure to everyone within their jurisdiction the rights" was not contentious.

5. The term "jurisdiction" is not elaborated further by the Convention. Interpretation of the term is one of the most pressing and still unresolved challenges both for the ECtHR and the States Parties to the Convention. The landmark ECtHR decision in the *Banković*[35] *case* affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial". Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR contracting parties' obligations may potentially extend beyond their territory.

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

6. In the case of *Cyprus v. Turkey*[36] the Court reiterated that:

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

7. From the outset, it should be noted that under Article 1 of the Convention the term "jurisdiction" relates to situations in which an individual enjoys Convention rights and the relevant State Party has correlative Convention obligations with respect to these rights. As the Court noted, the exercise of jurisdiction by a Contracting State is a necessary condition for that State to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.[37]

The case law

Bankovic

8. In its case law the ECtHR has affirmed that the state's jurisdiction as referred to by Article 1 is "primarily territorial". In its leading *Banković* decision the Court found that "State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts like the case in question".[38] The Court relied also on the *travaux préparatoires* of the Convention refusing to apply to Article 1 its own concept of the interpretation of the Convention as a "living instrument". The Court also refused to refer to the practice of other international human rights bodies.

[36] ECtHR, Cyprus v. Turkey, Just satisfaction (Judgment), para 23.

[37] ECtHR, Ilaşcu and others v. Moldova and Russia [GC], no. 48787/99, § 311, ECHR 2004-VII.

[38] ECtHR, Banković and Others v. Belgium and Others (dec.), cited above, para. 62

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

10. The ECtHR noted four categories of extraterritorial jurisdiction in its caselaw, each of which should be "exceptional and require special justification"[39]:

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

(ii) Extraterritorial effects cases where the acts of State authorities produced effects or were performed outside their own territory (based on the Drozd and Janousek judgment in which the "jurisdiction" of France or Spain was not in fact established); (iii) Effective control cases :where as a consequence of military action (lawful or unlawful) a Contracting Party exercises effective control of an area outside its national territory, (based on the line of ECtHR cases starting with *Loizidou v. Turkey*[40] and *Cyprus v. Turkey*[41] cases stemming from the occupation of the Northern Cyprus by the Turkish military forces); and

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

11. In this context it is recalled that in *Banković*, which concerned the bombing by NATO air forces of the objects in the territory of Yugoslavia (which at the material time was not a party to the Convention), the Court made it clear that "the Convention is a multilateral treaty operating …in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States" and the Federal Republic of Yugoslavia "clearly does not fall within this legal space" not

[39] ECtHR, Banković and Others v. Belgium and Others (dec.), cited above, para. 61

[40] ECtHR, Loizidou v. Turkey [GC], 18 December 1996, § 62, Reports 1996-VI.

[41] ECtHR, Cyprus v. Turkey, 10 May 2001, Reports of Judgments and Decisions 2001-IV.

being a signatory state of the Convention. Furthermore, the Court insisted that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory was one that, but for the specific circumstances, would normally be covered by the Convention" ('*espace juridique*' of the Convention).[42]

12. Finally, the Court held that "the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question"[43]

The caselaw leading to *Al Skeini*

13. However, in post *Banković* cases the ECtHR moved in a markedly different direction, seeking to develop a more extensive interpretation of Article 1 of the ECHR. In this string of cases the Court started to elaborate two models of extraterritorial jurisdiction: (i) when a State exercises effective overall control over a given territory of another State (even a small portion of the territory like a prison or military base) – the so-called "spatial" model; and (ii) when a person is within the exclusive authority and/or control of a State's agent – "personal model of jurisdiction". It appears that in all these cases the "control" exercised by a State implies, and means for the Court, that the responsibility of that State is engaged for any acts and omissions violating the Convention.

14. In its decision in *Issa* dealing with the alleged killings of Iraqi shepherds by Turkish soldiers, the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate

[42] Banković and Others v. Belgium and Others, cited above, para. 80

[43] Ibid, para 75

on its own territory".[44] The Court reached that conclusion relying on the very same decision of the Human Right Committee that it refused to apply in *Banković* case.

15. In its decision in *Pad and others v. Turkey*[45], the Court dealt with the applications of Iranian nationals that concerned death of their relatives killed by a Turkish military helicopter near the Turkish border. Following its reasoning in the *Issa* judgment the Court held that Turkey could potentially be liable under the personal model of jurisdiction in a clear departure from the *Banković* decision and despite striking resemblance of factual circumstances with the *Banković* case.

16. In its *Al-Skeini* judgment[46] the Grand Chamber sought to elaborate further on the concept of the extraterritorial jurisdiction under the Convention. The case concerned the applications of six Iraqi nationals brought in respect of actions of UK forces in Iraq in 2003, when the latter were seeking to establish security and support civil administration in and around Basra. On the issue of "jurisdiction" for the purposes of Article 1, the Court drew a number of significant conclusions implying that Article 1 could also be the subject of an evolutive interpretation by the Court. However, in doing so, the Court purported not to reverse its reasoning in the *Banković* decision. On the contrary, the Court reiterated the approach it had set out in *Banković* that extraterritorial jurisdiction shall be exceptional and justified by general international law.

17. Nevertheless the Court reformulated its categorisation of the exceptions to the territorial scope of jurisdiction, as being:

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

(i) acts of diplomatic and consular agents of Convention States on foreign territory, where these agents exert authority and control over others;

(ii) exercise of public powers by a Convention State in the territory of another State, with the consent, invitation or acquiescence of the latter; and

[44] ECtHR, Issa v. Turkey, Judgment, App. no. 31821/96, 16 Nov. 2004

[45] ECtHR, Pad and others v. Turkey (dec.), 28 June 2007

[46] ECtHR, Al-Skeini v. the United Kingdom, Judgment, App. no. 55721/07, 7 July 2011

(iii) in certain cases by virtue of a use of force by a Convention State in the territory of another State.

The Court described its personal model of jurisdiction as the "exercise of physical power and control" and hence of jurisdiction of the State through its agents outside its territory "over the person in question". The Court held that "the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".[47]

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

Describing the spatial model of jurisdiction, the Court held that this "occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory." The Court added that "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". It went further by holding that

"…The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and 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

[47] *Al Skeini v. the United Kingdom*, cited above, para 136-137.

subordinate administration provides it with influence and control over the region (see Ilaşcu and Others, cited above, §§ 388-94)."

The Court distinguished Article 56 of the Convention regarding unilateral declarations of the States on the applicability of the Convention to their dependent territories from the situation of "effective control" exercised by the State over a part of the territory of another State, holding that the effective control principle of jurisdiction does not replace the system of declarations under Article 56.[48]

18. In relation to the *Al Skeini* applications, the Court found that in the relevant security operations the British forces were exercising "authority and control" such as to establish a jurisdictional link between the deceased and the UK for purposes of Article 1.

The caselaw since *Al-Skeini*

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

20. 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."[49] 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.[50]

[48] *Al Skeini v. the United Kingdom*, cited above, para 140

[49] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 81, ECHR 2012.

[50] Although the Court did refer to it in its decision in *Banković and Others v. Belgium and Others*.

22. 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 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."[51]

23. Whilst not entirely clear, this finding may suggest that the Court was applying the "State agent authority" test. If so, it is unclear what role the existence of the checkpoint played. It has been suggested by commentators that this was intended as factor limiting the application of the "State agent authority" test,[52] but the Court does not make clear whether this was indeed the intention and if so, how the limitation operates.

24. 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."

[51] *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014.
[52] 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.

~~25. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there has also been some expansion of the factors the Court will consider. In its controversial judgment in the case of *Catan v Moldova and Russia*, in seeking to establish that the applicants were within Russia's jurisdiction for the purposes of Article 1, the Court looked beyond the question of the size of Russia's military deployment: placing its emphasis instead on the economic presence of the companies from Russia and even on "direct humanitarian aid". The Court outlined~~

~~"106. 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 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.~~

~~107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see Loizidou (merits), cited above, §§ 16 and 56; Ilaşcu, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see Ilaşcu, cited above, §§ 388-394; Al Skeini, cited above, § 139)…~~

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

26. In a series of further cases arising from the situation in Transdniestria the Court, basing itself on the findings it made in Ilaşcu in 2004 (see paras 45ff below) and without further inquiry into the circumstances of Russian involvement, has held the Russian Federation for all acts of the "MRT", including unlawful detentions, poor medical treatment in prisons and even confiscation of agricultural produce by MTR customs officials.[53]

27. Similarly in cases relating to Nagorno-Karabakh such as *Chiragov v. Armenia*[54] the Court appears to have diluted its criteria of effective control by adopting a rather broad and unspecific criterion of "military and economic support" in place of the relatively undisputable factor of mass military presence.

Discussion

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

29. Secondly the finding in Bankovic on the Convention's vocation as regional instrument operating within the "espace juridique" of the territories of the Contracting States accorded with the primary territorial approach to "jurisdiction" and the scheme of the Convention (including Art 56). Likewise the Court's finding that Article 1 required that the rights under the Convention should be guaranteed

[53] See *Soyma v Moldova, Russia and Ukraine* No. 1203/05, 30 May 2017; *Vardanean v Moldova and Russia* No. 22200/10, 30 May 2017; *Apcov v. Moldova and Russia* No. 13463/07, 30 May 2017; *Eriomenco v Moldova and Russia* No. 42224/11, 9 May 2017; *Paduret v. Moldova and Russia* No.26626/11, 9 May 2017.

[54] ECtHR, *Chiragov and Others v. Armenia*, no. 13216/05

~~as a whole, rather than divided and tailored can be considered as seeking to ensure the coherence and integrity of the Convention system.~~

~~30. Developments in the subsequent caselaw have seen some significant steps away from those "bright lines", but without achieving similar clarity in the rules that are proposed to replace them. Thus for example there is an ongoing acceptance of the idea of the *espace juridique* in the sense of the Convention as a constitutional instrument of European public order. However in the *Al Skeini* judgment the Court says that his does not mean that "jurisdiction under Article 1 of the Convention can never exist outside the territory covered by Council of Europe member States".~~

~~31. In relation to the question of dividing and tailoring Convention rights as we have seen the Court has gone further and, apparently overturned its finding on this *Bankovic*, and found that in situations where a State agent, acting outside the State's territory, exercises control and authority over an individual, the State must secure the rights "that are relevant to the situation of that individual". The concern here is for the coherence and integrity of the guarantees of the Convention as they have been elaborated systematically in the caselaw of the Court. The ever-increasing sophistication in the body of interpretative jurisprudence on the Convention rights and the Court's emphasis on the effectiveness of the Convention Guarantees, mean that simply to say a given Article of the Convention is "relevant" to a particular situation is likely to raise as many questions as it answers. In the Court's jurisprudence many Convention rights, as well as having close interrelations, now include additional positive and/ or procedural obligations, and require the interaction of a number of State organs to ensure their effective guarantee. In many of the situations in which the Court has found the Convention applies extra-territorially the respondent State has had (entirely appropriately) only limited powers that would not equip it to ensure the effective application of the Convention. The result of the "dividing and tailoring" of the Convention in these circumstances is likely to do increase the legal uncertainty, rather than provide effective protection of Convention rights.~~

~~32. Similarly the potential breadth of the Court's sub-categories within "State agent authority and control" of (a) the exercise of public powers and (b) use of force/exercise of physical control are so broadly expressed that they potentially enlarge what is an exceptional basis for extraterritorial~~

~~application of the Convention very broadly indeed, since almost any action of a State official, and particularly one that involved some impact on individuals, could by definition be described as "an exercise of public powers". In other words this could potentially signal a reversal of the central proposition of *Bankovic* that the application of the Convention is primarily territorial, and examples of its extraterritorial are exceptional.~~

~~33. A parallel expansion of the extraterritorial reach of the Convention by use of broad and highly contextual criteria has also been observed in recent case law on the question of "effective control of an area". In choosing the term "effective control" the Court appears to have taken up a concept familiar to international law, but as basis for attributing the conduct of one entity to another in the law of State responsibility (see Part B below). Nevertheless in the earlier caselaw such as *Loizidou* which was based on a sufficient military presence to enable the State in question to exercise genuine "control" of the territory, has is closest analogy in international law in the law of belligerent occupation. It is perhaps instructive to consider the Art 42 of the Hague Regulations, which provides:~~

~~Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.~~

~~The occupation extends only to the territory where such authority has been established and can be exercised.~~

~~34. Whilst the relationship between international humanitarian law and human rights will be considered in greater depth elsewhere, it is striking that threshold for the application of the law of occupation (which in some respects sets out a less onerous set of obligations on an occupying power than human rights law) appears to be set higher than the threshold for the application of the Convention. This is particularly so in the case where the Court purports to dilute the standard of "effective control" to issues relating to non-military factors such as political and economic influence. In the words of leading one commentator that "in its post *Al-Skeini* trend the Court is now likely to~~

~~find Article 1 jurisdiction and is being increasingly generous on threshold questions of the Convention's extraterritorial application".~~[55]

~~35. All of these developments have the potential to increase the range of uncertainty for States in being able predict the likely approach of the Court and thus seeking to meet their legal obligations under the Convention.~~

[55] ~~Marko Milanovic "The Nagorno-Karabakh Cases"// https://www.ejiltalk.org/the-nagorno-karabakh-cases/~~

AB. State Responsibility in International Law

Introduction

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

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

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

738. The Court has never expressly claimed that the regime of State responsibility under the Convention constitutes *lex specialis* except in respect of Article 41 concerning just satisfaction

("bearing in mind the specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law"[56]).

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

Caselaw

941. In its caselaw, the ECtHR generally does not explicitly address the question of the attribution of the conduct that is alleged to have violated the ECHR to the respondent State. However in a relatively small number of cases (which very largely relate to extraterritorial jurisdiction) the issue of attribution has been addressed, usually when a Respondent State has raised it, although on occasion the Court has inquired into attribution of its own accord.[57]

1042. For the purposes of this analysis, it is useful to distinguish different categories involved in the underlying facts:

---

[56] ECtHR, *Cyprus v. Turkey*, Just satisfaction (Judgment), para

[57] See e.g. *Stephens v. Malta (no. 1)*, no. 11956/07, § 45, 21 April 2004.

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

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

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

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

1143. The Court started to deal with the issues of jurisdiction and attribution well before most states of the Council of Europe joined ECHR (–in cases Cyprus v Turkey (1975) Stocke (1989) and Louizidou (1996) . In *Loizidou v. Turkey*,[58] 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.[59] The Court has described the relevant standard for determining attribution as follows:

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

[58] The caseges originated from the complaint of Cypriot national of Greek origin from Kyrenia in northern Cyprus who had moved to Nicosia after her marriage in 1972. She claimed to be the owner of several plots of land in Kyrenia claimed that since the invasion of Turkish forces in 1974, she had been prevented from returning to Kyrenia and the use of her property.

[59] *Loizidou v. Turkey*, *supra* note 50, § 64.

(see the above-mentioned Loizidou judgment (preliminary objections), ibid.)."[60]

~~44~~12. 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)."[61]

~~45~~13. 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 by ~~-~~arresting the four Moldovans in 1992 and sentencing them a year later for "terrorist attacks" on the enclave´s citizens during a war between MRT and Moldova in 1991. 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.

1~~4~~6. 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

[60] *Loizidou v. Turkey*, *supra* note *13* § 52
[61] Ibid., § 56.

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."[62]

1547. 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."

---

[62] *Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99, § 382, ECHR 2004-VII.

~~48~~16. In its discussion of State responsibility in *Loizidou* the Court appears to have found that all actions of the TRNC were attributable to Turkey. If this is the correct 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.[63]

~~49~~17. 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~~.[64] 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 significantly lower threshold than, the restrictive effective control approach, which classically requires evidence of factual control over specific conduct, which is favoured in the ICJ jurisprudence. ~~"direction or control" criterion used by the ILC~~.[65]

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

~~50~~18. A number of judgments of the ECtHR have dealt with attribution of conduct in cases in which more than one State was involved in a single injury/ claim. These are typically cases in which two

[63] 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 European Court of Human Rights: […] Loizidou v. Turkey, Merits, Eur. Court H.R., Reports, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310, p. 23, para. 62 (1995)."

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

[65] Se also in this respect the findings of the International Court of Justice in *Nicaragua v. USA* [1986] ICJ Rep. 14, at pp 62 and 64-5, paras 109 and 115; and also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep. 42, at pp. 207-211, paras 398-407

States act independently of each other and where the Court determines the responsibility of each Contracting State individually, by assessing the State's own conduct in relation to its Convention obligations. In this regard *Ilaşcu* is a relevant example. In this case the Court held Moldova and Russia responsible, each for different acts or omissions that the Court attributed to the State concerned. Those acts and omissions contributed to one injury/claim.

~~51~~19. Other examples include the case of *Rantsev v. Cyprus and Russia*[66], and *Stojkovic v. France and Belgium*.[67] 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.[68]

~~52~~21. In a number of other cases, the ECtHR was confronted with conduct by a State organ that had 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* *(the applicants in this case complained of the unfairness of their trial in Andorra (which the Court held it had no jurisdiction to investigate) and of their detention in France,* –At issue in this case was the attribution of the conduct of French and Spanish judges carrying out judicial functions in Andorra. On this point, the Court accepted the arguments of the respondent Governments. It held 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

---

[66] *Rantsev v Cyprus and Russia*, no. 25965/04, ECHR 2010. The case concerned the death of Oxana Rantseva in Cyprus and was brought by her father. The Court dealt with this case from the angle of human trafficking.

[67] *Stojkovic v France and Belgium*, no. 25303/08, 27 October 2011. The case originated from the complaint of Mr. Mr. Boban Stojkovic detained in Bruges (Belgium) and then interrogated by the French official without presence of the lawyer

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

> case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial."[69]

~~53~~22. In another ~~more controversial~~ category of cases, the ECtHR has attributed the conduct of one State to another. Thus in the case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, 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.

23~~54~~. 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)."[70]

~~55~~24. 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 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.[71]

25~~6~~. The Court held the respondent State responsible for the applicant's subsequent detention in

[69] Ibid., § 96.
[70] Ibid., § 206.
[71] Ibid., § 211.

Kabul. It referred in this regard to "attribution of responsibility" to that State.[72] It considered that:

> "239. …The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004 (see, mutatis mutandis, Rantsev v. Cyprus and Russia, no. 25965/04, § 207, ECHR 2010).
>
> 240. Having regard to the above, the Court considers that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law (see paragraphs 95 and 100 above). The applicant's "enforced disappearance", although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity (see Varnava and Others, cited above, § 148). In this connection the Court would point out 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)."[73]

2657. 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 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

[72] Ibid., § 215.
[73] *I*bid., § 239-240.

the acquiescence or connivance of its authorities (see Ilaşcu and Others, cited above, § 318; and El-Masri, cited above, § 206)."[74]

~~58~~27. 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 his destination.[75] 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)."[76]

28~~59~~. 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). This was so even despite findings that Poland was not directly involved in the interrogations (and, therefore, the torture inflicted in Poland), and that it was unlikely that the Polish officials witnessed or knew exactly what happened inside the facility, Poland's responsibility was based on having facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring.

~~60~~29. 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

[74] A*l-Nashiri v. Poland*, no. 28761/11, § 452, 24 July 2014.
[75] Ibid., § 453.
[76] Ibid., § 457.

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.[77]

~~61~~30. 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 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.[78]

~~62~~31. 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* 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)."[79]

32~~63~~. 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

[77] Ibid., § 518.
[78] *Nasr and Ghali v. Italy*, no. 44883/09, § 217 – 218, 23 February 2016.
[79] Ibid., § 241.

litigieux (El Masri, précité, § 211 et Al Nashiri, précité, § 517)."[80]

6433. The Court thus appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents. The Court also appears to have extended this approach to the transfer of Nasr from Italy,[81] and in respect of his detention in Egypt.

3465. Thus, at least in *El-Masri* and *Al-Nashiri*, the ECtHR does not appear to have followed the approach in the ARSIWA concerning the attribution of conduct (of a third State) to a State, or of cases of aid or assistance by one State in the commission of an internationally wrongful act of another State (Article 16 ARSIWA).

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

3566. 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* *(in this case the Court dealt with responsibility to harm to children from unexploded cluster munitions in the part of Kosovo for which a multinational brigade led by France was responsible. The brigade was part of an international security force (KFOR) deployed pursuant to UN Security Council Resolution 1244.)* and *Al-Jedda v. the United Kingdom* *(the case concerned indefinite detention of a dual British/Iraqi citizen in a Basra facility run by British forces acting on the basis by UN Security Council resolution 1546.)* . These concerned military operations authorized by the United Nations. These are considered in the section of the report on the relationship of the Convention with binding resolutions of the UN Security Council.

[80] Ibid., § 289.
[81] Ibid., § 290.

Discussion

36. According to legal commentators,[82] the case law of the Court demonstrates that the ECtHR has taken rather varied and uneven approach to the rules on attribution reflected in the ARSIWA, in some case following them expressly,[83] whilst in others it appears to have departed from those rules. The latter include cases related to attribution of conduct in situations that would be covered by the rules of customary international law as contained in ARSIWA. In other words, it appears that in these cases the Court departed from general international law on State responsibility. It is interesting to note that in a number of cases in which the ECtHR departed from general international law, it did so despite having referred to specific ARSIWA articles when listing relevant provisions of international law. The citation of the ARSIWA Articles in this context could be understood as the Court suggesting that it would apply them. But in reality, this was not always what the Court actually did. This leads to a reasonable conclusion that on occasion the Court has sought *de facto* to create on a case-by case basis its own *lex specialis* regime of State responsibility under the Convention, whilst claiming at the same time that it follows the rules of general international law.

37. Such an approach could present a number of problems. The current case-law of the Court has developed the Convention to a point that is markedly different from the prevailing understanding and interpretation of the ECHR at the time when most of the States joined this treaty. This clearly needs careful and sensitive consideration given the consent-based underpinnings of Convention obligations in the international law of treaties. This situation is probably common to the development of the law by a number of international tribunals if we remember that any case law is subject to change, but equally it should be understood that some treaty-regimes are more sensitive than others and may require more diligent analysis.

---

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

[83] Eg. *Loizidou*

38. An additional concern may arise where the ECtHR deviates from general international law without doing so in a consistent and coherent manner way.[84] This concern is compounded where explanation of the underlying reasoning for why and how it does so is also absent. This creates uncertainty for the Contracting Parties to the Convention, as they unable to predict the way in which the Court will interpret the rules on attribution in future cases and thus in practice they are left unaware of scope of their obligations under the ECHR (often matters of the greatest political and/or security sensitivity).

39. 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. The Court has expressly acknowledged that there is a conceptual distinction between the two, most recently in its judgment in the *Jaloud case*.[85] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. It has been argued that the Court conflated the two. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a lower threshold than, the "direction or control" criterion used by the ARSIWA.

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

[84] In this respect see the "Conclusions of the 'round table' on cooperation between the Russian Federation and the European court of Human Rights" of 20-121 January 2015, circulated in in the Committee of Ministers, DH-DD(2015)265, 6 March 2016.
[85] ECtHR, *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014.

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

C. Extra-territorial Application of the European Convention on Human rights ("the Convention", ECHR)

Introduction

41. There are two Articles of the Convention relate to the scope of its territorial application. Article 1 of the Convention states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

~~2.~~ At the same time Article 56 stipulates that "any State may declare that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible". A State making such a declaration may also (but is not obliged to) accept the competence of the Court to receive and examine individual applications in relation to such territories.

423. The ~~D~~drafting history of Articles 1 and 56 reveals that it was Article 56 (also called "colonial clause") which provoked more extensive debate. The colonial powers – the United Kingdom, France, Belgium and the Netherlands insisted on including it in the text of the Convention to make clear that the scope of the Convention was not to extend to dependent territories.

443. By contrast, Article 1 did not give rise to much debate. The first draft simply provided that the States "shall ensure the rights within their territories". Then the provision was slightly modified to say "ensure to all persons residing within their territories the rights…". The final version containing the wording "the States secure to everyone within their jurisdiction the rights" was not contentious.

4544. The term "jurisdiction" is not elaborated further by the Convention. Interpretation of the term is

one of the most pressing and still unresolved challenges both for the ECtHR and the States Parties to the Convention. The ~~landmark~~ ECtHR decision in the Banković case ~~-~~(in this case the Court dealt with complaints of the victims of air strikes carried out by NATO forces against radio and television facilities in Belgrade on 23 April 1999). affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial". Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR contracting parties' obligations may potentially extend beyond their territory.

~~6~~45. In the case of *Cyprus v. Turkey* the Court reiterated that:

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

~~7~~46. From the outset, it should be noted that under Article 1 of the Convention the term "jurisdiction" relates to situations in which an individual enjoys Convention rights and the relevant State Party has correlative Convention obligations with respect to these rights. As the Court noted, the exercise of jurisdiction by a Contracting State is a necessary condition for that State to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

The case law

Bankovic

~~8~~47. In its case law the ECtHR has affirmed that the state's jurisdiction as referred to by Article 1 is "primarily territorial". In its ~~leading~~ Banković decision the Court found that "State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts like the case in

question". The Court relied also on the travaux préparatoires of the Convention refusing to apply to Article 1 its own concept of the interpretation of the Convention as a "living instrument". The Court also refused to refer to the practice of other international human rights bodies.

~~9~~48. The Court also recognized that in exceptional circumstances acts of Contracting States performed, or producing effects, outside their territories can still fall within their "jurisdiction" for the purposes of Article 1 of the ECHR, but clearly marking extra-territorial jurisdiction as exceptional.

~~10~~49. The ECtHR noted four categories of extraterritorial jurisdiction in its caselaw, each of which should be "exceptional and require special justification":

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

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

(iii) Effective control cases :where as a consequence of military action (lawful or unlawful) a Contracting Party exercises effective control of an area outside its national territory, (based on the line of ECtHR cases starting with Loizidou v. Turkey and Cyprus v. Turkey cases stemming from the occupation of the Northern Cyprus by the Turkish military forces); and

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

~~11~~50. In this context it is recalled that in *Banković*, which concerned the bombing by NATO air forces of the objects in the territory of Yugoslavia (which at the material time was not a party to the Convention), the Court made it clear that "the Convention is a multilateral treaty operating …in an

essentially regional context and notably in the legal space (espace juridique) of the Contracting States" and the Federal Republic of Yugoslavia "clearly does not fall within this legal space" not being a signatory state of the Convention. Furthermore, the Court insisted that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory was one that, but for the specific circumstances, would normally be covered by the Convention" ('espace juridique' of the Convention).

~~12~~51. Finally, the Court held that "the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question"

The caselaw leading to Al Skeini

~~13~~52. However, in post-Banković cases the ECtHR moved in a markedly different direction, seeking to develop a more extensive interpretation of Article 1 of the ECHR. In this string of cases the Court started to elaborate two models of extraterritorial jurisdiction: (i) when a State exercises effective overall control over a given territory of another State (even a small portion of the territory like a prison or military base) – the so-called "spatial" model; and (ii) when a person is within the exclusive authority and/or control of a State's agent – "personal model of jurisdiction". It appears that in all these cases the "control" exercised by a State implies, and means for the Court, that the responsibility of that State is engaged for any acts and omissions violating the Convention.

~~14~~53. In its decision in *Issa* dealing with the alleged killings of Iraqi shepherds by Turkish soldiers on the territory of Iraq, the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory". The Court reached that conclusion relying on the very

same decision of the Human Right Committee that it refused to apply in *Banković* case.

~~15~~54. In its decision in *Pad and others v. Turkey* , the Court dealt with the applications of Iranian nationals that concerned death of their relatives killed by a Turkish military helicopter on the territory of Iran near the Turkish border. Following its reasoning in the *Issa* judgment the Court held that Turkey could potentially be liable under the personal model of jurisdiction in a clear departure from the *Banković* decision and despite striking resemblance of factual circumstances with the *Banković* case.

~~16~~55. In its *Al-Skeini* judgment the Grand Chamber sought to elaborate further on the concept of the extraterritorial jurisdiction under the Convention. The case concerned the applications of six Iraqi nationals brought in respect of actions of UK forces in Iraq in 2003, when the latter were seeking to establish security and support civil administration in and around Basra. On the issue of "jurisdiction" for the purposes of Article 1, the Court drew a number of significant conclusions implying that Article 1 could also be the subject of an evolutive interpretation by the Court. However, in doing so, the Court purported not to reverse its reasoning in the Banković decision. On the contrary, the Court reiterated the approach it had set out in Banković that extraterritorial jurisdiction shall be exceptional and justified by general international law.

~~17~~56. Nevertheless the Court reformulated its categorisation of the exceptions to the territorial scope of jurisdiction, as being:

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

(i) acts of diplomatic and consular agents of Convention States on foreign territory, where these agents exert authority and control over others;

(ii) exercise of public powers by a Convention State in the territory of another State, with the consent, invitation or acquiescence of the latter; and

(iii) in certain cases by virtue of a use of force by a Convention State in the territory of another

State.

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

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

58. Describing the spatial model of jurisdiction, the Court held that this "occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory." The Court added that "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". It went further by holding that

> "…The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and 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)."

The Court distinguished Article 56 of the Convention regarding unilateral declarations of the States on the applicability of the Convention to their dependent territories from the situation of "effective control" exercised by the State over a part of the territory of another State, holding that the effective control principle of jurisdiction does not replace the system of declarations under Article 56.

~~18~~59. In relation to the *Al Skeini* applications, the Court found that in the relevant security operations the British forces were exercising "authority and control" such as to establish a jurisdictional link between the deceased and the UK for purposes of Article 1.

The caselaw since *Al-Skeini*

~~19~~60. As will be discussed below, the analytical framework the Court set out in *Al Skeini* may raise a number of questions as to how clear and appropriate limitations can be drawn around the extension of extraterritorial application of the Convention. And such concerns are borne out to extent in subsequent caselaw of the Court.

~~20~~61. In its judgment in *Hirsi Jamaa and Others v. Italy*, where the Court dealt with complaints of Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya exposing them to a risk of ill-treatment).the Court concluded that the applicants "were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities." 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.

~~22~~62. In its judgment in *Jaloud v. the Netherlands* (the case arose out of the shooting of young Iraqi citizen by Dutch troops at a checkpoint in Iraq) , 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 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."

~~23~~63. Whilst not entirely clear, this finding may suggest that the Court was applying the "State agent authority" test. If so, it is unclear what role the existence of the checkpoint played. It has been suggested by commentators that this was intended as factor limiting the application of the "State agent authority" test, but the Court does not make clear whether this was indeed the intention and if so, how the limitation operates.

~~24~~64. 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."

~~25~~65. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there has also been some expansion of the factors the Court will consider. In its ~~controversial~~ judgment in the case of *Catan v Moldova and Russia* (the case concerned Moldovan

nationals living in the Moldovan Republic of Transdniestria and complaining the MRT's prohibition of using Latin scripts in schools), in seeking to establish that the applicants were within Russia's jurisdiction for the purposes of Article 1, the Court looked beyond the question of the size of Russia's military deployment: placing its emphasis instead on the economic presence of the companies from Russia and even on "direct humanitarian aid". The Court outlined

> "106. 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 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.
>
> 107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see Loizidou (merits), cited above, §§ 16 and 56; Ilaşcu, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see Ilaşcu, cited above, §§ 388-394; Al-Skeini, cited above, § 139)…
>
> 122. The Court, therefore, maintains its findings in the Ilaşcu judgment (cited above), that during the period 2002-2004 the "MRT" was able to continue in existence, resisting Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, only because of Russian military, economic and political support. In these circumstances, the "MRT"'s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the "MRT" administration during the period of the schools' crisis."

~~26~~66. In a series of further cases arising from the situation in Transdniestria the Court, basing itself on

the findings it made in Ilascu in 2004 (see paras 45ff below) and without further inquiry into the circumstances of Russian involvement, has held the Russian Federation for all acts of the "MRT", including unlawful detentions, poor medical treatment in prisons and even confiscation of agricultural produce by MTR customs officials.

~~27~~67. Similarly in cases relating to Nagorno-Karabakh such as Chiragov v. Armenia the Court appears to have diluted its criteria of effective control by adopting a rather broad ~~and unspecific~~ criterion of "military and economic support" in place of the relatively undisputable factor of mass military presence (-The case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Nagorno-Karabakh conflict).

28 Its worth noting that the Court's approach in relation to the extraterritorial jurisdiction was accepted to certain extent by other international courts and tribunals in course of interpretation of the jurisdiction clause of other human rights treaties. The ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory where the ICJ in Para 111 held that the Covenant on Human Rights is applicable to the actions of authorities when they exercise their jurisdiction outside their territory. The Human Rights Committee also held that the Covenant applies to all actions of the Israeli authorities and their representatives in the occupied territory (despite the fact that a significant proportion of powers was transferred to the Palestinian Authority).[86] The Inter-American Commission of Human Rights interpreting the American Convention on human rights (a treaty modeled after the European Convention) invoked the same approach expanding its jurisdiction over the cases that involved the US military intervention in Grenada in 1983 in Panama in 1989, and the cases of indefinite detention of aliens by the US in camps outside the US, in Guantanamo Bay, Cuba. But is should also noted that exterritorial jurisdiction of human rights treaties was persistently objected such states as the USA, Israel, United

[86] See also Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10] (providing that states have the duty to guarantee and respect the International Covenant on Civil and Political Rights ('ICCPR') at home and abroad for individuals within their 'power or effective control'

Kingdom and Canada.

Discussion

~~2~~68. For many commentators the *Bankovic* judgment remains the clearest statement of principle on the extraterritorial application of the Convention.[87] It provides some important "bright lines" by way of guidance on the primarily territorial aspect of the Convention that permits only few exceptions that the Court hitherto had been slow to find. Firstly the Court's finding in *Bankovic* that the scope of "jurisdiction" for the purposes of Article 1 should not be the subject of evolutive interpretation. The risks of taking an evolutive approach to such a fundamental question as the territorial application of the Convention carries with it clear risks to the stability and predictability of the caselaw, giving rise to genuine difficulties for States in seeking to meet the Convention's requirements.

~~29~~69. Secondly the finding in *Bankovic* on the Convention's vocation as regional instrument operating within the "*espace juridique*" of the territories of the Contracting States accorded with the primary territorial approach to "jurisdiction" and the scheme of the Convention (including Art 56). Likewise the Court's finding that Article 1 required that the rights under the Convention should be guaranteed as a whole, rather than divided and tailored can be considered as seeking to ensure the coherence and integrity of the Convention system.

~~30~~70. Developments in the subsequent caselaw have seen some significant steps away from those "bright lines", but without achieving similar clarity in the rules that are proposed to replace them. Thus for example there is an ongoing acceptance of the idea of the *espace juridique* in the sense of the Convention as a constitutional instrument of European public order. However in the *Al Skeini* judgment the Court says that his does not mean that "jurisdiction under Article 1 of the Convention can never exist outside the territory covered by Council of Europe member States".

[87] see Marko Milanovic "Al-Skeini and Al-Jedda in Strasbourg"// The European Journal of International Law 2012 Vol. 23 no. 1

*

~~31~~71. In relation to the question of dividing and tailoring Convention rights as we have seen the Court has gone further and, apparently overturned its finding on this *Bankovic*, and found that in situations where a State agent, acting outside the State's territory, exercises control and authority over an individual, the State must secure the rights "that are relevant to the situation of that individual". The concern here is for the coherence and integrity of the guarantees of the Convention as they have been elaborated systematically in the caselaw of the Court. The ever-increasing sophistication in the body of interpretative jurisprudence on the Convention rights and the Court's emphasis on the effectiveness of the Convention Guarantees, mean that simply to say a given Article of the Convention is "relevant" to a particular situation is likely to raise as many questions as it answers. In the Court's jurisprudence many Convention rights, as well as having close interrelations, now include additional positive and/ or procedural obligations, and require the interaction of a number of State organs to ensure their effective guarantee. In many of the situations in which the Court has found the Convention applies extra-territorially the respondent State has had (entirely appropriately) only limited powers that would not equip it to ensure the effective application of the Convention. The result of the "dividing and tailoring" of the Convention in these circumstances is likely to do increase the legal uncertainty, rather than provide effective protection of Convention rights.

~~32~~72. Similarly the potential breadth of the Court's sub-categories within "State agent authority and control" of (a) the exercise of public powers and (b) use of force/exercise of physical control are so broadly expressed that they potentially enlarge what is an exceptional basis for extraterritorial application of the Convention very broadly indeed, since almost any action of a State official, and particularly one that involved some impact on individuals, could by definition be described as "an exercise of public powers". In other words this could potentially signal a reversal of the central proposition of Bankovic that the application of the Convention is primarily territorial, and examples of its extraterritorial are exceptional.

~~33~~73. A parallel expansion of the extraterritorial reach of the Convention by use of broad and highly contextual criteria has also been observed in recent case law on the question of "effective control of an area". In choosing the term "effective control" the Court appears to have taken up a concept

familiar to international law, but as basis for attributing the conduct of one entity to another in the law of State responsibility ~~(see Part B below)~~. Nevertheless in the earlier caselaw such as Loizidou which was based on a sufficient military presence to enable the State in question to exercise genuine "control" of the territory, has is closest analogy in international law in the law of belligerent occupation. It is perhaps instructive to consider the Art 42 of the Hague Regulations, which provides:

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

~~34~~74. Whilst the relationship between international humanitarian law and human rights will be considered in greater depth elsewhere, it is striking that threshold for the application of the law of occupation (which in some respects sets out a less onerous set of obligations on an occupying power than human rights law) appears to be set higher than the threshold for the application of the Convention. This is particularly so in the case where the Court purports to dilute the standard of "effective control" to issues relating to non-military factors such as political and economic influence. In the words of leading one commentator that "in its post *Al-Skeini* trend the Court is now likely to find Article 1 jurisdiction and is being increasingly generous on threshold questions of the Convention's extraterritorial application".

~~35~~75. All of these developments have the potential to increase the range of uncertainty for States in being able predict the likely approach of the Court and thus seeking to meet their legal obligations under the Convention.

Discussion

67. According to the legal commentators[88], tThe case law of the Court demonstrates that the ECtHR has taken rather varied and uneven approach to the rules on attribution reflected in the ARSIWA, in some case following them expressly,[89] whilst in others it appears to have departed from those rules. The latter include cases related to attribution of conduct in situations that would be covered by the rules of customary international law as contained in ARSIWA. In other words, it appears that in these cases the Court departed from general international law on State responsibility. It is interesting to note that in a number of cases in which the ECtHR departed from general international law, it did so despite having referred to specific ARSIWA articles when listing relevant provisions of international law. The citation of the ARSIWA Articles in this context could be understood as the Court suggesting that it would apply them. But in reality, this was not always what the Court actually did. This leads to a reasonable conclusion that on occasion the Court has sought *de facto* to create on a case-by case basis its own *lex specialis* regime of State responsibility under the Convention, whilst claiming at the same time that it follows the rules of general international law.

68. Such an approach could present a number of problems. The current case law of the Court has developed the Convention to a point that is markedly different from the prevailing understanding and interpretation of the ECHR at the time when most of the States joined this treaty. This clearly needs careful and sensitive consideration given the consent based underpinnings of Convention obligations in the international law of treaties. This situation is probably common to the development of the law by a number of international tribunals if we remember that any case law is subject to change, but equally it should be understood that some treaty regimes are more sensitive than others and may require more diligent analysis.

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

[89] Eg. *Loizidou*

~~71. An additional concern may arise where the ECtHR deviates from general international law without doing so in a consistent and coherent manner way.[90] This concern is compounded where explanation of the underlying reasoning for why and how it does so is also absent. This creates uncertainty for the Contracting Parties to the Convention, as they unable to predict the way in which the Court will interpret the rules on attribution in future cases and thus in practice they are left unaware of scope of their obligations under the ECHR (often matters of the greatest political and/or security sensitivity).~~

~~72. 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. The Court has expressly acknowledged that there is a conceptual distinction between the two, most recently in its judgment in the *Jaloud case*.[91] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. It has been argued that the Court conflated the two. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a lower threshold than, the "direction or control" criterion used by the ARSIWA.~~

~~73. Apparent inconsistencies in the ECtHR's interpretation of "jurisdiction" make it difficult for a High Contracting Party to the ECHR to determine whether the Court will consider a person to be within its jurisdiction. Inconsistent and insufficiently reasoned case law of the ECtHR will result in unpredictability and uncertainty among the States as to how their actions might be qualified by the~~

~~[90] In this respect see the "Conclusions of the 'round table' on cooperation between the Russian Federation and the European court of Human Rights" of 20-121 January 2015, circulated in in the Committee of Ministers, DH-DD(2015)265, 6 March 2016.~~
~~[91] ECtHR, *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014.~~

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

Hirsi Jamaa The case concerned Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. Returning them to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion.

International tribunals usually determine the question of attribution on the basis of whether the authorities of the secessionist entity were 'controlled ' by the outside power when performing the internationally wrongful conduct[92].

Control is an essential element of the doctrine of attribution, defining the legal relationship between states, international organisations ('IOs'), and individuals. perception that the effective control test as an objective, portable, general concept of law will become increasingly suspect.[93]

It is apparent

that there are gaps in the architecture of legal responsibility, particularly with regard to non-state actors, which are increasingly implicated in many of the harms we encounter as a society

[92] Stefan Talmon The Responsibility of outside Powers for Acts of Secessionist Entities"// ICLQ vol 58, July 2009 pp 493–517

[93] Kristen Boon Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines// Melbourne Journal of International Law, Vol. 15, No. 2, 2014