DH-SYSC-II(2019)43

02/09/2019

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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

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Revised preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order,

as amended in the light of the experts' written comments in view of the 7th DH-SYSC-II meeting

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Note:

1. The present document constitutes the revised version of the first Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order (document DH-SYSC-II(2019)41). It compiles the different texts of Theme 1 (The challenge of the interaction between the Convention and other branches of international law, including international customary law), Theme 2 (The challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties) and Theme 3

(The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations), which the DH-SYSC-II, with the exception of some paragraphs listed below, has provisionally adopted in its past meetings. [1] The present revised document contains formal updates and linguistic changes as proposed by member States and corrections of references and quotations by the Secretariat.[2] These changes are indicated (track changes mode). Comments of a substantive nature by member States have been included in the compilation of comments on the Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order (document DH-SYSC-II(2019)42) and will be discussed at the 7th meeting of the Group.

2. As agreed upon in the DH-SYSC-II's 6th meeting, the document further contains an introduction, a conclusion and an executive summary drafted by the Secretariat and to be examined by the DH-SYSC-II in its 7th and last meeting (18–20 September 2019). The Secretariat further proceeded to a formal harmonisation of the text, as instructed by the DH-SYSC-II.[3] This harmonisation included notably a uniform spelling of terms such as "member States", case-law", time-limit etc. and the use of the British English spelling for terms such as "recognise", "harmonise" etc. as well as linguistic changes regarding the use of (in-)definitive articles or the order of words within a sentence. Moreover, the references to the case-law of the European Court of Human Rights have been harmonised and a list of abbreviations was added. The few other linguistic changes are highlighted in green.

3. At its 91th meeting (18–21 June 2019), the CDDH provisionally adopted the following draft chapters of its future Report[4]:

- Chapter of Theme 1, subtheme i): Methodology of interpretation by the European Court of Human Rights and its approach to international law;
- Chapter of Theme 1, subtheme iii): Interaction between the resolutions of the Security Council and the European Convention on Human Rights;
- Chapter of Theme 1, subtheme iv): Interaction between international humanitarian law and the European Convention on Human Rights; and
- Chapter of Theme 2: The challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties.

The Chapter of Theme 1, subtheme ii) (on State responsibility and extraterritorial application of the European Convention on Human Rights) has not yet been fully examined by the DH-SYSC-II and Theme 3 (on The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations) has been provisionally adopted only shortly before the 91th CDDH meeting. These parts of the text have therefore not been submitted to the CDDH at that meeting. The future revised draft Report in its entirety (including these draft chapters), as adopted by the DH-SYSC-II in its 7th and last meeting in September 2019, will be submitted for adoption to the DH-SYSC in October 2019 and to the CDDH in November 2019.

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[1] As explained by the DH-SYSC-II, provisional adoption means that the Group has examined the text of the draft chapter paragraph by paragraph and made amendments both on the content and on the form of the text. The text may be updated in case the European Court of Human Rights delivered new important judgments prior to the final adoption of the entire future report in 2019, and in order to harmonise the entire text of the future report and take into account possible orientations given by the CDDH (see document DH-SYSC-II(2019)R6, footnote 1).
[2] See also DH-SYSC-II(2019)R6, § 10.
[3] See DH-SYSC-II(2019)R6, §§ 9 and 10.
[4] See CDDH(2019)R91ab, § 2 (c) (i).

4. In the different draft chapters, certain paragraphs are yet to be examined and consolidated by the DH-SYSC-II at the occasion of the final adoption of the future report and have thus not been provisionally adopted yet. These paragraphs comprise former §§ 29 and 35 of Theme 1 subtheme i), former §§ 51 and 93-103 of Theme 1 subtheme ii), former § 13 of Theme 1 subtheme iv) and former §§ 32 and 65 of Theme 2. These paragraphs are highlighted in yellow in the text; the former paragraph numbers are added.

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EXECUTIVE SUMMARY

Introduction

1. The present Report was elaborated in the **context** of ~~the so-called~~ Interlaken reform process towards the long-term effectiveness of the Convention system. In its 2015 Report on "The longer-term future of the system of the European Convention on Human Rights", the Steering Committee for Human Rights (CDDH) had identified the place of the European Convention on Human Rights in the European and international legal order as one of the areas which were decisive for the longer-term effectiveness and viability of the Convention system. In its **terms of reference**, the CDDH and its Committee of experts on the system of the European Convention on Human Rights (DH-SYSC) were subsequently charged with preparing a draft report for the Committee of Ministers on that topic and the related challenges, containing conclusions and possible proposals for action. The preparatory work relating to this report was entrusted to the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II).

Comment [SE1]: Modified following a proposal by Greece

2. As for the **methodology** followed and the **outline** of the report, the DH-SYSC-II identified and addressed in turn the three priority themes it had identified: the challenge of the interaction between the Convention and other branches of international law, including international customary law (theme 1); the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties (theme 2); and the interaction between the Convention and the legal order of the European Union and other regional organisations (theme 3). The **aim** of the work in its entirety is the preservation of the efficiency of the Convention system against risks of fragmentation of the European and international legal space in the field of human rights protection, stemming from diverging interpretations. In the report, therefore, observations, or a stocktaking, is made in respect of each of the three priority themes addressed, followed by an analysis of the challenges arising for the efficiency of the Convention system and of possible solutions.

Comment [SE2]: Modified following a proposal by Greece

I. The challenge of the interaction between the European Convention on Human Rights and other branches of international law, including international customary law

1. Methodology of interpretation by the European Court of Human Rights and its approach to international law

3. At the outset, the way in which the European Court of Human Rights (the ECtHR / the Court) interprets the European Convention on Human Rights (ECHR / the Convention) is analysed in the Report and compared with the rules of international law on treaty interpretation, notably those contained in Articles 31 to 33 of the 1969 **Vienna Convention on the Law of Treaties** (VCLT).

Comment [SE3]: Modified following a proposal by Greece

4. Indeed, the **ECtHR** confirmed that for the interpretation of the ECHR, account is to be taken of Articles 31 to 33 VCLT subject, where appropriate, to any relevant rules of the Council of Europe. It relies on the VCLT's rules of interpretation, referring notably to the "object and purpose" (Article 31 § 1 VCLT) of the ECHR as a human rights treaty. It further reliesd on the "subsequent practice" (Article 31 § 3 (b) VCLT) of States Parties to the ECHR notably as a confirmation of the existence of tacit agreement between States Parties to the ECHR regarding the interpretation of certain provisions of the ECHR or in

Comment [SE4]: Modified following a proposal by Greece

finding support for its intention to depart from its previous case-law. It is, however, not clear whether the ECtHR may consider the subsequent practice of only some, but not all of the States Parties sufficient to establish an agreement regarding the interpretation of a Convention provision.[1] Where the Court seeks to establish a "European consensus", it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law.

5. Moreover, the ECtHR stated repeatedly that the ECHR had to be interpreted in the light of the rules set out also in Article 31 § 3 (c) VCLT, which indicated that account was to be taken of "[a]ny relevant rules of international law applicable in the relations between the parties". It is essential for States Parties that the Court's case-law is clear and consistent in this respect in order to avoid risks of fragmentation of international law.

6. On various occasions, the Court further invoked, with some variations in its approach, the *travaux préparatoires* (Article 32 VCLT) of the ECHR as a subsidiary means of interpretation, notably as confirmatory evidence of the ordinary meaning of a ECHR provision as already identified by it. It equally relied on Article 33 VCLT for the interpretation of ECHR provisions in cases of differences between the authentic English and French versions of the text.

7. As other international courts, the ECtHR also developed its own doctrines of interpretation, in particular the doctrine of autonomous concept and the 'living instrument' doctrine. In doing so, the Court has not expressly sought to derive them from, or otherwise invoke the VCLT. However, the language used in this context shows that the ECtHR tacitly operated with the general rules of interpretation as enshrined in the VCLT. The ECtHR acknowledged in this context that it could not, by means of an evolutive interpretation, derive from the ECHR a right that was not included therein at the outset, but it proved to be a delicate task to strike the right balance in this respect. The traditional rules of treaty interpretation and the consensual nature of public international law set limits to a dynamic interpretative approach. It is important that the Court explains its methods of interpretation and that the outcomes reached are predictable and understandable for the Contracting States.

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

8. Taking as its starting point the concept of jurisdiction in public international law, the Court has developed its own notion of jurisdiction for the purpose of Article 1 ECHR, invoking the special character of the Convention as a human rights treaty.

9. An analysis of the ECtHR's case-law comprising cases concerning the situation in northern Cyprus, the case of *Banković*, cases leading to the case of *Al-Skeini* and cases since *Al-Skeini* shows that the Convention organs – as other international courts and treaty organs in respect of the jurisdiction clauses of other treaties – have established already at an early stage that jurisdiction is primarily territorial, but that there are exceptions to that principle. Despite the attention given by the Court to defining and categorising in detail these exceptions, some unresolved issues of interpretation of that notion and its scope remain.

Comment [SE5]: Modified following a proposal by Greece

[1] *Comment by the Secretariat: check against the final version of former § 29 of Theme 1, subtheme i) which has not yet been provisionally adopted.*

10. In particular, in the case of *Banković*, one of its important decisions on the subject-matter, the Court had clearly set out the guiding principles on the interpretation of the notion of "jurisdiction". It had stressed that the Convention operated in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States and had enumerated five categories of exceptions to the territorial scope of jurisdiction (extradition/expulsion cases, extraterritorial effects cases, effective control cases, diplomatic or consular cases and flag jurisdiction cases). The facts of the case – concerning air strikes outside Convention territory – were found to fall under the principle that there was no jurisdiction extraterritorially; the conditions for any of the exceptions were not met.

11. In subsequent cases, and notably in *Al-Skeini*, another important judgment on the scope of the notion of jurisdiction, the Court restructured the different categories of exceptions to the rule of jurisdiction within the State's own territory and, to some extent, departed from *Banković*. It divided the exceptions into two groups: first, cases of State agent authority and control, in which the State must secure to the individual the rights relevant to the individual's situation and, second, cases of effective control over an area in which the State must secure, within the area under its control, the entire range of substantive rights of the Convention.

12. In *Al-Skeini*, as well as in a number of further applications such as *Hirsi Jamaa*, *Hassan* and *Jaloud*, the Court found the facts of the case to fall under the exception of State agent authority and control. As a consequence, the respondent State was found to have jurisdiction outside the Convention legal space in further situations arising outside the respondent States' territory, including operations of armed ground forces on the territory of a non-Convention State and the returning of migrants intercepted on the high seas to their country of departure. Because of the broad formulation of the principles in these cases it could be difficult for the respondent State to foresee the exact scope of its obligations under the Convention, in particular as the Convention rights now also ~~to~~ comprise positive and/or procedural obligations.

Comment [VAD6]: Change following a comment by Greece.

13. Several important judgments, notably in the cases of *Catan* and *Chiragov*, further defined the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In this category of cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.

14. The Court does not always clearly distinguish jurisdiction within the meaning of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. In choosing the term "effective control of an area", the Court appears to have taken up a concept familiar to international law, but as a basis for attributing the conduct of one entity to another in the law of State responsibility.

15. The interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. In view of the importance for the States of

knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is of the essence in this particular field.[2]

16. Likewise, the application or respect of the general international law on **State responsibility** by the ECtHR in its case-law was examined more closely. A distinction was made between cases concerning questions of attribution of the actions of private or non-State actors to a State; cases concerning questions of attribution in situations in which more than one State was involved in the underlying facts; and cases concerning attribution in situations in which one or more States and an international organisation were involved in the underlying facts.

17. [3]It emerges from the analysis of that case-law, and notably of the cases of *Ilaşcu and Others*, *Rantsev*, *Stojkovic*, *El-Masri* and *Al Nashiri*, that the Court, in determining whether conduct is attributable to the respondent State, does not make clear whether, and in how far it applies the rules of attribution reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). While the Court repeatedly referred to specific Articles of the ARSIWA when listing the relevant provisions of international law, it does not explicitly apply these rules when deciding at the merits stage whether an impugned act can be attributed to the respondent State. It rather appears that the Court applies its own principles, having taken into account the relevant rules of international law and applying them, as it usually does, while remaining mindful of the Convention's special character as a human rights treaty.

18. Despite the fact that the Court's methodological approach is not entirely clear in this respect, a comparison of the Court's case-law with the ARSIWA rules shows that in a large number of cases, the Court's approach does not differ from those rules. However, the threshold of the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was lower under the Court's case-law (see, *inter alia*, *Ilaşcu*) than under Article 8 of the ARSIWA. In some other cases (see, for instance, *El-Masri* and *Al Nashiri*), it is difficult to discern which rules exactly the Court applied in respect of State responsibility and, in particular, whether or not the Court's reasoning amounted to attributing to the respondent States the conduct of a third State.

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

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

20. The UN Charter's solution to any conflict between obligations under the Charter and obligations arising under other international agreements is that ~~the~~ Charter obligations should prevail by virtue of **Article 103 of the UN Charter**. It is further established in the jurisprudence of the International Court of Justice that mandatory

Comment [SE7]: Modified following a proposal by Greece

[2] One delegation disagreed with the decision taken by the CDDH that problems for the States at the stage of the execution of judgments in cases concerning the extraterritorial application of the Convention shall not be addressed as they go beyond the scope of the Report on the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the Report.

[3] Note by the Secretariat (to be deleted after the adoption of the Report): The present and following paragraphs, highlighted in blue, have to be revisited in the light of the finalised text of former §§ 93-101 of Theme 1, subtheme ii).

decisions of the Security Council are obligations arising under the Charter for the purposes of Article 103.

21. The ECtHR, rather than applying Article 103 of the UN Charter to give precedence to obligations under a United Nations Security Council Resolution, appears to avoid finding that conflicts have arisen between a ECHR right and an obligation arising under the UN Charter, in a spirit of systemic harmonisation. Referring to Article 24 § 2 of the Charter, the ECtHR has adopted ~~a~~ the presumption that Security Council resolutions are adopted in accordance with the Purposes and Principles of the United Nations and should therefore be ~~should be~~ interpreted so as to avoid finding any incompatibility with human rights under the ECHR.

Comment [SE8]: Modified following a proposal by Greece

22. This presumption may, however, affect the ability of States to comply with a clear requirement of a Security Council resolution. As the Security Council's tools rely for their effectiveness entirely on the active cooperation of States, an approach that national authorities subject their observance of binding measures of the Security Council to ECHR requirements might impair the Security Council's discretion to take effective measures to maintain peace and security. The ECtHR has sought to take into account the nature and purpose of the measures adopted by the Security Council by limiting the required scrutiny under the ECHR to arbitrariness (see the case of *Al-Dulimi*).

Comment [SE9]: Modified following a proposal by Greece

23. As regards **Security Council measures not involving the use of force**, in particular UN sanctions, the ECtHR had to decide on the compatibility with the ECHR of the imposition by member States of travels bans (see *Nada*) or of the freezing of assets (see *Al-Dulimi*) pursuant to a Security Council resolution. The ECtHR focussed in these cases on the actions of the member States implementing Security Council decisions rather than the decisions of the Security Council themselves. The approach of the ECtHR, which stressed that in the light of a degree of latitude which the States have in the implementation of sanctions, they could not confine themselves to relying on the binding nature of Security Council resolutions, may cause difficulties to, or even a conflict of obligations for the States. While there may be some room for a national judicial review regarding certain procedural or formal requirements, the discretion left to the States for a review regarding the merits of Security Council decisions is very limited. It was important to note that the Security Council, which is best placed to ensure that there are appropriate mechanisms and review processes regarding its decisions, has seen significant developments in its practice in this respect in recent years.

24. As regards ~~the applicability of Article 103 of the UN Charter to~~ **Security Council decisions authorising the use of force** by member States ~~it is noted that this has become the only way that in practice the Security Council can take forcible measures to meet its responsibility to maintain international peace and security.~~ and ~~D~~depending on the nature of the UN involvement, the ECtHR may consider impugned actions attributable to the UN (see the cases of *Behrami and Behrami* and *Saramati*) or the member State in question (see *Al-Jedda*) ~~and not to the UN (see for actions attributable to the UN *Behrami and Saramati*)~~. To take a too narrow view of the word "obligations" in Article 103 of the UN Charter, so as to deny primacy to a Chapter VII authorisation of enforcement action by States simply because there is no mandatory obligation on States to participate in such action, risks undermining the ability of the Security Council to carry out its tasks under the Charter.

Comment [SE10]: Modified following a proposal by Greece

4. Interaction between international humanitarian law and the European Convention on Human Rights

25. International Humanitarian Law (IHL) is the body of international customary and treaty based rules that specifically applies in armed conflict to ensure respect for the basic standards of humanity. International human rights law will apply in principle in times both of peace and conflict.

26. As regards the relationship between those two bodies of law, the International Court of Justice ~~seems to have~~has found that both bodies of law could apply to the same situation (see notably *DRC v. Uganda*).

Comment [SE11]: Modified following a proposal by Greece

27. The ECtHR, for its part, had initially been reluctant to consider the provisions of **IHL** (see *Isayeva*).[4] It has~~d~~ ~~then~~ subsequently acknowledged provisions of IHL as part of the legal context in which the ECHR applies (see *Varnava*). In other cases, it examined whether IHL gave a conclusive answer to the question of the lawfulness of the national authorities' measures, but found that this was not the case (see *Sargsyan*). Finally, in *Hassan*, the ECtHR found that even in situations of international armed conflict, the ECHR continued to apply, albeit interpreted against the background of the provisions of IHL and thus sought an "accommodation" between two apparently conflicting legal provisions, based on Article 31 § 3 (c) of the VCLT. In situations in which the provisions of IHL are clear and well-established, this constitutes a possible approach to the reconciliation of the two bodies of law.

Comment [SE12]: Modified following a proposal by Greece

28. A similar solution may be possible in relation to **non-international armed conflicts**, but there may be additional complexities, notably for determining the content of some of the rules applicable to these conflicts, which are still largely derived from customary international law.

29. An alternative solution to the question of determining conflicts between (at least some) provisions of IHL and of international human rights law is for a State to derogate from the ECHR in accordance with Article 15. However, further questions may arise regarding the applicability of **Article 15 ECHR** and the extent of possible derogations in particular in relation to an extra-territorial conflict situation. A careful assessment would have to be made of its overall contribution to creating greater legal certainty, which is of particular importance in armed conflict situations.

II. The challenge of the interaction between the European Convention on Human Rights and other international human rights instruments to which the Council of Europe member States are parties

30. The ~~present section~~second part of the R~~r~~eport ~~shall~~ addresses the interaction between the ECHR and other international human rights instruments to which the Council of Europe member States are parties, in particular human rights instruments ~~only in so far as the latter instruments have been~~ adopted under the auspices of the United Nations~~:~~. ~~Today all forty-seven Council of Europe member States are simultaneously bound by the ECHR and~~ the International Covenant on Civil and Political Rights (ICCPR, 1966), ~~as well as~~ the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), ~~of 1966. Moreover, since then several more UN human rights instruments have been~~

[4] Note by the Secretariat (to be deleted after the adoption of the Report): The section of the present paragraph, highlighted in blue, has to be revisited in the light of the finalised text of former § 13 of Theme 1, subtheme iv).

~~adopted:~~ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1966), the Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989) and its Optional Protocols, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006) and the Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006).

31. The coexistence ~~and interaction~~ between the **ECHR** and the **UN human rights conventions** through the case-law of the ECtHR and the practice of the UN treaty bodies may lead both to a diverging interpretation of substantive rights and to diverging approaches to procedural matters, despite the fact ~~. In examining these issues, it has to be borne in mind that, other than the final judgments of the ECtHR which the respondent State is obliged to execute (Article 46 ECHR),~~ the **"Views" of the UN treaty bodies** on individual communications are **not legally binding** and follow-up ~~to the "Views"~~ consists of the initiation of a dialogue between the relevant treaty body and the State concerned.

32. The coexistence of different normative sets in the ECHR and in different UN human rights conventions may lead to a **diverging interpretation of substantive rights** ~~even where the normative texts are quite similar~~. ~~This may be illustrated, first, by~~Illustrations could include, firstly, a number of cases concerning the scope of the freedom to manifest one's religion in the context of the wearing of religious symbols and clothing. Despite the fact that the wording of Article 9 ECHR and Article 18 ICCPR do not diverge significantly, the ECtHR, referring to the States' margin of appreciation, did not find prohibitions on the wearing of religious clothing to be in breach of Article 9 ECHR (see, for instance, *Leyla Sahin v. Turkey* and *S.A.S. v. France)*. In contrast, the UN Human Rights Committee, in a number of comparable cases, repeatedly found such prohibitions to be in breach of Article 18 ICCPR (see, in particular, *Bikramjit Singh* and *Sonia Yaker*).

33. Secondly, divergent interpretations of the right to liberty as guaranteed by the ECHR and different UN Conventions have, in certain cases, become apparent. Article 5 § 1 (e) ECHR and also Article 3 ECHR (as interpreted by the ECtHR), as well as Article 9 ICCPR (as interpreted by the UN Human Rights Committee) appear to be more permissive as regards the possibility to order the involuntary placement and treatment of persons with mental disorders than Article 14 of the CRPD (as interpreted by the CRPD Committee).

34. ~~A third point of divergence concerns~~ Divergence may also be illustrated with regard to the scope of the prohibition of torture under Article 3 ECHR, under the ICCPR and under Article 3 of the CAT in the context of expulsion or extradition procedures. In particular, it is apparent that the CAT Committee (see, for instance, *Abichou* and *H.Y. v. Switzerland*) is more reluctant than the ECtHR (see, for instance, *Othman (Abu Qatada)*) to place reliance on diplomatic assurances provided for the non-use of torture by the State to which the person concerned is to be deported.

35. Moreover the coexistence of different international mechanisms for the guarantee of human rights may lead to **diverging approaches to procedural matters**. Different approaches to questions of admissibility of an application or communication have the potential to threaten the coherence of human rights law if they may lead to an examination of the same or much similar matters by different organs and the latter come to contradictory results concerning the same legal obligation.

Comment [SE13]: Modified following a proposal by Greece

Comment [SE14]: Modified following a proposal by Greece

Comment [SE15]: Modified following a proposal by Greece

Comment [SE16]: Modified following a proposal by Greece

Comment [SE17]: Modified following a proposal by Greece

36. In particular, unlike Article 35 § 2 ECHR, Article 5 § 2 (a) of the Optional Protocol to the ICCPR does not bar the Human Rights Committee from examining communications which have previously been examined by the ECtHR unless the ~~member~~ State party concerned has made a valid reservation against the competence of that Committee to re-examine the same case; the same applies to the CED and CERD Committees. It must further be noted that even where~~in case~~ such a reservation has been made, the Human Rights Committee has considered that its competence to re-examine a case is not excluded~~a matter cannot be considered as having been "examined" within the meaning of Article 5 § 2 (a) of the said Optional Protocol by the ECtHR – so as to exclude the Committee's competence to reexamine it –~~ when the limited reasoning of the ECtHR for declaring a case inadmissible (arguing that "it does not disclose any violation of the rights and freedoms in the Convention") did not allow the Committee to assume that the examination included a sufficient consideration of the merits (see, in particular, *Maria Cruz Achabal Puertas*).

Comment [SE18]: Modified following a proposal by Greece

37. Moreover, compared to the ECtHR, the UN treaty bodies including the Human Rights Committee, the CAT Committee, the CRC Committee and the CESCR appear to have a broader approach in respect of interim measures provided for in ~~its~~ their respective rules of procedure~~, both as regards the areas in which such measures are granted and the frequency with which such measures are issued~~.

Comment [SE19]: Modified following a proposal by Greece

38. For reasons inherent in the relevant treaty provisions, in the different geographical scope of those treaties, but also because different bodies are involved, complete convergence in the human rights protection under these treaties would be neither possible nor appropriate. ~~The ECtHR seeks to interpret and apply the rights protected under the ECHR in a way that is in harmony not only with general international law, but in particular with the relevant universal human rights instruments. As it acknowledges a margin of appreciation of the States Parties, this does not, however, mean that the interpretation of the same right always corresponds (see, for instance, *Correia de Matos*). By contrast, the UN treaty bodies, in particular the Human Rights Committee, rarely refer to the Court's case-law, although this does not necessarily mean that the latter is not considered.~~ Nevertheless,

39. t~~T~~he existence of parallel human rights protection mechanisms, normally a source of enrichment and enhancement of the universal protection of human rights, ~~thus~~ has also the potential of becoming a source of uncertainty for States parties on how to best fulfil their human rights commitments, not to mention for individuals as regards the exact scope of their rights. Overlapping jurisdictions and conflicting findings led to some extent to human rights forum-shopping.

Comment [SE20]: Modified following a proposal by Greece

The proposal also involves combining current paragraphs 38 and 39 into one paragraph.

40. Thise threat ~~this development poses~~ to the coherence of human rights law and the credibility of human rights institutions should be addressed by containing divergence between the different human rights protection systems. The ECtHR should continue to seek, and the UN treaty bodies should increasingly refer to, and attempt to arrive at a harmonious interpretation of different treaties by which ~~member~~ States are simultaneously bound. Moreover, the **dialogue** between the ECtHR and the UN treaty bodies and between the latter and the States Parties should be increased. Moreover, in so far as possible, **measures limiting overlapping jurisdiction** between these organs, for instance by the introduction of stricter time-limits for filing communications with the UN treaty bodies or by an extension of the reasons given by the ECtHR for declaring an application inadmissible, could help to minimise the risk of contradictory interpretation of human rights standards.

Comment [SE21]: Modified following a proposal by Greece

III. The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations

Comment [SE22]: Modified following a proposal by Greece

41. As regards the interaction between the ECHR and the **EU legal order**, it is to be noted that fundamental rights in the EU legal order are now codified in the Charter of Fundamental Rights of the European Union, which, since the entry into force of the Lisbon Treaty on 1 December 2009, has the same legal value as the primary law Treaties of the EU (the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU); see Article 6 § 1 TEU).

42. A strong **link** has been established between the **EU** and its **Charter of Fundamental Rights** and the **ECHR**. Pursuant to Article 6 § 3 TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member States, shall constitute general principles of the EU's law. Moreover, Article 52 § 3 of the EU Charter of Fundamental Rights provides that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

43. The **ECtHR** developed the following **principles regarding the interaction** between the ECHR and the EU legal order. While the ECHR does not exclude the transfer of competences to international organisations, the member States' responsibility to secure the Convention rights continues even after such a transfer (see, *inter alia*, *Matthews*). The fact that national measures give effect to EU law does not remove them from the ambit of the ECHR (see, for instance, *Cantoni*). However, if the international organisation to which the member State in question had transferred part of its sovereignty provides~~d~~ a protection of fundamental rights in a manner which could be considered at least equivalent to that for which the ECHR provides, a presumption arises that a State has~~d~~ not departed from the requirements of the ECHR when it did no more than implement its strict legal obligations flowing from its membership of the organisation in question. However, any such presumption could be rebutted if, in the circumstances of a particular case, it ~~was~~ is considered that the protection of ECHR rights was manifestly deficient (see, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*). The ECtHR has clarified that the presumption, which led to it reducing the intensity of its supervisory role in the interests of international cooperation, ~~arose~~ arises only under two conditions, namely the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law (see *Michaud* and *Avotiņš*).

Comment [SE23]: Modified following a proposal by Greece

44. ~~As regards an~~The **accession of the EU to the ECHR**~~, which~~ has been discussed since the late 1970s.~~,~~ Article 6 § 2 TEU, as amended by the Lisbon Treaty, provides that the EU shall accede to the ECHR. In December 2014 the Court of Justice of the European Union (CJEU), in its Opinion 2/13, found, however, that the draft Accession Agreement, elaborated by the CDDH in co-operation with the ~~EU~~ European Commission and setting out the modalities of the EU's participation in the ECHR system, was not compatible with EU law. The CJEU took the view that the draft Accession Agreement, *inter alia*, was liable to affect the specific characteristics and the autonomy of EU law as well as the principle of ~~member States'~~ mutual trust between member States. It further failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts on the part of the EU in Common Foreign and Security Policy (CFSP)

matters. Possible solutions to the various objections raised by the CJEU in its Opinion are currently being examined by the EU institutions.

Comment [SE24]: Modified following a proposal by Greece

45. The co-existence, in the same geographical area, of the EU Charter of Fundamental Rights and the ECHR, which are strongly linked, but not identical, can be a source of mutual enrichment. At the same time, it can create challenges if the different instruments are interpreted, in substance and in relation to methodology, in a manner which creates **conflicting obligations** for States and can thus potentially lead to a fragmentation of international human rights law.

46. From the perspective of an EU member State, the need to simultaneously comply with the principles of mutual recognition and mutual trust as developed in EU law and with the obligation to carry out an individualised examination of the applicant's situation as required by the ECHR notably under Article 3 ECHR in expulsion cases (see, for instance, *Tarakhel*) appears particularly challenging. Mutual recognition and mutual trust in essence delimit the extent to which an EU member State can engage in individualised examination without running the risk of being found in breach of its obligations stemming from EU law. Judicial dialogue is one of the most powerful tools in this respect to ensure a harmonious cooperation between the ECtHR and the CJEU and enhance consistency of the case-law. Involvement of the EU institutions, namely, the EU Commission as a third party, could also serve as a tool to assist the ECtHR in the cases which concern the interpretation and application of EU law provisions.

47. Furthermore, it may be considered problematic that the "*Bosphorus* presumption" described above requires the ECtHR to interpret EU law in order to determine whether it left the member States a margin of manoeuvre in the application of that law. The reduction of the intensity of the ECtHR's supervisory role in the event of the application of the said presumption could further lead to a **non-uniform protection** of the rights of persons in different Council of Europe member States, although sight may not be lost of the fact that where the presumption applies, the applicants' rights are also protected by EU law.

48. As for the delay in the EU's accession to the ECHR, it entails the risk that two separate bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, creating a dividing line in Europe. As long as the EU is not a Contracting Party to the ECHR and therefore not subject to external scrutiny, it could further be argued that a **protection gap** exists. It is therefore desirable that accession negotiations will be resumed soon and that possible changes to the draft Accession Agreement can be accommodated in an acceptable manner.

49. As regards the interaction between the ECHR and the **Eurasian Economic Union** (EAEU), it is noted that the EAEU was established by the Treaty on the Eurasian Economic Union which entered into force on 1 January 2015, replacing the Eurasian Economic Community (2000 – end of 2014). It is an international organisation for regional economic integration which consists of five member States, two of which – the Russian Federation and the Republic of Armenia – are also member States of the Council of Europe.

50. The Court of the EAEU has jurisdiction to resolve disputes arising in connection with the implementation of the Treaty on the EAEU, international treaties within the EAEU and/or decisions of the EAEU institutions. It notably established the principle of the **primacy of EAEU law** over national law (see *Russia v. Belarus (Kaliningrad Transit)*). In view of the lack of express provisions on the protection of fundamental rights in the Treaty on the EAEU, the Court of the EAEU rarely dealt with

human rights issues. However, the Court of the EAEU has referred to the preamble of that Treaty stating that the member States are "guided by … the need for unconditional respect for the rule of constitutional rights and freedoms of man and national" to find that the level of protection of the rights and freedoms offered by the EAEU cannot be lower than the level of protection ensured in the member States (see *Opinion CE-2-2/7-18-БК*). It further sporadically referred to the practice of the ECtHR (see *Opinion CE-2-3/1-16-БК*).

51. At the moment the interaction between the ECHR system and the EAEU is limited and does not appear to raise immediate challenges in terms of fragmentation of human rights law. However, ~~should the Court of the EAEU continue to refer to the case-law of the ECtHR, it is necessary to ensure that the references are made to the current case-law. T~~the interaction between the ECHR and the EAEU could notably benefit from constructive **judicial dialogue** that would help the judges to exchange information about the relevant developments in the two systems, as well as to ensure that both systems maintain proper cross-references.

Comment [SE25]: Modified following a proposal by Greece

Conclusion

52. As the ECtHR itself found on many occasions, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights. Legal certainty as regards, in particular, the applicable rules ~~regarding~~ concerning the interpretation of the ECHR as well as the applicable rules in the relationship with other rules of international law on State responsibility or international humanitarian law is of great importance for the States Parties.

Comment [SE26]: Modified following a proposal by Greece

53. In order to avoid a risk of fragmentation of the international legal order, the ECtHR, just as all other systems making up the European architecture of human rights protection, should proceed, to the extent possible, in the direction of a harmonisation of their practice, notably with the help of an enhanced judicial dialogue. In order to avert the particular risk that two separate bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

INTRODUCTION

1. Background to the work

54. The reflections on the place of the European Convention on Human Rights (ECHR, the Convention) in the European and international legal order have been conducted in the context of the ~~so-called~~ Interlaken reform process towards long-term effectiveness of the Convention system.[5] The Interlaken Declaration, adopted at a first intergovernmental conference on the future of the European Court of Human Rights in Interlaken in 2010, sought to establish a roadmap for the reform process and notably invited the Committee of Ministers to decide, before the end of 2019, whether the measures adopted in the course of the reform process have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary.[6]

55. Since the Interlaken conference, the measures considered necessary to guarantee the long-term effectiveness of the Convention system have been further elaborated in the Declarations adopted at four further high-level conferences (in Izmir ~~(~~2011~)~~[7], Brighton ~~(~~2012~)~~[8], Brussels ~~(~~2015~)~~[9] and Copenhagen ~~(~~2018~)~~[10]). The Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) throughout the reform process to provide analyses and proposals on different topics related to the effectiveness of the Convention system. It ~~had~~ notably asked the CDDH to present its opinions and proposals in response to a number of issues raised in the Brighton Declaration ~~on the future of the European Court of Human Rights (20 April 2012)~~.[11] The CDDH had thereupon elaborated[12] and adopted on 11 December 2015 its Report on "The longer-term future of the system of the European Convention on Human Rights".[13]

56. In that report, the CDDH identified the place of the Convention mechanism in the European and international legal order as one of four overarching areas which are decisive for the longer-term effectiveness and viability of the Convention system (alongside national implementation of the Convention, the authority of the Court and the execution of the Court's judgments and its supervision).[14] It agreed in conclusion § 203 iii) of its report "that an in-depth analysis needs to be conducted on all issues raised regarding the place of the Convention mechanism in the European and international legal order" in a follow-up to the report.

Comment [SE27]: Modified following a proposal by Greece

Comment [SE28]: Modified following a proposal by Greece

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[5] See the Interlaken Declaration of 19 February 2010 of the High Level Conference on the Future of the European Court of Human Rights, PP 10.
[6] See the Interlaken Declaration, Implementation of the Action Plan, point 6.
[7] See the Izmir Declaration of 26/27 April 2011 of the High Level Conference on the Future of the European Court of Human Rights.
[8] See the Brighton Declaration of 19/20 April 2012 of the High Level Conference on the Future of the European Court of Human Rights.
[9] See the Brussels Declaration of 27 March 2015 of the High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility".
[10] See the Copenhagen Declaration of 12/13 April 2018 of the High-Level Conference on "Continued Reform of the European Court of Human Rights Convention System – Better balance, improved Protection".
[11] See the Committee of Ministers' decision at its 122nd session, instructing the CDDH to submit a report in response to paragraphs 35c to 35f of the Brighton Declaration.
[12] The work on this report had been conducted during the biennium 2014–2015 by the Committee of Experts on the Reform of the Court (DH-GDR) and its Drafting Group "F" (GT-GDR-F).
[13] See the website of the CDDH for further information on the Report on "The longer-term future of the system of the European Convention on Human Rights".
[14] See the Report on "The longer-term future of the system of the European Convention on Human Rights", § 13.

2. Terms of reference

57. In its terms of reference for the biennium 2016–2017, the Committee of experts on the system of the European Convention on Human Rights (DH-SYSC) was charged as follows: "*(ii) [c]oncerning the longer term future of the Convention system and the Court: achieve any results expected on the basis of decisions that may be taken by the Committee of Ministers further to the submission of the CDDH report containing opinions and possible proposals on this issue*".[15]

58. The Ministers' Deputies, at their 1252nd meeting (30 March 2016), welcomed the Report on "The longer-term future of the system of the European Convention on Human Rights" and "instructed the CDDH to carry out a detailed analysis of all questions relating to the place of the Convention in the European and international legal order and on the medium-term and longer-term prospects, in the light of the relevant paragraphs of the report (conclusion § 203 iii)."[16]

59. In its terms of reference given by the Committee of Ministers to the CDDH regarding the work of the DH-SYSC for the 2018–2019 biennium, the DH-SYSC was subsequently charged with the following specific task:
"*(i) Concerning the place of the European Convention on Human Rights in the European and international legal order, as well as the related challenges, prepare a draft report for the Committee of Ministers containing conclusions and possible proposals for action (deadline: 31 December 2019).*"[17]

60. The CDDH entrusted the preparatory work relating to this report to the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II).[18] It elected Ms Florence MERLOZ (France) as Chair of the Group. Representatives of a total of 31 member States of the Council of Europe participated in one or more of the seven meetings of the Drafting Group.[19]

3. Methodology and purpose of the report

61. The starting point of the intergovernmental work resulting in the present report was a brainstorming Seminar on the place of the European Convention on Human Rights in the European and international legal order that was held in Strasbourg, on 29–30 March

Comment [SE29]: Modified following a proposal by Greece

[15] See DH-SYSC(2016)003.
[16] See the decisions of the Ministers' Deputies of 30 March 2016, Appendix 5, § 14; and also DH-SYSC(2016)009.
[17] 2018–2019 CDDH terms of reference as adopted by the Committee of Ministers at its 1300th meeting, 21–23 November 2017.
[18] The DH-SYSC-II was initially called Drafting Group II on the follow-up to the CDDH report on the longer-term future of the System of the Convention. The DH-SYSC-II had eight members (Bulgaria, Croatia, Czech Republic, France, Italy, Latvia, the Netherlands and Norway); moreover, as numerous other member States had equally participated in the DH-SYSC-II's meetings from the outset, in line with a proposal by the CDDH, the participation of ten further member States was covered by the Council of Europe's budget on a rotation basis for the 3rd to 6th meeting and the participation of the costs of one representative from each of the Member States which have previously participated in one or more of the meetings of the Group was covered by the budget of the Council of Europe for the 7th meeting (see CDDH(2017)R88, § 9; DH-SYSC-II(2018)R3, § 19; and DH-SYSC-II(2019)R6, §§ 11–12).
[19] The 1st meeting was held from 30-31 March 2017, the 2nd meeting from 20-22 September 2017, the 3rd meeting from 3-5 April 2018, the 4th meeting from 25-28 September 2018, the 5th meeting from 5-8 February 2019, the 6th meeting from 22-24 May 2019 and the 7th meeting from 18-20 September 2019.

2017. It was co-organised by the Directorate General Human Rights and Rule of Law and the *PluriCourts* (Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, University of Oslo) academic network and brought together Judges of the International Court of Justice and the European Court of Human Rights, Government Agents before the latter Court as well as leading international legal scholars and practitioners. The results of the discussions during that seminar were subsequently taken into account in the works of the DH-SYSC-II.[20]

62. The DH-SYSC-II identified three priority themes which emerge from the CDDH Report on "The longer-term future of the system of the European Convention on Human Rights" and which needed to be examined in the context of its work. These comprise

- the challenge of the interaction between the Convention and other branches of international law, including international customary law (theme 1);
- the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties (theme 2); and
- the interaction between the Convention and the legal order of the EU and other regional organisations (theme 3).[21]

63. In accordance with the Group's decision,[22] drafts covering these themes were elaborated by Rapporteurs, with the help of Contributors. Mr Alexei ISPOLINOV (Russian Federation) and Mr Chanaka WICKREMASINGHE (United Kingdom), Co-rapporteurs, elaborated a draft of theme 1. The Rapporteurs and the Group were assisted in their work by a written submission of Mr Marten ZWANENBURG (Netherlands), Contributor, on theme 1, subtheme ii) on State responsibility and extraterritorial application of the European Convention on Human Rights. Furthermore, Mr Anatoly KOVLER (Russian Federation) was ~~nominated~~ named Contributor for theme 1, subtheme iv) on the Interaction between international humanitarian law and the European Convention on Human Rights and submitted a text on this topic. A draft of theme 2 was submitted by Ms Sofia KASTRANTA (Greece), Rapporteur. The draft of theme 3 was elaborated by Ms Kristine LĪCIS (Latvia), Rapporteur.[23] The Group further decided to work consecutively on these three themes.[24]

Comment [SE30]: Modified following a proposal by Greece

64. Moreover, in order to assist it in its reflections on the different topics, the Group ~~had~~ invited *ad hoc* experts to its meetings to make short presentations on the different themes and to exchange views with the Group.[25] In the course of its work, the Group exchanged views with Professor Rick LAWSON (University of Leiden) on the specific topic of State responsibility and extraterritorial application of the European Convention on Human Rights (theme 1, sub-theme ii)) and with Professor Sébastien TOUZÉ (Paris II Panthéon-Assas University) on the topic of the interaction between international humanitarian law and the European Convention on Human Rights (theme 1, sub-theme iv)).[26] It further ~~heard~~ consulted Professor Photini PAZARTZIS (University of Athens, Vice-Chair of the

[20] See DH-SYSC-II(2017)R1, § 3.
[21] See DH-SYSC-II(2017)R1, § 5; DH-SYSC-II(2017)R2, § 4; and DH-SYSC-II(2017)002, § 2.
[22] Both the DH-SYSC (see DH-SYSC(2017)R3, §§ 16–17) and the CDDH (see CDDH(2017)R87, §§ 14–15) endorsed the DH-SYSC-II's working methods.
[23] See DH-SYSC-II(2017)R2, § 5.
[24] See DH-SYSC-II(2017)R1, § 12; and DH-SYSC-II(2017)R2, § 4.
[25] See DH-SYSC-II(2017)R1, § 10; DH-SYSC-II(2017)R2, § 10; and DH-SYSC-II(2018)R4, § 23.
[26] See DH-SYSC-II(2018)R3, §§ 8 and 17.

UN Human Rights Committee) on the topic of theme 2[27] and Professor Olivier DE SCHUTTER (University of Louvain, Belgium) on theme 3[28].

Comment [SE31]: Modified following a proposal by Greece

65. Furthermore, the DH-SYSC-II considered it important to inform and, as far as possible consult other Council of Europe entities relevant to its work.[29] The Committee of Legal Advisers on Public International Law (CAHDI) appointed a representative, Mr Petr VALEK (Czech Republic, then Vice-Chair of the CAHDI) who participated in several of the meetings of the DH-SYSC-II. Likewise, the Chair of the DH-SYSC-II presented the works started by the Group to the CAHDI at a meeting of the latter on 22 March 2018.[30] Representatives, in particular, of the Registry of the European Court of Human Rights, of the Secretariat of the CAHDI and of the Directorate for Legal Advice and public international law (DLAPIL) equally participated in the Group's meetings.

66. The DH-SYSC-II considered that the aim of its work in its entirety was the preservation of the efficiency of the Convention system against risks of fragmentation of the European and international legal space in the field of human rights protection, stemming from diverging interpretations.[31] In the report, therefore, observations, or a stocktaking, is made in respect of each of the three priority themes addressed, followed by an analysis of the challenges arising for the efficiency of the Convention system and possible responses.[32] The draft report was examined, amended and adopted by the DH-SYSC-II in its 7th and last meeting (18–20 September 2019).

4. Outline of the report

67. The present Report, preceded by an executive summary and an introduction, shall address in turn the three priority themes identified above. With regard to theme 1 on "The challenge of the interaction between the Convention and other branches of international law, including international customary law", the Report addresses four separate sub-themes: 1) Methodology of interpretation by the European Court of Human Rights and its approach to international law (sub-theme i)); 2) State responsibility and extraterritorial application of the European Convention on Human Rights (sub-theme ii)); 3) Interaction between the resolutions of the Security Council and the European Convention on Human Rights (sub-theme iii)); and 4) Interaction between international humanitarian law and the European Convention on Human Rights (sub-theme iv)). The Report subsequently covers the "Challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties" (theme 2) and "The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations" (theme 3), followed by a Conclusion.

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[27] See DH-SYSC-II(2018)R4, § 18.
[28] See DH-SYSC-II(2018)R5, § 15.
[29] See DH-SYSC-II(2017)R1, § 10; and DH-SYSC-II(2017)R2, § 10.
[30] See DH-SYSC-II(2018)R3, §§ 4–5.
[31] See DH-SYSC-II(2017)R1, §§ 9 and 13; DH-SYSC-II(2017)R2, § 15(iii); and DH-SYSC-II(2017)002, § 4. See in the same vein already the CDDH Report on "The longer-term future of the system of the European Convention on Human Rights", §§ 181 and 189.
[32] See DH-SYSC-II(2017)002, §§ 4 and 13.

I. THE CHALLENGE OF THE INTERACTION BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OTHER BRANCHES OF INTERNATIONAL LAW, INCLUDING INTERNATIONAL CUSTOMARY LAW

1. Methodology of interpretation by the European Court of Human Rights and its approach to international law

a. INTRODUCTION

68. The object of the present chapter is to analyse the way in which the European Court of Human Rights (the ECtHR / the Court) interpret~~sed~~ the European Convention on Human Rights (ECHR) and compare this with the rules of international law on treaty interpretation, notably contained in the Vienna Convention on the Law of Treaties.

Comment [SE32]: Modified following a proposal by Greece

69. For the sake of clarity, it may be helpful to keep in mind the following definitions:

70. **Legal interpretation** is an act of attributing and then communicating the meaning of a word or group of words or sentences in a legal text.

71. **Treaty interpretation** is the activity of giving meaning to a treaty or provisions of a treaty.

72. **Authentic interpretation** is the interpretation given by the law-maker or treaty – makers (parties to the treaty).

73. **Authoritative treaty interpretation** is a process of attributing meaning of the treaty provisions by an entity authorised for that purpose by the parties of the treaty. According to well-known words of the Permanent Court of International Justice,[33] "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it" (*Question of Jaworzina*~~, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, at 37~~)[34].

74. **Judicial interpretation** is an activity through which international courts give meaning to a treaty in the context of a particular case.

[33] The Permanent Court of International Justice was subsequently replaced by the International Court of Justice.
[34] *Question of Jaworzina*, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, p. 37.

b. THE VIENNA CONVENTION ON THE LAW OF TREATIES

i. Vienna Convention on the Law of Treaties (VCLT)

Comment [SE33]: Modified following a proposal by Greece

75. The rules of interpretation have been codified in the Vienna Convention on the Law of Treaties (VCLT) of 1969. The VCLT contains three articles on the interpretation of international treaties.

"**Article 31 General Rule of Interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

76. In other words the ~~approach offered by the~~ VCLT requires the following. Firstly the interpreter shall try to interpret the provisions of the treaties in "good faith," in accordance with the "ordinary meaning" of the "terms" or text of the treaty, in their "context," and in light of the treaty's "object and purpose". Secondly the "preparatory work of the treaty and the circumstances of its conclusion" are only secondary sources of interpretation to confirm meaning deduced by the interpreter or in case the meaning of the treaty remains unclear or leads to an absurd result. Article 33 provides that in principle all authentic language versions of a treaty shall be equally authoritative.

ii. Legal status of Articles 31 to 33 of the VCLT

77. Firstly, it should be noted that strictly speaking the VCLT applies only to treaties concluded between states (bilateral; or multilateral, see Article 1 VCLT).

78. Secondly, as Article 4 of the VCLT states, "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

79. According to the International Court of Justice (ICJ) approach, the Vienna Convention's rules of interpretation could be applicable even in a dispute where one or even both disputants are not parties to the VCLT ~~(ICJ *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Decision of 13 December 1999, para. 18)~~ 'inasmuch as it reflects customary international law'.[35] In the same vein, the ECtHR applies the VCLT rules of interpretation to the ECHR in spite of the fact that the ECHR had been signed and came into force before the VCLT.

80. Other international courts and tribunals have also acknowledged the customary character of these rules - the International Tribunal for the Law of the Sea (ITLOS), the Appellate Body of the World Trade Organization (WTO), the Inter-American Court of Human Rights (I-ACHR), the Court of Justice of the European Union (CJEU), and tribunals established by the International Centre for Settlement of Investment Disputes (ICSID). The Vienna Convention rules apply, as a matter of principle, to all international courts and tribunals, irrespective of their institutional set-up, competence or geographical location. It should be noted that the VCLT does not make any distinction between human rights treaties and other international treaties, being equally applicable to all international treaties.

Comment [SE34]: Modified following a proposal by Greece

81. At the same time, the VCLT does not provide any guidance on how these rules of interpretation (recourse to the text, context and object and purpose of the treaty) shall be applied in order to achieve a sufficient result – separately or cumulatively, in what order – as listed on the VCLT or at discretion of the interpreter. The VCLT remains silent about any hierarchical structure between the elements of the General Rule and their exhaustive character. This may leave some room for discussion about the weight to be given to the different elements of the VCLT rules and some degree of leeway for the courts and tribunals to prioritise between them.

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[35] ICJ, *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, § 18.

c. THE EUROPEAN COURT OF HUMAN RIGHTS' PERSPECTIVE

i. The reception of the VCLT (*Golder* judgment)

82. Under the terms of Article 32 of the ECHR, the Court's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and the protocols thereto. In spite of the fact that the ECHR provides the Court with the right to interpret the provisions of the ECHR, the ECHR itself provides no guidance on how the Court should do it. From the perspective of public international law and having in mind that the ECHR is a multilateral international treaty it might be presumed that its interpretation shall be made in accordance with the VCLT rules of interpretation as reflecting customary international law.

83. It should be borne in mind that an important feature of the ECHR's rights is that most of the provisions of the ECHR were deliberately drafted in a very abstract form, and their application in a concrete case before the Court will necessarily require a process of interpretation.

84. The ECtHR expressly relies upon the VCLT rules of interpretation in construing the substantive rights of the ECHR and its provisions concerning the Court's competences and jurisdiction. In terms of the frequency of the reference by the Court to the VCLT rules, it should be mentioned that:

1) According to the calculations made by one commentator, by 2010 the VCLT has been cited in no more than 60 out of more than 10,000 judgments delivered by the Court;[36]
2) As noted in the academic literature the Court in its earlier years seems to be more inclined to refer to the VCLT rules than more recently.[37]

85. In its *Golder* judgment of 1975[38], the Court noted that:

> "29. […] That Convention [VCLT] has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention)."

ii. The VCLT's rules of interpretation in the jurisprudence of the ECtHR

- **Object and purpose of the ECHR (Article 31 § 1 VCLT)**

86. In setting out the aims of its interpretative approach, the Court has constantly relied on the special purpose and character of the ECHR as a human rights treaty and its preamble, which indicates such aims.

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[36] G. Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer / European Journal of international law, 2010 vol. 21 No. 3, 509–541.
[37] See, for instance, Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights, 2010, p. 25.
[38] *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975.

87. In the *Golder* judgment, the Court held that "as stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed".[39]

88. Looking at the ECHR as a treaty distinct from other international treaties, the Court observed in the *Ireland v. the United Kingdom* judgment (1978)[40]:

> "239. […] Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'. […]"

89. In the *Soering* case[41] the Court turned to the special character of the ECHR:

> "87. -In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. […]"

90. In another judgment the Court relied on the "general spirit of the Convention" finding that any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society" (*Kjeldsen, Busk Madsen and Pedersen*[42] ~~judgment of 7 December 1976~~).

- **Subsequent agreement and subsequent practice (Article 31 § 3 (a) and (b) VCLT)**

91. The subsequent practice of the States Parties to the ECHR plays a very important role in the Court's interpretative approach to the ECHR. The Court relied on and referred to the subsequent practice in two ways:

> 1) as a confirmation of the existence of tacit agreement between the States Parties to the ECHR regarding interpretation of certain provisions of the ECHR and
>
> 2) as an element confirming a "European consensus" which according to the Court emerged in the course of the implementation of the rights under the ECHR.

92. The ECHR held in *Loizidou v. Turkey*[43] that its interpretation was "confirmed by the subsequent practice of ~~the~~ Contracting Parties", i.e. "the evidence of a practice

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[39] *Golder*, cited above, § 34.
[40] *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978.
[41] *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989.
[42] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, nos. 5095/71, 5920/72 and 5926/72, § 53, 7 December 1976.
[43] *Loizidou v. Turkey* (merits) [GC], no. 15318/89, 18 December 1996.

denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (...) of the Convention do not permit territorial or substantive restrictions".[44]

93. The string of cases starting from *Soering* is also a remarkable example of the jurisprudence of the Court showing how the Court invoked the subsequent practice. In these cases, the Court referred to subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, stating that it could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (*Soering*, § ~~para.~~ 103).

94. In its *Al-Saadoon and Mufdhi v. the United Kingdom* judgment (2010)[45] the Court came to the conclusion that the number of States prohibiting death penalty taken together with "consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances" ~~(para. 120)~~.[46]

95. In its judgment in the case of *Cruz Varas and others v. Sweden* (1991)[47] the Court took a more cautious approach noting that:

> "100. […] Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see […] Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset -[…]."

96. **[former 29.]** It is important to note that the Court often referred to the subsequent practice of not all but only some of the States Parties of the ECHR, even on occasion considering contrary practice, of a relatively small number of States. [add references if this paragraph is to be retained][48]
[This paragraph has not yet provisionally adopted].

97. In its recent *Hassan v. the United Kingdom* judgment[49] the Court again confirms this approach[50] stating:

> "101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention (~~see paragraph 34 above~~[…]), the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention […]."

98. The Court's approach could be compared with the views of the International Law Commission (ILC) and other international courts and tribunals.

Comment [SE35]: Modified following a proposal by Greece

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[44] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, §§ 79-80, 23 March 1995.
[45] *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 2 March 2010.
[46] Ibid., § 120.
[47] *Cruz Varas and others v. Sweden*, no. 15576/89, 20 March 1991.
[48] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: This paragraph does not seem to be sufficiently substantiated in the text.
[49] *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014.
[50] DH-SYSC-II: This formulation is to be verified depending on the formulation of (former) paragraph 29.

99. As the ILC explains in the Commentaries to its original draft of the VCLT, subsequent practice requires that the parties as a whole to a treaty, not just some of them, accept this interpretation in such a way as to evidence their agreement.[51]

100. The ICJ in its *Namibia* and *Wall* Advisory Opinions considered subsequent practice as tacit consent of the United Nations (UN) members through acquiescence, presuming the absence of direct and repeated objections.

101. The WTO Appellate Body acknowledged in the *EC—Chicken Cuts* report that "not each and every party must have engaged in a particular practice for it to qualify as a 'common' and 'concordant' practice", requiring active participation in subsequent practice of the majority of WTO members complemented by the tacit acquiescence of the remaining part of WTO membership.[52]

102. **[former 35.]** [At the same time the WTO Appellate Body seems not ready to accept for the purpose of interpretation as a sufficient practice the conduct of even a significant majority of the parties of WTO where there is contrary practice by a small portion of WTO member States (EC—Computer Equipment, WT/DS62/AB/R, p.p. 92—93).[53]]
[This paragraph has not been provisionally adopted yet].

103. The VCLT rules are now mainly invoked by the Court ~~(ECtHR)~~ in cases when it refers to other treaties or instruments of international law, or general principles of international law, citing Article 31(3) VCLT and seeking to find a support to its intention to depart from its previous case-law. For instance, in the *Scoppola v. Italy (No. 2)* judgment (2009)[54] the Court was willing to depart from its 30-years practice towards *lex mitior* (retrospective application of a law providing for a more lenient penalty enacted after the commission of the relevant criminal offence) and noted that "during that time there have been important developments internationally"[55] referring then to the corresponding provisions of the American Convention on Human Rights, the EU Charter of Fundamental Rights and the case-law of the Court of Justice of the European Union (CJEU), the Rome Statute of the International Criminal Court and the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY).

Comment [SE36]: Modified following a proposal by Greece

- **Relevant rules of international law applicable in relations between the parties (Article 31 § 3 (c) VCLT)**

104. In relation to the practical use by the Court for the purpose of interpretation of any relevant rules of international law, it is worth noting that on different occasions the Court has expressly mentioned that the ECHR "has to be interpreted in the light of the

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[51] See the Draft Articles on the Law of Treaties with commentaries adopted by the International Law Commission at its 18th session, in 1966, and submitted to the General Assembly, published in the Yearbook of the International Law Commission, 1966, Vol. II, pp. 221-222.
[52] Report of the Appellate Body of the WTO, *European Communities – Customs classification of frozen boneless chicken cuts*, § 259, 12 September 2005.
[53] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: paras. 92-93 of Report of the WTO Appellate Body in EC-Customs Classification of Certain Computer Equipment (W/DS62/AB/R) seem to be about *prior* practice, or rather the parties of the particular dispute (EC-USA) during the Uruguay Round tariff negotiations ("*The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties*").
[54] *Scoppola v. Italy (No. 2)* [GC], no. 10249/03, 17 September 2009.
[55] Ibid., § 105.

rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969 ~~on the Law of Treaties~~, and that Article 31 § 3 ~~(~~c) of ~~which~~ that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'".[56]

105. According to the Court, the ECHR should so far as possible be interpreted in harmony with other rules of international law of which it forms part (*Al Adsani* judgment[57] (2001)~~, para. 55~~). In this case the Court referred to "other areas of public international law" as witnessing a growing recognition of the overriding importance of the prohibition of torture.[58] The Court referred to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights as well as jurisprudence of other international courts and tribunals.

106. On another occasion, the Court has held that Article 2 of the ECHR should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict" (*Varnava and Others v. Turkey*[59], 2009).

107. Similarly in its *Hassan v. the United Kingdom* judgment (2014) the Court held that:

> "102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention (~~see paragraph 34 above~~…), the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part (~~see paragraph 77 above~~…). This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. […] "

108. In its judgment in the case of *Sabeh El Leil v. France*[60] (2011) the Court held that:

> "[…] The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account […]."[61]

109. In that case it considered the generally recognised rules of public international law on State immunity and the Convention on Jurisdictional Immunities of States and their Property of 2004.

- References to the case-law of the ICJ

110. In its *Hassan* judgment the ECtHR pronounced that the Court must endeavor to interpret and apply the ECHR in a manner which is consistent with the framework under international law delineated by the International Court of Justice. In this case the

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[56] See, for instance, *Al-Adsani v. the United Kingdom*, no. 35763/97, § 55, 21 November 2001.
[57] Ibid, § 55.
[58] Ibid., § 60.
[59] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 185, 18 September 2009.
[60] *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011.
[61] Ibid., § 48.

Court referred to the ICJ judgment in the case of *Armed Activities on the Territory of the Congo (DRC v Uganda)* and ICJ Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

111. However, in the *Loizidou* judgment (preliminary objections) the Court noted that:

> "84. […] [Tt]he context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on inter alia to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.
>
> 85. Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46 (art. 25, art. 46), provides a compelling basis for distinguishing Convention practice from that of the International Court."

112. In the case of *Mamatkulov and Askarov v. Turkey*[62] (2005) the Court stating that "account must be taken of 'any relevant rules of international law applicable in the relations between the parties'"[63], referred to practice of other bodies on applications for interim measures, including the ICJ (citing extensively its *LaGrand* judgment), the Human Rights Committee of the United Nations, the United Nations Committee against Torture and the Inter-American Court of Human Rights.

- **Travaux préparatoires (Article 32 VCLT)**

113. The Court has on various occasions invoked the *travaux préparatoires* of the ECHR but never explicitly admitting that it did so because the meaning of the treaty remained unclear or led to an absurd result as mentioned in Article 32 of the VCLT.

114. In *Johnston and Others v. Ireland*[64] (1986) the Court invoked the intentions of the drafters of the ECHR (referring to the Collected Edition of the *Travaux préparatoires*) when giving a restrictive reading of Article 12 of the ECHR:

> "52. [...] [T]the travaux préparatoires disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce."

115. The decision of the Court in the case of *Banković and Others v. Belgium and Others*[65] presents one of the recent and vivid examples of an "internationalist" approach in the ECtHR jurisprudence. Interpreting Article 1 of the ECHR the Court held that:

> "65. […] In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention, which cannot be ignored. The Court would ~~emphasize~~ emphasise that it is not interpreting Article 1 "solely" in accordance with the *travaux préparatoires* or finding

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[62] *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005.
[63] Ibid., § 111.
[64] *Johnston and Others v. Ireland*, no. 9697/82, 18 December 1986.
[65] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 12 December 2001.

those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969)."

116. In its judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina* (2009~~15~~)[66], the Court referred to the preparatory work of the drafters of the ECHR and its Protocols:

> "40. […] the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50 and 52) that the Contracting Parties took into account the particular position of certain parliaments which included non-elective chambers. […]"

117. In same vein in the *Hirsi Jamaa* judgment[67] (2012) the Court used the *travaux préparatoires* of the ECHR saying:

> "174. The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history. […]".

118. In its *Sitaropoulos and Giakoumopoulos v. Greece* judgment[68] (2012) the Court again invoked the *travaux préparatoires* as well as the general context of the ECHR in order to interpret Article 3 of Protocol No. 1 to the Convention:

> "63. […] However, having regard to the *travaux préparatoires* of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has held that it also implies individual rights, including the right to vote and the right to stand for election (…). […]"

119. However, on numerous occasions the Court has held that it cannot rely exclusively on the intention of parties of the ECHR for deducing the meaning of certain terms. As mentioned by the Court in its *Loizidou* judgment (1995) "[…] these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago"[69] ~~(*Loizidou v. Turkey* (preliminary objections))~~.

120. In the recent case of *Magyar Helsinki Bizottság v. Hungary*[70] the *travaux préparatoires* were the subject of considerable discussion, in considering whether Article 10 could be interpreted as encompassing a right of access to information held by public authorities. The Grand Chamber held that in line with Article 32 of the VCLT the *travaux préparatoires* could be a subsidiary means of interpretation in certain cases, but concluded that in the present case they did not have "conclusive relevance" to the question at issue.[71]

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[66] *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, 22 December 2009.
[67] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.
[68] *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, 15 March 2012.
[69] *Loizidou* (preliminary objections), cited above, § 71.
[70] *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016.
[71] See on the relevance of the "preparatory work" (*travaux préparatoires)* also the separate opinions of Judge Sicilianos, joined by Judge Raimondi and of Judge Spano, joined by Judge Kjølbro.

- **Disparities in authentic language versions (Article 33 VCLT)**

121. Due to the fact that the ECHR was signed in English and French, both texts being equally authentic, the Court inevitably faces cases where the meaning of the words or terms in the French version differ from the wording in English.

122. In its *Sunday Times*[72] judgment the Court examined the difference between English "prescribed by the law" and French "prévues par la loi". The Court invoking Article 33 §para. 4 of the VCLT held that:

> "48. […] Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realize the aim and achieve the object of the treaty".

123. It In *James and Others v. the United Kingdom*[73] the Court facing the necessity to reconcile the meaning of the English expression "in the public interest" and French "pour cause d'utilité publique" also referred to Article 332 of the VCLT and thus paid regard to the object and purpose of Article 1 of Protocol No. 1.

124. The Court explicitly invoked Article 33 of the VCLT and relevant case-law of the ICJ as well as the drafting history of the ECHR in its *Stoll* judgment[74] (2007) examining the difference in the wording of Article 10(2) of the ECHR in French and English languages.

> "59. The Court does not subscribe to such an interpretation, which it considers unduly restrictive. Given the existence of two texts which, although equally authentic, are not in complete harmony, it deems it appropriate to refer to Article 33 of the 1969 Vienna Convention on the Law of Treaties, the fourth paragraph of which reflects international customary law in relation to the interpretation of treaties authenticated in two or more languages (see the *LaGrand* case, International Court of Justice, 27 June 2001, I.C.J. Reports 2001, § 101)[75]
>
> 60. Under paragraph 3 of Article 33, "the terms of the treaty are presumed to have the same meaning in each authentic text". Paragraph 4 states that when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted […].
>
> 61. The Court accepts that clauses, which allow interference with Convention rights, must be interpreted restrictively. Nevertheless, in the light of paragraph 3 of Article 33 of the Vienna Convention, and in the absence of any indication to the contrary in the drafting history of Article 10, the Court considers it appropriate to adopt an interpretation of the phrase "preventing the disclosure of information received in confidence" which encompasses confidential information disclosed either by a person

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[72] *Sunday Times v. the United Kingdom*, no. 6538/74, 26 April 1979.
[73] *James and Others v. the United Kingdom*, no. 8793/79, 21 February 1986.
[74] *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007.
[75] In its *LaGrand* judgment the ICJ recognised that Article 33(4) VCLT reflected customary international law in relation to the interpretation of treaties authenticated in two or more languages.

subject to a duty of confidence or by a third party and, in particular, as in the present case, by a journalist."

iii. Other methods of interpretation developed by the ECtHR

125. Starting from the 1970s, the Court has gradually developed its own doctrines of interpretation which are not explicitly mentioned, listed or derived from the VCLT rules of interpretation. The doctrine of autonomous concept had been formulated by the Court in its *Engel*[76] judgment in 1976, the 'living instrument' concept appeared in the *Tyrer*[77] judgment in 1978.

126. However, the Court is not alone in resorting to these innovative techniques of interpretation. The two interpretative methods may also be found in other international courts and tribunals' jurisprudence.[78] By way of example, the so-called evolutive or dynamic interpretation was similarly applied by the Inter-American Court of Human Rights.[79] Likewise, the doctrine of autonomous concept is commonly applied by the CJEU[80] or the Inter-American Court of Human Rights.[81]

127. The main idea lying behind these innovations is aptly illustrated in the *Scoppola (No. 2)* judgment:

> "104. […] It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement […]."[82]

128. In applying the evolutive method, the Court often reiterates that:

> "[…] the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. […]"[83]

129. Although the dynamic interpretation is not expressly mentioned in the VCLT, it could be argued that the special object and purpose of the ECHR, and similarly also any

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[76] *Engel and Others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976.
[77] *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978.
[78] Even if the ICJ does not apply human rights treaties, it can be noted that it has occasional recourse to the evolutive interpretation approach, see, for instance, *Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, judgment of 16 December 2015.
[79] See, for example, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* of 23 August 2013, § 153; *Mapiripán Massacre v. Colombia*, 2005c, § 106 or in its advisory opinion on the interpretation of the American Declaration of the Rights and Duties of Man OC-10/89 of 14 July 1989, Series A No. 10, at § 37. See also LIXINSKI, Lucas. *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*. The European Journal of International Law, Vol. 21, no. 3, 2010.
[80] See, amongst many authorities, C-66/85 *Lawrie-Blum*, ECLI:EU:C:1986:284 as to the autonomous meaning of the notion of „worker" under the EU law.
[81] See *Mapiripán Massacre v. Colombia*, 2005c, § 187 or *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, § 146.
[82] *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 104, 17 September 2009.
[83] See, among other authorities, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 146, 12 November 2008.; See also *Öcalan v. Turkey* [GC], no. 46221/99, § 163, 12 May 2005, and *Selmouni v. France* [GC], no. 25803/94, § 101, 28 July 1999..

subsequent agreements, subsequent practice or relevant rules of international law applicable in the relations between the parties, might justify the Court's evolutive approach to the ECHR. It may be noted that some judges of the Court have attempted to explain that it is implicitly based on and compatible with the underlying logic of the VCLT's general rules of interpretation.[84] The evolutive approach would enable the Court to take into account the changing conditions in the respondent State and in the States Parties to the ECHR in general and to respond to any emerging consensus as to the standards to be achieved. The same could be said of the Court's emphasis on making rights practical and effective. It is noticeable that in developing these concepts the Court has not expressly sought to derive them from or otherwise to invoke the VCLT rules of interpretation. However, the language used in this context shows that the Court tacitly operated with the general rules of interpretation as enshrined in the VCLT.

130. There are limits on the extent of such dynamic interpretation that are inherent in the VCLT rules on interpretation and the nature of international law itself. In its *Johnston* judgment[85] the Court acknowledged the limits of the evolutionary interpretation as follows:

> "53. […] It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions […] However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. […]"

Determining where the balance should be struck is therefore a delicate task, particularly where evolutive interpretation appears to result in the creation of new rights (see for example *Demir and Baykara*, and *Magyar*).

131. Some friction between the VCLT and the Court's evolutive interpretation may therefore potentially occur if the latter goes beyond what is stipulated in Article 31(3)(c) of the VCLT. While the provision admits that only those rules of international law that are applicable in the relations between all parties to a treaty can be taken into consideration, on occasion the Court appears to have taken a different stance. In the *Demir and Baykara* case,[86] it observed that "in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State". In other words, the Court has considered it sufficient that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.

d. CHALLENGES AND POSSIBLE SOLUTIONS

132. As agreed by the High Contracting Parties and consistently confirmed by the Court the ECHR is a part of public international law and thus should be interpreted in accordance with the VCLT rules of interpretation. At the same time the Court stressed the special character of the ECHR as an instrument for the protection of individual human beings.

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[84] See concurring opinion of judge Sicilianos, joined by judge Raimondi, in the case of *Magyar Helsinki Bizottság*, cited above *v. Hungary* [GC], no. 18030/11, 8 November 2016.
[85] *Johnston and Others v. Ireland*, no. 9697/82, § 53, 18 December 1986.
[86] *Demir and Baykara*, cited above *v. Turkey* [GC], no. 34503/97, §§ 78, 85 and 86, 12 November 2008.; see for several examples of previous cases in which the Court took that stance §§ 78-83 of the judgment.

133. The rights and freedoms guaranteed by the ECHR are phrased in a general form. There is thus in some situations a need for concretisation in accordance with Articles 31-33 VCLT.

134. The Court has not established a hierarchy between different interpretative approaches, but in the case-law the use of a dynamic approach is noticeable. It also seems that there is some variation in the Court's use of preparatory works of the drafters of the ECHR.

135. The requirement in Article 31(3)(c) of the VCLT that other rules of international law are taken into account when interpreting a treaty, is an important factor in avoiding the risks of fragmentation of international law. As will become clear in the subsequent chapters, it is essential for States Parties that there is clarity and consistency in the Court's case-law when dealing with these issues.

136. The Court has referred to both the subsequent practice of the States Parties to the ECHR (Art 31(3)(b) VCLT) and other rules of international law (Art 31(3)(c) VCLT) as a means of tacit modernisation of the provisions of the ECHR by the States. Where the Court seeks to establish a "European consensus" in this respect, it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law.

137. In addressing the need to apply the ECHR in present day circumstances and to ensure that the rights are practical and effective, the Court uses dynamic interpretative approaches. However the traditional rules of treaty interpretation and the consensual nature of international law, as well as the need to avoid fragmentation of the latter, place limits on such approaches. It is important therefore that the Court explains its methods of interpretation within these limits and that the outcomes reached are predictable and understandable for the Contracting States in line with the obligations they have undertaken under the ECHR.

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

a. INTRODUCTION

138. In considering the place of the European Convention on Human Rights ("the Convention", ECHR) in the European and international legal order, a key focus of the European Court of Human Rights' ("the Court" / ECtHR) case-law and academic commentary has been on the core obligation contained in Article 1 of the Convention that State Parties shall secure to everyone within their "jurisdiction" the rights and freedoms set out in the Convention. The vast majority of cases brought before the Court concern challenges to the actions of a State within its territory; as jurisdiction is presumed to be exercised normally throughout the State's territory, it is usually clear that a State has "jurisdiction" and the notion does not require further interpretation. However, a respondent State may notably dispute the questions of "jurisdiction" and responsibility where it acts outside its own territory.

139. The question of whether a State had "jurisdiction" must be distinguished from the question whether the State can be held responsible for an impugned act (including regarding issues of causation), or whether that act is attributable to that State. This may equally be disputed by States, notably where non-State actors or other States or international organisations are involved in the conduct complained of.

140. There are extensive bodies of international law on the notions of State jurisdiction and international responsibility. The Court has the ~~ability~~ possibility 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(3)(c) of the Vienna Convention on the Law of Treaties.

141. The notion of "jurisdiction" in general international law refers to the exercise of lawful power by a State to affect persons, property, and circumstances. ~~Such~~ That power 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.[87] Enforcement jurisdiction is in principle only 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).

142. According to the Court's well-established case-law, "the concept of 'jurisdiction' for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law".[88] The ECHR being a human rights treaty, the notion of jurisdiction has a specific function. It sets limits on the scope of application of the Convention by defining the persons who enjoy the rights and freedoms set out in that treaty. In the case-law of the Court, this notion of jurisdiction is not concerned with the

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[87] As is well known, the "*Harvard Draft Convention on Jurisdiction with Respect to Crime"* of 1935 identifies five principles for the exercise of legislative jurisdiction, namely the territorial principle, the nationality principle (or active personality principle), the protective principle, the universality principle and the passive personality principle; see Harvard Research in International Law: *Draft Convention on Jurisdiction with Respect to Crime*, Supplement to the American Journal of International Law (1935), pp. 437–635.

[88] See, *inter alia*, *Banković and Others*, ~~*v. Belgium and Others* (dec.) [GC], no. 52207/99~~cited above, §§ 59-61, ~~12 December 2001~~; *Assanidze v. Georgia* [GC], no. 71503/01, § 137, 8 April 2004; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, 18 July 2004.

question whether the exercise of jurisdiction was lawful or unlawful. The Court considers that "'jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention".[89] In other words, only when the Court is satisfied that the matters complained of were within the State's jurisdiction, the question of State responsibility arises.[90] Applications in which the respondent State is found not to have jurisdiction in respect of the acts complained of are declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention for being incompatible with the provisions of the Convention.[91] Thus, it is important to determine the jurisdictional connection between a State and the actions impugned before the ECtHR.

143. The notion of State responsibility in general international law addresses the identification of an internationally wrongful act and the consequences that flow from it.[92] In the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[93] Article 1 provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State". An internationally wrongful act within that provision covers both actions and omissions, and the wrongfulness or otherwise of such conduct is to be judged according to the requirements of the allegedly violated obligation.[94] Furthermore, in international law the notion of "attribution" is used to determine when there is a sufficiently close link between a certain conduct and a State so as to consider that conduct as an "act of a State" within the meaning of Article 1 of the ARSIWA.[95]

144. The ECtHR does not always address the question of whether the respondent State is responsible for the conduct complained of, or whether that conduct is attributable to that State, as a separate issue from jurisdiction. In the – relatively rare – cases in which this issue is examined in more detail by the Court, it deals with the question of whether the conduct complained of is attributable, or imputable to the respondent State when deciding on the merits of a complaint.[96]

145. When regarding the place of the Convention in the European and international legal order, it is important to examine if the notion of "jurisdiction" and its extraterritorial application differ in general international law and under the Convention and if so, to what extent (A.). Likewise, the application or respect of the general international law on State

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[89] See *Ilaşcu and Others ~~v. Moldova and Russia~~* [GC], no. 48787/99, cited above, § 311~~, 18 July 2004~~; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, 7 July 2011; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 103, 19 October 2012 (extracts); and *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 168, 16 June 2015 .

[90] See Michael O'Boyle, The European Convention on Human Rights and extraterritorial jurisdiction : a comment on 'Life after Banković', in: Fons Coomans and Menno T. Kamminga (eds.), Extraterritorial Application of Human Rights Treaties, 2004, pp. 130-131.

[91] See, *inter alia*, *Banković and Others ~~v. Belgium and Others~~* ~~(dec.)~~ [GC], no. 52207/99, cited above, §§ 84-85~~, 12 December 2001~~.

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

[93] The ARSIWA were prepared by the UN International Law Commission, which stated that "[t]hese articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts", see Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (1).

[94] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 1, point (1), and on Article 2, point (4) with a number of examples.

[95] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 2, point (5), and Commentary on Part One, Chapter II, points (1) – (9).

[96] See, for instance, *Loizidou ~~v. Turkey~~* (merits), cited above, ~~18 December 1996,~~ §§ 52-57; and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 199 ss., 13 December 2012.

responsibility by the ECtHR in its case-law merits a closer analysis (B.). On this basis, possible risks of fragmentation between the different legal systems shall be identified and discussed under both sections.

b. JURISDICTION AND EXTRA-TERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

i. Introduction

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

147. The drafting history of Articles 1 and 56 reveals that it was Article 56 (also called "colonial clause") which provoked more extensive debate. The colonial powers – in particular the United Kingdom, Belgium and the Netherlands – insisted on including it in the text of the Convention to make clear that the scope of the Convention was not to extend automatically to dependent territories.[97]

148. By contrast, Article 1 did not give rise to much debate. The first draft simply provided that every State shall guarantee the rights to all persons "within its territory". Then the provision was slightly modified to say secure to everyone "residing in their territories the rights …". The final version containing the wording the "High Contracting Parties shall secure to everyone within their jurisdiction the rights …" was not contentious.[98]

149. The term "jurisdiction" is not elaborated further by the Convention. In the case of *Banković*, one of its important decisions on the topic, the Court ~~had~~ affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial".[99] Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR Contracting Parties' obligations can extend beyond their territory.

Comment [SE37]: Modified following a proposal by Greece

150. In the case of *Cyprus v. Turkey*[100] the Court reiterated in respect of the interpretation of the notions contained in the Convention that:

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

[97] For an overview over the Preparatory work on (then) Article 63 of the European Convention on Human Rights see the Information document drawn up by the Registry of the European Court of Human Rights, document Cour(78)8.
[98] For an overview over the Preparatory work on Article 1 of the Convention see the Information document drawn up by the Registry of the European Court of Human Rights, document Cour(77)9.
[99] *Banković and Others*, cited above, § 59.
[100] See *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, 12 May 2014.

Convention on the Law of Treaties of 23 May 1969 […]."[101]

ii. The case-law

- **Cases concerning the situation in northern Cyprus**

151. Questions concerning the extraterritorial application of the Convention were raised relatively rarely in the Convention organs' earlier case-law.[102] They had to deal with the possibility of an exercise of jurisdiction outside a State's own territory in more depth notably in several applications concerning the situation in northern Cyprus following the Turkish military operations in 1974.

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

> "8. In Art. 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" …. The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad. The Commission refers in this respect to its decision on the admissibility of Application No. 1611/62 - X. v/Federal Republic of Germany - Yearbook of the European Convention on Human Rights, Vol. 8, pp. 158-169 (at pp. 168-169)."[103]

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

> "62. […] the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a

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[101] ~~See *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 23, 12 May 2014.~~

[102] In the case of *Soering v. the United Kingdom*, 7 July 1989, the Court concluded that the decision by a Contracting State to extradite a person might engage that State's responsibility under the Convention where a risk existed that the person would be tortured or otherwise ill-treated if extradited. In the case of *Stocké v. Germany*,19 March 1991, §§ 51 and 54-55, in which the applicant was tricked into returning to Germany for being arrested, the Court could not establish that there had been unlawful activities abroad for which the German authorities were responsible and could thus leave open the question whether such activities could lead to a breach of Articles 5 or 6 of the Convention by Germany. See also decisions of the European Commission of Human Rights in *Illich Sánchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June 1996, Decisions and Reports (DR) 86, p. 155-162; *Luc Reinette v. France*, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189; *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250; and *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992.

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

person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; […]). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the Drozd and Janousek v. France and Spain judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[104]

154. The Court subsequently reiterated these principles in the case of *Cyprus v. Turkey*, which concerned, *inter alia*, alleged violations of the rights of Greek-Cypriot missing persons and their relatives and of the home and property rights of displaced persons.[105] In finding that Turkey's jurisdiction extended to "securing the entire range of substantive rights set out in the Convention",[106] the Court had regard to "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings"[107]. It further noted that in view of Cyprus's inability to exercise its Convention obligations in northern Cyprus, any other finding as to "jurisdiction" would "result in a regrettable vacuum in the system of human-rights protection in the territory in question"[108].

- **The case of *Banković***

155. The Court subsequently set out in more detail the principles on whether, and in what circumstances, extra-territorial acts of Contracting States can constitute an exercise of jurisdiction by them within the meaning of Article 1 in one of its leading decisions on the subject-matter in the case of *Banković and Others v. Belgium and Others*.[109] In this case the Court dealt with complaints of the victims of air strikes carried out by North Atlantic Treaty Organisation ("NATO") forces against radio and television facilities in Belgrade on 23 April 1999 as part of a series of NATO air strikes against the Federal Republic of Yugoslavia (which at the material time was not a party to the Convention) during the Kosovo conflict.

156. In its important *Banković* decision, the ECtHR has affirmed that the States' jurisdiction as referred to in Article 1 is "essentially territorial"[110]. It further found "State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial

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[104] *Loizidou ~~v. Turkey~~* (preliminary objections), ~~23 March 1995~~cited above, § 62; see also *Loizidou ~~v. Turkey~~* (merits), ~~18 December 1996~~cited above, § 52.
[105] *Cyprus v. Turkey* [GC], no. 25781/94, § 76, 10 May 2001.
[106] Ibid., § 77.
[107] Ibid., § 78.
[108] Ibid., § 78.
[109] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 12 December 2001.
[110] Ibid., §§ 61, 63 and 67.

responsibility in contexts similar to the present case"[111]. The Court did not apply its interpretative approach of the Convention being a "living instrument" in the context of Article 1 and referred to the *travaux préparatoires* of the Convention in that context. It found as follows:

> "64. It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law. The Court has applied that approach not only to the Convention's substantive provisions (for example, the *Soering* judgment cited above, at § 102; […]) but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs (the above-cited Loizidou judgment (*preliminary objections*), at § 71). [(…)]
>
> 65. However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou case (*preliminary objections*), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 "solely" in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969)."

157. The Court recognised that in exceptional circumstances acts of Contracting States performed, or producing effects, outside their territories can still fall within their "jurisdiction" for the purposes of Article 1 of the ECHR, but clearly marking extra-territorial jurisdiction as exceptional.[112]

158. The ECtHR noted four examples of extraterritorial jurisdiction in its case-law, each of which should be "exceptional and requir[e] special justification"[113]:

> (i) Extradition or expulsion cases involving the extradition or expulsion of an individual from a member State's territory which give rise to concerns about possible death or ill-treatment in the receiving country under Articles 2 or 3 or, in extreme cases, the lawfulness of detention or denial of a fair trial under Articles 5 or 6 in the receiving State;
>
> (ii) Extraterritorial effects cases where the acts of State authorities produced effects or were performed outside their own territory (based on the *Drozd and Janousek* judgment in which the "jurisdiction" of France or Spain was not in fact established);
>
> (iii) Effective control cases where as a consequence of military action (lawful or unlawful) a Contracting Party exercises effective control of an area outside its national territory (based on the line of ECtHR cases starting with *Loizidou v. Turkey* and *Cyprus v. Turkey* (see above); and

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[111] Ibid., § 62.
[112] Ibid., § 67.
[113] Ibid., § 61.

(iv) Diplomatic or consular cases, and flag jurisdiction cases that involve activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.[114]

159. In this context it is recalled that in *Banković*, 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 High Contracting Party of the Convention. Furthermore, the Court stressed that the "Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention"[115] ('*espace juridique*' of the Convention).

160. 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".[116]

161. In the case at issue, the Court was not persuaded that exceptional circumstances existed which amounted to the extraterritorial exercise of jurisdiction in the applicants' case also when having regard to the practice of other international human rights bodies.[117]

- **The case-law leading to the case of *Al-Skeini***

Comment [SE38]: Modified following a proposal by Greece

162. Following its decision in the *Banković* case, the Court further developed its case-law on extra-territorial jurisdiction; both the decision in *Banković* and the Court's subsequent case-law have been the subject of numerous comments and shall be further analysed below.[118]

163. In the string of cases leading to the Court's judgment in *Al-Skeini*, the Court elaborated two models of extraterritorial jurisdiction: (i) when a State exercises effective overall control over a given territory of another State (even a small portion of the territory like a prison or military base) – the so-called "spatial" model; and (ii) when a person is within the exclusive authority and/or control of a State's agent – "personal model of jurisdiction".[119] 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.

164. In its judgment in *Issa*[120], which dealt with the alleged killing of Iraqi shepherds

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[114] Ibid., §§ 68-73.
[115] Ibid., § 80.
[116] Ibid., § 75.
[117] Ibid., §§ 78 and 82.
[118] See the "Challenges and possible solutions" section, §§ 46 *et seq.*
[119] See the summary of the principles in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 130-142, 7 July 2011.
[120] *Issa and Others v. Turkey*, no.31821/96, 16 November 2004.

by Turkish soldiers on the territory of Iraq, the Court notably addressed again the question of the potential extra-territorial application of the Convention outside the legal space (*espace juridique*) of the Contracting States. It found that "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[121] The Court reached that conclusion by reference, *inter alia*, to the views adopted by the Human Rights Committee in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*[122] whereas it had found in *Banković* that "exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction" did not displace the territorial jurisdiction expressly conferred by Article 2 § 1 of the Covenant on Civil and Political Rights (CCPR)[123].

165. In its decision in *Pad and Others v. Turkey*[124], the Court then dealt with the applications of several Iranian nationals that concerned the alleged killing of their relatives either, as claimed by the Government, by shots from a Turkish military helicopter over Turkish territory near the Turkish border, or, as claimed by the applicants, after physical arrest on Iranian territory by the helicopter crew after landing and after having been brought on Turkish territory. Following its reasoning in the *Issa* judgment the Court held that Turkey could potentially be liable under the personal model of jurisdiction.[125]

166. In its *Al-Skeini* judgment[126], another leading case,[127] the Grand Chamber elaborated further on the concept of extraterritorial jurisdiction under the Convention. The case concerned the applications of six Iraqi nationals brought in respect of actions of UK forces in Iraq in 2003, when the latter were seeking to establish security and support civil administration in and around Basra; the applicants' relatives were killed during the security operations in question.

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

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

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

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

(iii) in certain cases by virtue of a use of force by agents of a Convention State in the territory of another State.[128]

168. 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

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[121] ~~*Issa and Others v. Turkey*, no.31821/96,~~ Ibid., § 71~~, 16 November 2004~~.
[122] Ibid., § 71.
[123] *Banković and Others*~~,~~, cited above, § 78.
[124] *Pad and Others v. Turkey* (dec.), no. 60167/00, 28 June 2007.
[125] ~~*Pad and Others v. Turkey* (dec.), no. 60167/00,~~Ibid., § 53~~, 28 June 2007~~.
[126] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011.
[127] See for this assessment also *Marko Milanovic*, *Al-Skeini* and *Al-Jedda* in Strasbourg, European Journal of International Law, Vol. 23, no. 1, p. 121.
[128] *Al-Skeini and Others*~~Ibid.~~, cited above, §§ 133-136.

outside its territory "over the person in question".[129] The Court held that, in these circumstances, "the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".[130]

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

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

170. Describing the spatial model of jurisdiction, the Court held that this "occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration". The Court added that "[w]here the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration".[131] It went further by holding that:

> "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)."

171. The Court in its judgment in *Al-Skeini* 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.[132] The Court further explained that it:

> "[…] has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention' (see *Cyprus v. Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, *Öcalan*; *Issa*

[129] Ibid., § 136.
[130] Ibid., § 137.
[131] Ibid., § 138.
[132] Ibid., § 140.

and Others; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above)."[133]

172. In relation to the applicants in *Al-Skeini*, the Court found that in the relevant security operations the British forces were exercising "authority and control over individuals killed in the course of such security operations" so as to establish a jurisdictional link between the deceased and the UK for the purposes of Article 1.[134]

- **The case-law since *Al-Skeini***

173. In its judgment in *Hirsi Jamaa and Others v. Italy*[135] the Court dealt with complaints of Somali and Eritrean migrants travelling aboard three vessels from Libya who had been intercepted at sea by the Italian authorities and returned to Libya on Italian military ships, exposing them to a risk of ill-treatment. The Court concluded that the applicants "were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities".[136] The Court based its finding that Italy had *de jure* control on the fact that the applicants were brought on board naval vessels flying the Italian flag. It observed that by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it is flying.[137] The Court further based its finding that Italy exercised also *de facto* control over the applicants on the fact that in the period between boarding the ships and being handed over to the Libyan authorities, the applicants were under the control of a crew composed exclusively of Italian military personnel.[138]

174. The subsequent case of *Hassan v. the United Kingdom*[139] concerned the capture of the applicant's brother, an Iraqi national, by the British armed forces, his detention at Camp Bucca in Iraq during the hostilities in 2003 and his death several months after his release. The Court reiterated the applicable principles on jurisdiction within the meaning of Article 1 exercised outside the territory of the Contracting States as summarised in *Al-Skeini*, that is, the territorial principle, the exceptions of State agent authority and control and of effective control of an area, as well as the explanations regarding the Convention legal space (*'espace juridique'*).[140] Relying on this case-law, the Court found that from his capture until his release from Camp Bucca the applicant's brother was within the physical power and control of the UK soldiers and thus fell within UK jurisdiction under the State agent authority and control exception covering instances of a use of force by agents of a Convention State in the territory of another State.[141]

175. In its judgment in *Jaloud v. the Netherlands*[142] (the case arose out of the shooting of an Iraqi citizen at a checkpoint in Iraq), the Court concluded that the respondent State had jurisdiction over the applicant's son on the basis that he:

> "152. […] 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

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133 Ibid., § 142.
134 Ibid., §§ 143-149.
135 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.
136 Ibid., § 81.
137 Ibid., § 77; the Court referred to the cases of *Banković and Others,*, cited above, § 73, and *Medvedyev and Others v. France* [GC], no. 3394/03, § 65, 29 March 2010; in this respect, see ibid., § 75.
138 Ibid., § 81.
139 *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014
140 *Hassan v. the United Kingdom* [GC], no. 29750/09, Ibid., § 74, 16 September 2014.
141 Ibid., §§ 76-80.
142 *Jaloud v. the Netherlands* [GC], no. 47708/08, 20 November 2014.

> 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. […]"[143]

176. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there have been developments as regards the factors the Court will consider, notably in the Court's judgment in *Catan and Others v. the Republic of Moldova and Russia.*[144] The case concerned the complaint lodged by children and parents belonging to the Moldovan community in Transdniestria about the effects of a language policy adopted by the separatist regime of the "Moldavian Republic of Transdniestria" ("MRT") prohibiting the use of the Latin alphabet in schools and the subsequent measures to implement that policy. The Court, in establishing that the applicants were within Russia's jurisdiction for the purposes of Article 1, looked beyond the question of the establishment of the "MRT" as a result of Russian military assistance (in 1991-1992) and the size of Russia's military deployment (in 2002-2004)[145] and had also regard to the fact that "the "MRT" only survived during the period in question (2002-2004) by virtue of Russia's economic support, *inter alia*"[146]. The Court concluded that Russia was continuing to provide military, economic and political support to the Transdniestrian separatists so that it was found to have exercised during the period in question effective control and decisive influence over the "MRT" administration.[147] According to the Court, the impugned facts therefore fell within the jurisdiction of Russia, although the Court accepted that there was no evidence of any direct involvement of Russian agents in the action taken against the applicants' schools.[148] The Court specified:

> "106. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (*Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković*, cited above, § 70; *Ilaşcu*, cited above, §§ 314-316; *Loizidou* (merits), cited above, § 52; *Al-Skeini*, cited above, § 138). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to

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[143] ~~*Jaloud v. the Netherlands* [GC], no. 47708/08~~Ibid., § 152~~, 20 November 2014~~. Compare also *Pisari v. Moldova and Russia*, no. 42139/12, § 33, 21 April 2015 (concerning the death of the applicants' son at a peacekeeping checkpoint in the Transdniestrian region of Moldova as a result of a Russian soldier's decision to shoot at his passing vehicle).

[144] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06~~and 2 others~~, 19 October 2012 (extracts).

[145] Ibid., §§ 118-119. The Court accepts that, by 2002 – 2004, the number of Russian military personnel stationed in Transdniestria had decreased significantly (see *Ilaşcu*, cited above, § 387) and was small in relation to the size of the territory.

[146] Ibid., § 120.

[147] Ibid., § 122.

[148] Ibid., § 114.

secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (*Cyprus v. Turkey*, cited above, §§ 76-77; *Al-Skeini*, cited above, § 138).

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

114. […] the Court has also held that a State can exercise jurisdiction extra-territorially when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory (see paragraph 106 above). The Court accepts that there is no evidence of any direct involvement of Russian agents in the action taken against the applicants' schools. However, it is the applicants' submission that Russia had effective control over the "MRT" during the relevant period and the Court must establish whether or not this was the case. [{…]}

121. In summary, therefore, the Russian Government have not persuaded the Court that the conclusions it reached in 2004 in the *Ilaşcu* judgment (cited above) were inaccurate. The "MRT" was established as a result of Russian military assistance. The continued Russian military and armaments presence in the region sent a strong signal, to the "MRT" leaders, the Moldovan Government and international observers, of Russia's continued military support for the separatists. In addition, the population were dependent on free or highly subsidised gas supplies, pensions and other financial aid from Russia.

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

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

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

150. Nonetheless, the Court has established that Russia exercised effective control over the "MRT" during the period in question. In the light of this conclusion, and in

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

178. In *Ilaşcu and Others v. Moldova and Russia*[149] in 2004 the Court concluded that the "MRT" was "under the effective authority, or at the very least under the decisive influence" of the Russian Federation and concluded that the Russian Federation exercised jurisdiction over the applicants.[150] However, in a series of further cases arising from the situation in Transdniestria the Court, basing itself on the findings it made in *Ilaşcu and Others v. Moldova and Russia*[151] in 2004, has held the Russian Federation exercised jurisdiction on the applicants in relation to all acts of the "MRT", including unlawful detentions,[152] poor medical treatment in prisons[153] and also confiscation of agricultural produce by "MRT" customs officials[154], on the ground that Russia exercised effective control over the "MRT".

179. The Court further had to decide on the question of effective control of an area outside a State's own territory in *Chiragov and Others v. Armenia*.[155] The case concerned the complaints made by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992. Referring to *Catan and Others*, the Court reiterated that the assessment of whether, on the facts of the case, the Republic of Armenia exercised and continues to exercise effective control over the territories in question "will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance".[156] Examining Armenia's military involvement, the Court concluded that "it finds it established that the Republic of Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue, and the evidence, not the least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated".[157] Furthermore, examining other support provided by Armenia to the "Nagorno-Karabakh Republic" ("NKR"), the Court found that Armenia provided "general political support"[158], noted "the operation of Armenian law enforcement agents and the exercise of jurisdiction by Armenian courts on that territory"[159] and

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[149] *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004.
[150] ~~*Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99,~~ Ibid., §§ 392 and 394~~, 8 July 2004~~.
[151] ~~*Ilaşcu and Others, cited above.*~~
[152] See *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 116-120 and §§ 132-134, 15 November 2011; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 101-111 and §§ 156-158, 23 February 2016; and *Apcov v. the Republic of Moldova and Russia*, no. 13463/07, §§ 23-25 and §§ 47-49, 30 May 2017.
[153] See *Mozer*, cited above, §§ 101-111, §§ 156-158 and § 184; and *Apcov, cited above,* , §§ 23-25 and §§ 47-49.
[154] See *Sandu and Others v. the Republic of Moldova and Russia*, nos. 21034/05, 41569/04, 41573/04, 41574/04, 7105/06, 9713/06, 18327/06 and 38649/06, §§ 36-38, 17 July 2018.
[155] *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16 June 2015.
[156] Ibid., § 169.
[157] Ibid., § 180.
[158] Ibid., § 181.
[159] Ibid., § 182.

considered that "the 'NKR' would not be able to subsist economically without the substantial support stemming from Armenia"[160]. The Court concluded that "the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. [(…)] the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention."[161]

- **Approaches taken by other international organs**

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

- The ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it held that the International Covenant on Civil and Political Rights (ICCPR) was applicable to the acts done by a State in the exercise of its jurisdiction outside its own territory,[162] notably referring to the Human Rights Committee findings,[163] according to which "the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law".

- The Human Rights Committee in its General Comment No. 31 on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", where the HRC provided that States have the duty to guarantee and respect the ICCPR at home and abroad for individuals within the power or effective control of a State Party acting outside of its territory, regardless of the circumstances in which such power or effective control was obtained.[164]

- The Inter-American Commission of Human Rights interpreting the American Convention on Human Rights (a treaty modelled after the European Convention) invoked the same approach expanding its jurisdiction over the cases that involved the US military intervention in Grenada in 1983[165] and in Panama in 1989[166], and the cases of indefinite detention of aliens by the US in camps outside the US, in

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[160] Ibid., § 185.
[161] Ibid., § 186.
[162] International Court of Justice, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, §§ 110-111.
[163] Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant - Concluding observations of the Human Rights Committee: Israel, 63rd sess., UN Doc. CCPR/C/79/Add.93, 18 August 1998, § 10. The Human Rights Committee reiterated this view in its Consideration of reports submitted by States parties under article 40 of the Covenant - Concluding observations of the Human Rights Committee: Israel, 78th sess., UN Doc. CCPR/CO/78/ISR, 21 August 2003, § 11; 99th sess., UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, § 5; and UN Doc. CCPR/C/ISR/CO/4, 21 November 2014, § 5.
[164] 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. See also Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 124th sess., UN Doc. CCPR/C/GC/36, 30 October 2018, § 36.
[165] Inter-American Commission of Human Rights (IACHR) Report No. 109/99, Case 10.951, Coard et al., United States, 29 September 1999.
[166] IACHR Report No. 31/93, Case 10.573, United States, 14 October 1993.

Guantanamo Bay, Cuba[167].

181. This being said, extraterritorial application of human rights treaties and notably of the ICCPR, even when relating to direct actions of State agents, was persistently objected to by such states as the USA[168], Israel[169], United Kingdom[170] and Canada[171].

iii. Challenges and possible solutions

182. The Court's case-law on the application of the Convention set out above shows that the Convention organs have established already at an early stage that jurisdiction under Article 1 of the Convention is primarily territorial. However, it is equally clear that it is not always restricted to the national territory of the High Contracting Parties. Despite the attention given by the Court to defining and categorising in detail the exceptions to the principle that jurisdiction is primarily territorial, some unresolved issues of interpretation of that notion and its scope remain.

183. Following the Convention organs' decisions on the extraterritorial application of the Convention notably in the cases concerning the situation in northern Cyprus, the Court set out clearly the guiding principles on the interpretation of the notion of "jurisdiction" in one of its important decisions on the subject matter in the case of *Banković*. It marked the States' jurisdiction as essentially territorial and enumerated four categories of extraterritorial jurisdiction (extradition/expulsion cases, extraterritorial effects cases, effective control cases, diplomatic, consular cases and flag jurisdiction cases). It indicated that, given that the scope of Article 1 was determinative of the reach of the

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

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

[169] See for Israel's stance in this respect, for instance, Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure, Fourth periodic reports of States parties due in 2013, Israel, document CCPR/C/ISR/4, 12 December 2013, §§ 45-48.

[170] See for the United Kingdom's position, for instance, Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Information received from the United Kingdom of Great Britain and Northern Ireland on the implementation of the concluding observations of the Human Rights Committee, document CCPR/C/GBR/CO/6/Add.1, 3 November 2009, §§ 24-27; and Consideration of reports submitted by States parties under article 40 of the Convention, Seventh periodic reports of States parties due in July 2012, United Kingdom, the British Overseas Territories, the Crown Dependencies, document CCPR/C/GBR/7, 29 April 2013, § 562, in which the United Kingdom reiterated that "the UK's human rights obligations are primarily territorial, owed by the government to the people of the UK and that the UK considers that the Covenant could only have effect outside the territory of the UK in very exceptional circumstances".

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

entire Convention system it had not applied the "living instrument" approach to its interpretation of Article 1 in that case. Moreover, the Court's finding that the Convention operated "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States"[172] could be read as indicating that the Convention, if exceptionally applicable extraterritorially, would be applied only in respect of territory of another Convention State. Finally, the Court's finding that the obligation in Article 1 could not be "divided and tailored" in accordance with the particular circumstances of the extra-territorial act in question could be seen as excluding an obligation to secure only rights that were relevant to an applicant's situation. The Court found that the facts of the case at issue – concerning air strikes outside Convention territory – to fall under the principle that there was no jurisdiction extraterritorially; the conditions for any of the exceptions were not met.

184. Some subsequent cases of the Court have developed its application of the Convention extraterritorially as set out in *Banković*. In *Issa* the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"[173] and thereby indicated that the Convention could be applied outside the Convention legal space. In *Pad* the Court found that the respondent State could potentially be held liable in a case involving the death of persons possibly brought about by shots from a military helicopter on foreign territory and thus possibly in a situation concerning air strikes which had not been found to make the victims thereof fall within the respondent State's jurisdiction in *Banković*.

185. In *Al-Skeini*, another important judgment on the scope of the notion of jurisdiction, the Court restructured the different categories of exceptions to the rule of jurisdiction within the State's own territory and, to some extent, departed from *Banković*. It divided the exceptions into two groups: first, cases of State agent authority and control, in which the State must secure to the individual the rights relevant to the individual's situation and, second, cases of effective control over an area in which the State must secure, within the area under its control, the entire range of substantive rights of the Convention. It is clear from the Court's definition of the scope of the State's obligations in the first category of State agent authority and control cases that the Convention rights can, as recognised by the Court itself, be "divided and tailored" in the end, in so far as only Convention rights relevant to the situation must be secured.[174] Moreover, the facts of the case, which concerned the death of the applicants' relatives during security operations on the ground in Iraq, were found to fall under the exception of State agent authority and control. The respondent State was thus found to have jurisdiction outside the Convention legal space.

186. In further applications including the cases of *Hirsi Jamaa*, *Hassan* and *Jaloud*, the Court, while relying on the principles as summarised in *Al-Skeini*, found the facts of the case to fall under the exception of State agent authority and control, thus again enlarging the scope of application of the Convention to further situations arising outside the respondent States' territory. The broad formulation of the principles set out in *Al-Skeini*, in respect of State agent authority and control, case-law means that it could be difficult for the respondent State to foresee the exact scope of its obligations under the Convention in respect of individual rights in a given situation. This is particularly so in the light of the development of the substantive rights under the Convention, which now also

[172] *Banković and Others*, cited above, § 80.
[173] *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004.
[174] *Al-Skeini and Others*, cited above, ~~*v. the United Kingdom* [GC], no. 55721/07,~~ § 137~~, ECHR 2011~~.

~~to~~ comprise positive and/or procedural obligations.

187. **[former 51.]**Several important judgments further defined the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In several cases concerning the creation, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military presence in the area. In *Catan*, in particular, it emphasised that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".[175] Similarly, in *Chiragov*, the Court found not only the respondent State's military support continues to be decisive for the continued control over the territories in question, but in addition that the "Nagorno Karabakh Republic" – whose army and administration and those of Armenia had been found to be highly integrated – survived "by virtue of the military, political, financial and other support" given to it by Armenia.[176] No direct action by respondent State in relation to the impugned act was thus found to be necessary in this group of cases in order for the acts to come within the respondent States' jurisdiction.
[This paragraph has not yet been provisionally adopted].

188. In this category of cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.[177] This category of cases may cause difficulties for the States at the stage of the execution of judgments. However, the unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention must be recalled. It has been decided that this aspect relating to the execution of judgments will not be addressed as it goes beyond the scope of the Report on the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the present report.[178]

189. The Court does not always clearly distinguish jurisdiction in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. In choosing the term "effective control of an area", the Court appears to have taken up a concept familiar to international law, but as a basis for attributing the conduct of one entity to another in the law of State responsibility (see in more detail paragraph 238 [formerly 101] below).

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[175] *Catan and Others*, cited above, ~~*v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, 19 October 2012 (extracts).~~

[176] *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180, 185 and 186, 16 June 2015.

[177] See Philippe Boillat, Execution of judgments: new paths, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 63-67.

[178] [*Note by the Secretariat (to be deleted on the adoption of the Report): This passage has been added in order to reflect the guidance given by the CDDH in its meeting of 27-30 November 2018 on whether questions relating to the execution of judgments should be addressed in this chapter (see for the referral of this question to the CDDH DH-SYSC-II(2018)R4, § 12).]* One delegation considered that problems for the States at the stage of the execution of judgments in cases concerning the extraterritorial application of the Convention are within the scope and should have been addressed in the Report. [*Note by the Secretariat: see discussions in the CDDH in June 2019]*

190. Taking as its starting point the concept of jurisdiction in public international law, the Court has developed its own notion of jurisdiction for the purpose of Article 1, invoking the special character of the Convention as a human rights treaty. Other international courts and treaty organs have also given extraterritorial effect to the jurisdiction clauses of other human rights treaties, albeit not without this being contested by some States. However, there are some differences in the approaches of these courts and treaty organs.

191. The Court, in recent years, has more frequently found the Convention to apply extraterritorially on the basis of principles developed in its case-law and the particular facts of the case. This development, against the background of the inherent uncertainties of a fact-dependent approach and some uncertainties in the interpretation of the principles regarding the scope of the States' obligations outlined above, entails to a certain extent a lack of foreseeability for the States of the exact obligations under Article 1. Such uncertainty may compromise the States' willingness, in particular, to participate in certain forms of international cooperation, including peacekeeping missions, governed by international law.

192. It must be borne in mind that the interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. For this reason, an evolutive interpretation in this area could reduce the ability of States to reliably predict the likely approach of the Court and thus to meet their legal obligations under the Convention. In view of the importance for the States of knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is, in any event, of the essence in this particular field.

c. THE APPLICATION OF THE INTERNATIONAL LAW OF STATE RESPONSIBILITY BY THE EUROPEAN COURT OF HUMAN RIGHTS

i. Introduction

193. 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[179] which determine whether a State has committed an internationally wrongful act such as to engage its responsibility towards another State(s). Article 55 of the ARSIWA states that "these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

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

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[179] Whereas primary rules define the content of the international obligation under substantive customary and conventional law (the breach of which gives rise to responsibility), secondary rules govern the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom, see Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (1).

> "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)."

195. 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"[180]).

196. For the purposes of the current consideration of the notion of "jurisdiction" in Article 1 of the Convention, the primary issue of State responsibility that arises is that of "attribution". The ECHR does not contain any provision referring to criteria for the attribution of conduct to a High Contracting Party. There is thus no *lex specialis* in the Convention in relation to such attribution (indeed, issues of attribution are often examined as part of the consideration of "jurisdiction" for the purposes of Article 1). Therefore, the Court has on a number of occasions referred to ARSIWA under the heading of the applicable law.[181]

ii. Case-law of the Court

197. In its case-law, the ECtHR generally does not explicitly address the question of the attribution of the conduct that is alleged to have violated the ECHR to the respondent State. However in a relatively small number of cases (which very largely relate to extraterritorial jurisdiction) the issue of attribution has been addressed, usually when a respondent State has raised it,[182] although on occasion the Court has inquired into attribution of its own accord.[183]

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

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

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[180] *Cyprus v. Turkey* (just satisfaction) ~~[GC], no. 25781/94~~, cited above, § 42~~, 12 May 2014~~.

[181] It must be noted that, according to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, General commentary, point (5) "the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."

[182] See, for instance, *Loizidou ~~v. Turkey~~* (merits), cited above, §§ 51-57~~, 18 December 1996~~.

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

- **Cases concerning questions of attribution of the actions of private or non-State actors to a State**

199. The Court started to deal with the issues of jurisdiction and attribution well before most States of the Council of Europe ratified the ECHR (notably in the cases of *Cyprus v. Turkey* (1975),[184] *Stocké* (~~1989~~1991)[185] and *Loizidou* (1996)[186]). In *Loizidou v. Turkey,*[187] the Court dealt with the question of whether the applicant fell within the jurisdiction of Turkey within the meaning of Article 1 ECHR in its judgment on preliminary objections. The question whether the matters complained of were imputable to Turkey and gave rise to that State's responsibility was determined by the Court at the merits phase.[188] The Court has described the relevant standard for determining attribution as follows:

> "52. […] 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.)."[189]

200. 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 "Turkish Republic of Northern Cyprus" ("TRNC") and the ensuing loss of all control over it were imputable to Turkey, the ECtHR held:

> "56. […] It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (see paragraph 16 above) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" (see paragraph 52 above). Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.
> In view of this conclusion the Court need not pronounce itself on the arguments which have been adduced by those appearing before it concerning the alleged

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[184] See *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission decision of 26 May 1975, Decisions and Reports (DR) 2, p. 136; and Commission report adopted on 10 July 1976, p. 32.
[185] *Stocké v. Germany*, no. 11755/85, § 54, 19 March 1991.
[186] *Loizidou ~~v. Turkey~~* (preliminary objections), ~~23 March 1995~~cited above.
[187] Ibid., §§ 60-64. The case originated from the complaint of a Cypriot national of Greek origin from Kyrenia in northern Cyprus who had moved to Nicosia after her marriage in 1972. She claimed to be the owner of several plots of land in Kyrenia and alleged that since the invasion of the Turkish forces in 1974, she had been prevented from returning to Kyrenia and using her property.
[188] *Loizidou ~~v. Turkey~~* (merits), cited above, §§ 52-57~~, 18 December 1996.~~.
[189] ~~*Loizidou v. Turkey* (merits), cited above~~Ibid., § 52.

lawfulness or unlawfulness under international law of Turkey's military intervention in the island in 1974 since, as noted above, the establishment of State responsibility under the Convention does not require such an enquiry (see paragraph 52 above). […]"[190]

201. It may be noted that in its discussion of State responsibility in *Loizidou* the Court appears to have found that all actions of the "TRNC" were attributable to Turkey. This would constitute a fairly straightforward application by the Court of the principle of attribution which was subsequently set out in Article 8 ARSIWA, dealing with conduct of a person or a group of persons directed or controlled by a State. Indeed, the International Law Commission (ILC) commentary on this article mentions in footnote 160 *inter alia* the *Loizidou* judgment.[191]

202. In the case of *Ilaşcu and Others v. Moldova and Russia*, the Court was concerned with the responsibility of Russia for acts committed in the "Moldovan Republic of Transdniestria" ("MRT"), an entity set up in Moldavian territory. The applicants, who had been arrested during the conflict between Moldova and Transdniestrian separatists, had been handed over by the Russian military authorities to the "MRT" in 1992, and had been detained and sentenced variously to death and heavy prison sentences by the "supreme court" of the "MRT", complained of a series of violations of the Convention which they alleged were imputable to Russia.[192] 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 on 5 May 1998.

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

"382. […] 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."[193]

204. 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,

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[190] Ibid., § 56.
[191] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 YILC, Vol. II (Part two). The footnote [160] states: "The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by […] the European Court of Human Rights: […] *Loizidou v. Turkey*, *Merits*, *Eur. Court H.R.*, *Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid.*, *Preliminary Objections*, *Eur. Court H.R.*, *Series A*, *No. 310*, p. 23, para. 62 (1995)."
[192] *Ilaşcu and Others*, cited above.
[193] Ibid., § 382.

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."

205. In *Ilaşcu*, the Court does not seem to make 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 applicants on the other.[194] With respect to the issue of attribution, it does not appear that the Court considered the "MRT" as an organ of the Russian Federation. Had the Court therefore referred to Article 8 of the ARSIWA, it would have had to examine whether the conduct of the "MRT" could be attributed to Russia as being the conduct of a group of persons which is in fact acting under the direction or control of that State. It may be noted that the ILC Commentary on this Article stipulates that conduct will be attributable to the State in such a situation "only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation"[195], an approach supported by the case-law of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case.[196]

206. However, the said Commentary reveals that international courts have not agreed on the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in *Prosecutor v. Duško Tadić*, diverged from the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case and found that "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The "*degree of control"* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[197] This "overall control" test developed by the ICTY was however expressly

[194] See also the dissenting opinion of Judge Kovler in *Ilaşcu and Others*, cited above, pp. 149 ss.
[195] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 8, point (3).
[196] Compare Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 8, point (4); and the findings of the International Court of Justice in *Nicaragua v. USA* [1986] ICJ Rep. 14, at pp. 62 and 64-5, paras. 109 and 115; and also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep. 42, at pp. 207-211, paras. 398-407.
[197] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November1999), p. 1518, at p. 1541, § ~~para.~~ 117. Thus, the Appeals Chamber held that "Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de

rejected by the ICJ in the 2007 case *Bosnia and Herzegovina v. Serbia and Montenegro*.[198] [199] ~~FOOTNOTE: The ICJ, observing that the ICTY was not called upon to rule on questions of State responsibility, found that " the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility.']~~

207. The ILC Commentary highlights the fact that legal issues and the factual situation in the *Tadić* case were different from those facing the ICJ in *Nicaragua,* noting: "the tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law". The Commentary also refers to the fact that, "[i]n any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it."[200]

208. As regards the ECtHR, its mandate differs both from that of the ICJ and that of the ICTY, and the Court regularly stresses "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings".[201] It may be noted that the necessary degree of control of a State over an entity, defined in *Ilaşcu and Others* as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State, is less stringent than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under the case-law of the ICJ and ICTY referred to above.

- **Cases concerning questions of attribution in situations in which more than one State was involved in the underlying facts**

209. A number of judgments of the ECtHR have dealt with attribution of conduct in cases in which more than one State was involved in a single injury / claim. These are typically cases in which two States act independently of each other and where the Court determines the responsibility of each Contracting State individually, by assessing the State's own conduct in relation to its Convention obligations. In this regard *Ilaşcu and*

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facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)."

[198] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), ~~1996 I.C.J. 210, 404 (July 11)~~judgment of 26 February 2007, I.C.J. Reports 2007, pp. 43 ss. The ICJ, observing that "the ICTY was not called upon in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only" (ibid., § 403), found that "the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility" (*ibid.*, § 406).

[199] ~~The ICJ, observing that the ICTY was not called upon to rule on questions of State responsibility (ADD SOURCE " the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only."), found that " the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility."~~

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

[201] *Cyprus v. Turkey*, cited above, § 78.

Others, the facts of which have been described above, is a relevant example. In this case the Court held Moldova and Russia responsible, each for different acts or omissions that the Court attributed to the State concerned. Those acts and omissions contributed to one injury/claim. In particular, as regards the applicants' complaints about their ill-treatment in, and the conditions and lawfulness of their detention, Moldova was held responsible for a violation of Articles 3 and 5 in respect of three of the applicants for its failure to discharge its positive obligations with a view to obtaining these applicants' release. Russia' responsibility for the applicants' detention by the authorities of the "MRT" was engaged as the latter had been found to remain under the effective authority, or at the very least under the decisive influence, of the Russian Federation; therefore, the impugned conduct was imputable to Russia, which was found to have breached Articles 3 and 5 in respect of all applicants.

210. Other examples include the cases of *Rantsev v. Cyprus and Russia*[202], and *Stojkovic v. France and Belgium*.[203] In *Rantsev v. Cyprus and Russia*, the applicant's daughter O. Rantseva, a Russian national, died in unexplained circumstances after falling from a window of a private property in Cyprus where she had gone to work in March 2001; in the circumstances, there was a suspicion that she might be a victim of human trafficking. The Court held that Cyprus had breached Article 2 of the Convention because of its failure to conduct an effective investigation into Ms Rantseva's death and Article 4 on account of its failure to establish a suitable framework to combat trafficking in human beings or to take the necessary measures to protect Ms Rantseva. It further found that there had been a violation of Article 4 of the Convention by Russia for its failure to conduct an effective investigation into the recruitment of the young woman on its territory by the traffickers.

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

212. The approach of the Court in those two cases, in which it was clear on whose behalf particular persons or entities were acting, is consistent with the principle of independent responsibility – that is, the principle that each State is responsible for its own internationally wrongful conduct and that State responsibility is specific to the State concerned[204] – that underlies the ARSIWA.[205]

213. In another category of cases, the ECtHR was confronted with conduct by a

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[202] *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010.
[203] *Stojkovic v. France and Belgium*, no. 25303/08, 27 October 2011.
[204] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Part One, Chapter IV, point (1).
[205] See M. Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights', (2012) 04 *ACIL Research Paper (SHARES Series)*, at p. 18.

State organ that had been placed at the disposal of another State. In this category of cases it was not clear from the outset to which State conduct of that organ had to be attributed. This is illustrated by the Court's judgment in *Drozd and Janousek v. France and Spain*.[206] The applicants in this case complained of the unfairness of their trial in Andorra (which the Court held it had no jurisdiction to examine) and of their detention in France. The case raised the question of the attribution of the conduct of French and Spanish judges carrying out judicial functions in Andorra. On this point, the Court accepted the arguments of the respondent Governments. It held:

> "96. […] 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. […]"[207]

214. In a further category of cases, however, the question arises whether the ECtHR has attributed the conduct of one State to another. Thus, in the case of *El-Masri v. the former Yugoslav Republic of Macedonia*,[208] 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.

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

> "206. […] 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)."[209]

216. It also held that the "former Yugoslav Republic of Macedonia"

> "211. […] must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring (see *Z and Others v. the United Kingdom*, cited above; *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII; and *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, §§ 124 and 125, 3 May 2007)."[210]

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206 *Drozd and Janousek v. France and Spain*, no. 12747/87, 26 June 1992.
207 ~~Ibid., § 96.~~
208 *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13 December 2012.
209 ~~Ibid., § 206.~~
210 ~~Ibid., § 211.~~

217. The Court further examined under Article 3 "whether any responsibility may be attributed to the respondent State for having transferred the applicant into the custody of the US authorities".[211] In the general principles applicable in this regard the Court reiterated that

> "212. […] there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (see *Soering*, cited above, § 91; […])."[212]

The Court concluded that "by transferring the applicant into the custody of the US authorities, the Macedonian authorities knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention".[213]

218. The Court also examined under Article 5 "whether the applicant's subsequent detention in Kabul is imputable to the respondent State".[214] It found in this respect as follows:

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

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211 Ibid., § 215.
~~212 Ibid., § 212.~~
213 Ibid., § 220.
214 Ibid., § 235.

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~~[…])."

219. The case of *Al Nashiri v. Poland*[215] arose from comparable facts. Mr. *Al Nashiri* was captured in Dubai and transferred to the custody of the CIA. He was subsequently transferred to a CIA 'black site' in Poland where he was subjected to various forms of ill-treatment. He was subsequently transferred to further countries, ultimately ending up in Guantanamo Bay. As regards the State's responsibility for an applicant's treatment and detention by foreign officials on its territory, the Court reiterated that:

"452. […] in accordance with its settled case-law, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see *Ilaşcu and Others*, cited above, § 318; and *El-Masri,* cited above*,* § 206)."[216]

220. As regards the State's responsibility for an applicant's removal from its territory, the Court reiterated that "removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination".[217] It explained that:

"457. While the establishment of the sending State's responsibility inevitably involves an assessment of conditions in the destination country against the standards set out in the Convention, there is no question of adjudicating on or establishing the responsibility of the destination country, whether under general international law, under the Convention or otherwise.
In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment or other violations of the Convention (see *Soering*, cited above, §§ 91 and 113; *Mamatkulov and Askarov*, cited above, §§ 67 and 90; *Othman (Abu Qatada),* cited above, § 258; and *El-Masri*, cited above, §§ 212 and 239)."[218]

221. The Court concluded that Poland, "on account of its 'acquiescence and connivance' in the [US] Programme must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on its territory (see paragraph 452 above and *El-Masri*, cited above, §§ 206 and 211)".[219] This was so despite findings that Poland was not directly involved in the interrogations (and, therefore, the torture inflicted in Poland), and, while Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory, it was unlikely that the Polish officials witnessed or knew exactly what happened inside the facility. However, "under Article 1 of the Convention, taken together with Article

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[215] *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.
[216] ~~Ibid., § 452.~~ The Court reiterated this statement, for instance, in *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 449, 24 July 2014.
[217] Ibid., § 453.
[218] ~~Ibid., § 457.~~ The Court reiterated this statement, for instance, in *Husayn (Abu Zubaydah) v. Lithuania*, no. 46454/11, § 584, 31 May 2018.
[219] Ibid., § 517.

3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment" and its responsibility was based on having "facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring".[220]

222. 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".[221]

223. In the case of *Nasr and Ghali v. Italy*,[222] the Court was similarly confronted with a case of extraordinary rendition by the US, in this instance from Italy to Egypt. The Court found it established that the applicant had been abducted in the presence of a carabinieri and that the Italian authorities had been aware of the CIA's plan to abduct the applicant in order transfer him abroad in an extraordinary rendition operation.[223]

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

> "241. […] la responsabilité de l'État défendeur est engagée au regard de la Convention à raison des actes commis sur son territoire par des agents d'un État étranger, avec l'approbation formelle ou tacite de ses autorités (*Ilaşcu et autres c. Moldova et Russie* [GC], n° 48787/99, § 318, CEDH 2004-VII : *El Masri*, précité, § 206 et *Al Nashiri*, précité, § 452)."
> "241.[…] 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 (*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99, § 318, ECHR 2004-VII; *El Masri*, cited above, § 206 and *Al Nashiri*, cited above, § 452)."[224]

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

> "288. […] en laissant la CIA opérer le transfert du requérant hors de leur territoire, les autorités italiennes l'ont exposé à un risque sérieux et prévisible de mauvais traitements et de conditions de détention contraires à l'article 3 de la Convention. (paragraphe 242 ci-dessus et *Al Nashiri*, précité, § 518).
> "228. […] by enabling the CIA to transfer the applicant outside its territory, the

[220] Ibid., § 517.
[221] Ibid., § 518.
[222] *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016.
[223] Ibid., §§ 221-235.
[224] [*Translation by the Secretariat*]. Ibid., § 241. The Court reiterated this statement in *Al Nashiri v. Romania*, no. 33234/12, § 594, 31 May 2018; and *Husayn (Abu Zubaydah) v. Lithuania*, no. 46454/11, § 581, 31 May 2018.

Italian authorities exposed him to a foreseeable serious risk of ill-treatment and conditions of detention in breach of Article 3 of the Convention (see paragraph 242 above and *Al Nashiri*, cited above, § 518).

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

289. Under Article 1 of the Convention, taken together with Article 3, the Italian authorities were required to take appropriate measures to ensure that the applicant, who was within their jurisdiction, was not subjected to torture or inhuman or degrading treatment or punishment. However, this was not the case and the respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents failed to take any measures that would have been necessary in the circumstances of the case to prevent the impugned treatment from occurring (see *El Masri*, cited above, § 211 and *Al Nashiri*, cited above, § 517)."

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

- **Cases concerning attribution in situations in which one or more States and an international organisation were involved in the underlying facts**

227. The question of whether particular conduct should be attributed to either a (member) State or an international organisation, or to both, in situations in which one or more States and an international organisation were involved in the underlying facts, was addressed by the Court in the landmark cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*[225] and *Al-Jedda v. the United Kingdom*.[226]

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

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[225] *Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.
[226] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 7 July 2011.

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

iii. Challenges and possible solutions

230. **[former 93.]** It emerges from the analysis of the Court's case-law described above that the Court, in determining whether conduct is attributable to the respondent State, does not make clear whether, and in how far it applies the rules of attribution reflected in the ARSIWA.[227] While the Court repeatedly referred to specific Articles of the ARSIWA when listing the relevant provisions of international law, it does not explicitly apply these rules when deciding at the merits stage whether an impugned act can be attributed to the respondent State.

[The following former paragraphs 93-103 have not yet been provisionally adopted].

231. **[former 94.]** This can be illustrated, for instance, by the Court's approach in *Al Nashiri v. Poland*: After having quoted the relevant provisions of the ARSIWA in the section on relevant international law[228] and after the applicant and the third-party interveners had argued that the Contracting Party's responsibility under the Convention for co-operation in renditions and secret detentions should be established in the light of Article 16 of the ARSIWA,[229] the Court stated that it would "examine the complaints and the extent to which the events complained of are imputable to the Polish State in the light of the above principles of State responsibility under the Convention, as deriving from its case-law"[230] and does not make any further reference to the ARSIWA in its ensuing examination of the question of the respondent State's responsibility.

232. **[former 95.]** It therefore appears that the Court applies its own principles, having taken into account the relevant rules of international law and applying them, as it usually does, while remaining mindful of the Convention's special character as a human rights treaty.[231]

233. **[former 96.]** Despite the fact that the Court's methodological approach is not entirely clear, a comparison of the Court's case-law with the ARSIWA rules showed that in a large number of decisions, the Court's approach does not differ from that under those rules.

234. **[former 97.]** However, an analysis of the case of *Ilaşcu* disclosed that the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was defined as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State and that this threshold was lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under Article 8 of the ARSIWA as interpreted by the ILC or under the case-law of the ICJ. However, it was equally noted that the ICTY, by reference, *inter alia*, to its different mandate, had equally

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[227] See also Jane M. Rooney, "The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands", Neth Int Law Rev 2015, vol.62, p.p.407–428; Kristen Boon, Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines, Melbourne Journal of International Law, Vol. 15, No. 2, 2014.
[228] *Al Nashiri v. Poland*, no. 28761/11, § 207, 24 July 2014.
[229] Ibid., §§ 446-449.
[230] Ibid., § 459.
[231] Compare *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 57, 12 December 2001.

considered a lower threshold to apply. It must be regretted though that the Court does not give more detailed reasons for the development of these criteria and their relationship with the rules of international law.

235. **[former 98.]** In another two cases described above, *El-Masri* and *Al Nashiri v. Poland*, it is difficult to discern which rules exactly the Court applied in respect of State responsibility and, in particular, whether or not the Court's reasoning amounted to attributing to the respondent States the conduct of a third State.[232]

236. **[former 99.]** As regards the question raised in *El-Masri* of whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team was imputable to the respondent State, the Court finds, on the one hand, that "… the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities"[233], which may be read as implying the attribution of the conduct of a third State. A similar statement was made in *Al Nashiri* in respect of the respondent State's responsibility for the applicant's treatment and detention by foreign officials on its territory.[234]

237. **[former 100.]** However, the Court further found in *El-Masri* that the respondent State "… must be considered directly responsible for the violation of the applicant's rights under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring"[235], which implies that the respondent State was held responsible for its own conduct. In *Al Nashiri*, the Court further found that "under Article 1 of the Convention, taken together with Article 3, Poland was required to take measures designed to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment"[236], which in turn may be read as referring to the breach of an own positive obligation by the respondent State. In *Nasr and Ghali v. Italy*, which refers to both *El-Masri* and *Al Nashiri*, the Court then appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents.

238. **[former 101.]** Finally, another conclusion that can be drawn from the case-law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. As show above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in its judgment in the *Jaloud case.*[237] 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

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[232] See for the difficulties in interpreting the Court's conclusions on the issues relating to State responsibility in *El-Masri* the speech of Helen Keller, The Court's Dilution of Hard International Law: Justified by Human Rights Values?, at the Seminar organised for the launching of the work of the DH-SYSC-II, co-organised by PluriCourts and the Council of Europe, Strasbourg, 29-30 March 2017; and the speech of Rick Lawson, State responsibility and extraterritorial application of the ECHR, at the DH-SYSC-II meeting on 3 April 2018, document DH-SYSC-II(2018)12.
[233] Ibid., § 206.
[234] Ibid., § 452.
[235] Ibid., § 211.
[236] Ibid., § 517.
[237] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., 20 November 2014.

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.

[to be moved to the section on state responsibility, around paragraph 101:] [Moreover, the threshold for assuming jurisdiction would be higher if the criteria of "effective control of an area" in that sense were applied. The Court, referring to the difference between the rules governing jurisdiction and attribution of conduct to a State so that it may be held responsible under international law for that conduct, has explained in this respect that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law".[238] Nevertheless, it is clear that the Court, although set in the framework of States' jurisdiction under general international law, has developed some particular features which take account of the nature and scope of the Convention as a human rights treaty,[239] and that the threshold thus developed appears less high than that under the – albeit different – law of State responsibility.]

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

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

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[238] See *Catan and Others,* cited above, § 115~~,~~; *Mozer*, cited above, §§ 98 and 102~~,~~; and *Chiragov and Others, cited above,* § 168.

[239] See also Robert Spano, "*Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law*", in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 43-47.

3. Interaction between the resolutions of the United Nations Security Council and the European Convention on Human Rights

Comment [SE39]: Modified following a proposal by Greece

a. INTRODUCTION – THE UN CHARTER

241. It is indisputable that the United Nations occupies a central position in the international system, and, correspondingly the Charter of the UN is a central document of the international legal system. The primary aim of the United Nations is the maintenance of peace, but, in its holistic approach to this task, the UN not only seeks to restore peace where conflict has arisen, but it also seeks to prevent conflict and address its causes, including through its work on disarmament, sustainable development, human rights and the development of international law. And, of course, it was the same spirit of reconstruction and recognition of the need to build the foundations of a sustainable peace that led to the establishment of the Council of Europe[240] and the European Convention on Human Rights (ECHR).[241]

242. The Charter system envisages a sophisticated structure of organs, each with its own defined areas of activity and responsibilities, powers, procedures and working methods; ~~. And~~ the relationship~~s~~ between the organs and between the organisation and its member States is governed by a complex body of law and practice stemming from the Charter itself. The Charter is therefore the supreme law of the organisation, and given the universal vocation of the UN as the world's central political organisation charged with the maintenance of international peace and security, the Charter is of central significance in the international political and legal systems. In the context of this Report, there are two particularly striking features of the Charter, which are unprecedented in international law and demonstrate the commitment of the member States to ensuring the effectiveness of the UN system in its core role of maintaining international peace and security. The first is the authority given to the Security Council, an organ of 15 member States which operates through a special system of majority voting, and has the power to take decisions which the whole of the membership have a legal obligation to implement (explored in the next section). The second feature is Article 103 of the Charter according to which in case of any conflict between obligations arising on the member States under the Charter and obligations arising under other international agreements, Charter obligations shall prevail.

Comment [SE40]: Modified following a proposal by Greece

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[240] The Statute of the Council of Europe provides:
"**Article 1**
a) The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.
b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.
c) Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.
d) Matters relating to national defence do not fall within the scope of the Council of Europe."

[241] See the preamble to the ECHR:
"Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;" ...

243. The guarantee of the supremacy of UN obligations over other international obligations contained in Article 103 is unique in the horizontal system of international law that operates between sovereign States. Its special place is reflected in Article 30 of the Vienna Convention on the Law of Treaties. In legal terms it is a vital provision that ensures that UN obligations are carried out effectively by the member States. States therefore may not invoke other treaty obligations to justify a failure to observe an obligation arising under the UN Charter. Importantly for present purposes obligations arising under mandatory decisions of the Security Council are to be considered as obligations arising under the UN Charter for the purposes of Article 103.[242] Article 103, however, does not provide for a hierarchy among conflicting UN Charter obligations to the extent they exist.

b. THE SECURITY COUNCIL

244. Under Article 24 of the UN Charter, the Security Council is charged with the primary responsibility for the maintenance of international peace and security:

> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (*emphasis added*)
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

245. The powers of the Security Council are broad, giving it a large measure of freedom of action to determine the most appropriate response to a breach of or threat to the peace. It may use either its powers to seek diplomatic solutions to disputes under Chapter VI of the Charter or its powers of decision to take enforcement action under Chapter VII to address threats to the peace, breaches of the peace and acts of aggression. Decisions of the Council under Chapter VII are legally binding (Article 25) and the Council has the power to determine whether action is to be taken by all or some member States of the UN (Article 48).

246. Following the end of the Cold War, the Security Council has been able to make much more extensive use of its Chapter VII powers than previously. The Charter provides for the Council (a) to decide on measures not involving the use of force, such as economic sanctions[243], and (b) to use military force, albeit that, as a result of political and other factors, in its practice the Council has had to adapt the means by which these powers are exercised. Further, and in order to fulfil its responsibility for the maintenance of international peace and security, the Council has also shown considerable ingenuity in its use of its Chapter VII powers including in ways which are not expressly foreseen in the

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[242] See ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Provisional Measures, Order of 14 April 1992, § 42.

[243] See Article 41 of the UN Charter: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Charter. Thus, for example, the Council has used these powers to mandate peace operations, to administer territory, to establish international tribunals, to refer situations to the International Criminal Court, and to establish a Compensation Commission. Whilst aspects of the Council's practice have not been without critics (at least as often for what the Council has been unable to do, as for what it has in fact done), the Council remains the central institution of the international system for the maintenance of peace and a unique source of legitimacy.[244]

i. The Security Council and the use of measures not involving the use of force, such as economic sanctions

247. Article 41 of the Charter gives the Council a broad discretion to decide the measures short of the use of force that it considers necessary to give effect to its decisions. These can include, but are not limited to economic sanctions. There is now an extensive body of Council practice where sanctions have been imposed by the Council, which has been developed largely in the post-Cold War period. Sanctions represent an essential tool, which can be used by the Council in response to various threats to international peace and security, importantly as a credible alternative to forcible action. They have been used to support peace processes / peaceful transitions, to deter non-constitutional changes, to constrain terrorism, to protect human rights and to promote non-proliferation. There are currently 14 different UN sanctions regimes in existence.[245]

248. The measures taken will vary according to the nature of the threat and the Council's objective that can range from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions. It is comparatively rare for general or comprehensive sanctions to be imposed on all trade which targets a country or region, because of the unintended impacts they can have on population of targeted States who have little to do with the threat to the peace in question. The Council's practice has resorted to the use of targeted sanctions against individuals, or against particular goods that will have an impact that the Council intends on the situation. It should be noted that sanctions are intended as temporary measures, whose purpose is to induce the individual to change his or her behaviour and to comply with decisions of the Council, rather than punishment. Where sanctions are imposed against individuals, the Council will accompany such measures with a system of humanitarian exemptions to ameliorate the effect of the sanctions on fundamental aspects of the lives of individuals.

Comment [SE41]: Modified following a proposal by Greece

Comment [SE42]: Modified following a proposal by Greece

[244] The Security Council's development and expansion of the use of its powers in the immediate post-Cold War era has been observed and discussed in an abundant literature by international lawyers – for some recent examples see: R Higgins et al., *Oppenheim's International Law United Nations* (Vol I and II) (2017); I. Johnstone "The Security Council and International Law" in S. von Einsiedael, D Malone, and B Stagno Ugarte (ed.s) *The UN Security Council in the 21st Century* (2016) pp 771-792; M. Mattheson *Council Unbound* (2006). Other works have focused primarily on the legal limitations of the Council's powers and how they can appropriately be given effect: see D Akande "The International Court of Justice and the Security Council: Is there room for Judicial Control of Decisions of Political Organs of the United Nations" (1997) 46 ICLQ 309-43; M Bedjaoui *The New World Order and the Security Council: testing the legality of its acts* (1994); B Fassbender "Quis judicabit? The Security Council, Its powers and Its Legal Control" 11 EJIL 219-20; V Gowlland-Debbas (ed) *United Nations Sanctions and International Law* (2001); D Sarooshi *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999); A Tzanakoupolous *Disobeying the Security Council* (2011); E de Wet *The Chapter VII Powers of the United Nations Security Council* (2004).

[245] The currently ongoing sanctions regimes have been established by the Security Council in the Central African Republic, the Democratic Republic of the Congo, the Democratic People's Republic of Korea, Guinea-Bissau, Iraq, Lebanon, Libya, Mali, Somalia/Eritrea, South Sudan, Sudan and Yemen, as well as against ISIL (Da'esh) / Al-Qaida and the Taliban.

ii. The Security Council and the use of military force

249. The intention of the drafters of the UN Charter was that the Security Council itself should be in a position to use force (Article 42), through the deployment of forces made available to it by the member States under standing agreements (Article 43). However, such agreements with the UN have not been concluded. The Council has therefore had to use the model of authorising States to use force in order to respond to breaches or threats to peace. Such authorisations famously take the form of an authorisation in a resolution adopted under Chapter VII "to take all necessary measures" or "to use all necessary means". This model of authorisation of States to take part in military action was for example adopted in 1990/1991 following Iraq's invasion of Kuwait.

250. There has been a greater willingness among States to deploy troops under a UN command in peacekeeping operations. During the Cold War, when the Security Council was frequently paralysed from authorising the use of force under Article 42, the Security Council was more successful in developing its practice of deploying international troops to maintain a peace, once the warring parties had agreed to suspend fighting. Classically these peacekeeping forces were lightly armed and deployed with the consent of the relevant territorial State(s), and authorised to provide a barrier between opponents and only to use force in self-defence. However over time, and with a greater degree of consensus in the Security Council that is now possible in the post-Cold War era, mandates of some UN peace-keeping missions have developed to include, on occasion, the authorisation of the use of force under Chapter VII, for example to tackle immediate threats to blue helmets or civilian population in the area of the mission's responsibility. Equally, rather than deploying a UN force, the Security Council may authorise a regional organisation or particular member States to carry out post-conflict peace operations, including the possibility of using force.

c. THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND SECURITY COUNCIL RESOLUTIONS

i. The use of measures not involving the use of force, such as economic sanctions

251. The starting point for any discussion of the interaction of UN sanctions and the ECHR is the *Bosphorus* case.[246] This case in fact turned on the relationship between EU law (through which the relevant UN sanctions measure had been transposed and was the domestic legal basis of the respondent State's impugned conduct) and the ECHR, rather than an examination of the relationship of UN law and the ECHR. The key finding in the judgment of the Grand Chamber is that where an international organisation imposes sanctions which require enforcement through the actions of a Contracting Party to the ECHR, then provided that the organisation in question provides "equivalent

[246] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005~~*Bosphorus Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (2005)~~. The case concerned a Yugoslav-owned aircraft that had been leased by a Turkish company, and was in Ireland for repairs, when in response to the conflict in the former Yugoslavia, the Security Council adopted resolution 820(1993) requiring inter alia States to impound Yugoslav aircraft in their territories. The UNSCR was transposed into EU law, and thus became applicable in Irish law. When Ireland impounded the aircraft the applicant litigated the issue in the Irish courts and then before the European Court of Justice which upheld the Government's actions pursuant to the sanctions resolution.

protection" of fundamental rights to the ECHR, the Contracting Party will not incur liability under the ECHR.

> "155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (~~see paragraph 150 above~~[…]). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
>
> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. […]"

252. However subsequent cases, which interestingly involved the implementation of more targeted sanctions, have required a more direct consideration of relevant UN Security Council resolutions. In *Nada*[247] the applicant was subject to a travel ban imposed on him pursuant to the then sanctions regime against the Taliban and Al Qaeda, under United Nations Security Council Resolution (UNSCR) 1267 (1999) and a number of following resolutions. The particularities of the case were that the applicant lived in an Italian enclave surrounded by Swiss territory, and the effect of the Swiss authorities' decisions, pursuant to the relevant UNSCRs, not to permit him to traverse Swiss territory, effectively confined him to that enclave. As such he claimed, amongst others, to have been denied access to healthcare infringing his rights under Article 8 and without a remedy in Swiss law contrary to Article 13.

253. The European Court of Human Rights ~~(the ECtHR / the Court)~~ rejected a preliminary objection by the Respondent State that the imposition of sanctions was attributable to the UN and therefore not within the "jurisdiction" of the Respondent State, on the basis that the Court sought to confine its consideration to actions of the national authorities in implementing the sanctions. Similarly, when considering the merits the focus of the ECtHR was on national implementation measures rather than considering whether there was a possible conflict between the requirements of the UNSCRs and the ECHR. The ECtHR started by recognising that the travel ban was expressly required under UNSCR 1390(2002), and therefore that the presumption in *Al-Jedda* that the Security Council would only intend to act in conformity with human rights obligations of the member States was rebutted. However, in considering whether the interference with the applicant's Article 8 rights was proportionate, the ECtHR focused entirely on the implementation of the sanctions by the Swiss authorities, finding that they had a degree of latitude "which was admittedly limited but nevertheless real" in how this was done. The ECtHR went on:

> "195 […] In this connection, the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of

Comment [SE43]: Modified following a proposal by Greece

[247] *Nada v. Switzerland* [GC], no. 10593/08, 12 September 2012.

the measures imposed or the applicant's nationality, age and health. It further finds that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein.

196. In the light of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see, for example, *Soering*, cited above, § 87, and *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25), the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation."

The difficulty picked up by some of the judges in one of the Separate Opinions is how real the "latitude" in national implementation was under the relevant UNSCRs.[248]

254. The ECtHR then considered the requirement of a domestic remedy under Article 13 taken in conjunction with its finding in relation to Article 8:

"212. The Court would further refer to the finding of the CJEC (sic) that "it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (see the *Kadi* judgment of the CJEC, § 299, ~~paragraph 86 above~~[…]). The Court is of the opinion that the same reasoning must be applied, *mutatis mutandis*, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council Resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those Resolutions.

213. Having regard to the foregoing, the Court finds <u>that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged</u> (see, *mutatis mutandis*, Lord Hope, in the main part of the *Ahmed and others* judgment, §§ 81-82, ~~paragraph 96 above~~[…])." (*emphasis added*)

It might be observed at this stage that, given that the inclusion of the applicant's name on the list annexed to the Taliban Ordinance reflected Switzerland's obligations under the relevant UNSCR, taken literally this finding appears to leave the respondent State with a conflict of obligations.[249]

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[248] See the joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska in the case of *Nada v. Switzerland*.
[249] See the concurring opinion of Judge Malinverni in the case of *Nada v. Switzerland*.

255. Most recently, the ECtHR has considered the interaction of the ECHR and UN sanctions in *Al-Dulimi v. Switzerland*[250]. The case concerned targeted sanctions against named persons associated with the former regime in Iraq following the overthrow of Saddam Hussein in 2003, which required the freezing of assets of named persons and their transfer to the Development Fund for Iraq. When the applicants sought judicial review of their listing before the Swiss Courts, the Federal Court found that whilst certain procedural questions relating to the listings and proposed confiscations could be subject to domestic judicial review, the underlying substantive question of the validity of the inclusion of the applicant's name on the list was a question exclusively for the Security Council, and therefore outside the jurisdiction of the Federal Court.

256. In 2016, the Grand Chamber found the case admissible *ratione personae*, despite the Respondent State's arguments that the impugned acts were acts required by a mandatory decision of the Security Council which, as a matter of international law, had primacy over obligations arising from other international agreements. On the merits, the ECtHR considered whether there was in fact a conflict between the ECHR and the requirements of the relevant Security Council resolution.[251] The ECtHR's starting point was to revert to the presumption that the Security Council did not intend to act contrary to human rights which it had first posited in *Al-Jedda*:

> "140. Consequently, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights (ibid.). In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law (ibid.). Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. […]
>
> 143. The Court would emphasise, however, that the present case is notably different from the above-cited cases of *Al-Jedda* and *Nada* (together with *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011), in that it does not concern either the essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention. The Court's remit here is confined to examining whether or not the applicants enjoyed the guarantees of Article 6 § 1 under its civil head, in other words whether appropriate judicial supervision was available to them (~~see paragraph 99 above~~[…]; see, *mutatis mutandis*, *Stichting Mothers of Srebrenica and Others*, cited above, §

[250] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016.

[251] The Chamber had stressed in its judgment of 2013 that its focus was on the Swiss implementing measures, which it sought to address separately from the Security Council resolutions requiring Switzerland to adopt those measures (ibid., §§ 91 and 117). In their dissenting opinion, Judge Lorenzen, joined by Judges Raimondi and Jočienė, regretted that the Chamber has not directly addressed the issue of how the conflict between obligations under the United Nations Charter and under the ECHR, which the Chamber was confronted with, should be resolved.

137). There was in fact nothing in paragraph 23 or any other provision of Resolution 1483 (2003), or in Resolution 1518 (2003) – understood according to the ordinary meaning of the language used therein – that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions (see, *mutatis mutandis*, *Nada*, cited above, § 212). Moreover, the Court does not detect any other legal factor that could legitimise such a restrictive interpretation and thus demonstrate the existence of any such impediment."

257. The ECtHR noted the seriousness of the consequences for the listed persons and the importance of the ECHR for the maintenance of the rule of law and in particular the prohibition of arbitrariness. On these points the Court concluded:

"146. This will necessarily be true, in the implementation of a Security Council resolution, as regards the listing of persons on whom the impugned measures are imposed, at both UN and national levels. As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.

147. In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention. […]

151. The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. That was not the case, however. […] Consequently, the very essence of the applicants' right of access to a court has been impaired."

ii. The use of military force

258. The use of military force pursuant to a Security Council authorisation has been the context of a number of cases before the European Court of Human Rights, and in a few the question of whether the ECHR is applicable has turned on the Court's interpretation of relevant Security Council resolutions.

259. The first was the Grand Chamber Decision in the joined cases of *Behrami and Saramati* [252], concerning claims against France and Norway, in relation to their participation in KFOR in Kosovo in 2000-2002.[253] It will be recalled that KFOR was a NATO operation, which was mandated by UNSCR 1244(1999) to provide the security presence for the UN Interim Administration of Kosovo (UNMIK). In considering the admissibility of the claim the Grand Chamber carefully examined the mandates and structures of the international presences established by UNSCR 1244, before finding that the impugned actions were in fact attributable to the UN rather than the individual respondent States. This led the Grand Chamber to the conclusion that it did not have jurisdiction *ratione personae* over the acts of the respondent States when they were acting on behalf of the UN pursuant to a Chapter VII mandate. In this respect the Grand Chamber made the following observations about the relationship between the ECHR and the UN acting under Chapter VII of its Charter:

> "147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice ~~(see paragraph 27 above)~~([…]).
>
> 148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (~~see paragraphs 18-20 above~~[…]).
>
> 149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.
> Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and

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

[253] The *Behrami* case concerned the death of a child and serious injuries sustained by his brother as a result of playing with unexploded cluster bomb units (CBUs). The Claimants alleged that the French KFOR contingent had failed to mark and/ or defuse the CBUs, despite knowing that the CBUs were present on the site in question. The Claimants therefore invoked Article 2 against France for the alleged inaction of the French troops. The *Saramati* case concerned the detention of the applicant by KFOR for a period of about 6 months. He complained under Articles 5, 5 with 13, and 6.

security and since they rely for their effectiveness on support from member States, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim."

260. In the case of *Al-Jedda*[254], the ECtHR came to a different conclusion in relation to a UN Chapter VII mandate concerning the stabilisation of Iraq following the US-led military action taken in 2003. The case concerned an internee detained by UK forces and interned during the period 2004-2007. The Grand Chamber rejected the UK's argument that the applicant was not within its jurisdiction. The UK had argued that, following *Behrami*, since its impugned actions were pursuant to a mandate in a Security Council resolution (UNSCR 1546(2004)) under Chapter VII, its actions were attributable to the UN, and therefore not within the jurisdiction of the UK for the purposes of Article 1 of the ECHR. However based on the nature of UN involvement in Iraq, which it found to be different from the UN involvement in Kosovo, the Grand Chamber rejected this and found the internment attributable to the UK.

261. The Grand Chamber then rejected the Respondent State's argument that, in light of the fact that the detention and internment of the applicant were carried out pursuant to a Chapter VII mandate from the Security Council, Article 103 of the UN Charter operated so as to displace the UK's obligations under Article 5 ECHR in favour of the fulfilment of the Security Council mandate. The ECtHR held as follows:

"102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms". Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that

[254] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 7 July 2011.

clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law." (*emphasis added*)

262. In line with this approach, the ECtHR then considered the language of the UNSCR 1546(2004) and the letters attached thereto, finding that at most it was potentially permissive of internment. However it concluded as follows:

"109. In conclusion, therefore, the Court considers that United Nations Security Council Resolution 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither Resolution 1546 nor any other United Nations Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.

110. In these circumstances, where the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1 of the Convention." (*emphasis added*).

d. CHALLENGES AND POSSIBLE SOLUTIONS

263. The above survey of the ECtHR's decisions demonstrates that the interaction of the ECHR and binding decisions of the UN Security Council raises complex questions in relation to which the ECtHR's case-law is still recent.

264. In some cases, notably for example in the quotation above from the *Behrami* case, the ECtHR provides a careful appreciation of the legal underpinnings and the context of the work of the Security Council in discharging of its primary responsibility for the maintenance of international peace and security. Whereas, beyond reciting relevant provisions of the UN Charter, this kind of systemic understanding of the Security Council is less apparent in much of the subsequent case-law. That may in part be explained by the fact that the ECtHR has sought in those subsequent cases to focus its enquiry on the decisions at the national level in implementing the Security Council decisions. However from the perspective of the States such a separation of national action from its basis in obligations under UNSCRs lies at the heart of the problem and risks leading to a divergence of legal obligations.

265. From the perspective of States, the role of the UN Security Council is fundamental to the maintenance of international peace and security on a global basis, and it is endowed with extraordinary powers to that end. The authority of the Council and the agreement of States to carry out its decisions are vital pillars of the whole system of collective security under the United Nations. This is particularly so as, despite the ingenuity the Council has shown from time to time in the use of its powers, its range of tools to achieve international action to maintain peace still remains relatively limited, and rely for their effectiveness entirely on the active cooperation of States. A proposition that national authorities should be able to subject their observance of binding measures addressed to them by the Security Council to considerations of national or even regional

law, clearly has implications for the effective discharge by the Security Council of its responsibility for the maintenance of international peace and security.

266. As is well-known the UN Charter's solution to any conflict between obligations under the Charter and obligations arising under other international agreements, is that the Charter obligations should prevail by virtue of Article 103. And, as is equally well-known, Article 103 is given a special place in international law, as for example recognised in Article 30 of the Vienna Convention on the Law of Treaties. It is established in the jurisprudence of the International Court of Justice that binding decisions of the Security Council are obligations arising under the Charter for the purposes of Article 103.[255]

267. Rather than applying Article 103 to give precedence to obligations under a UNSCR, the ECtHR appears to avoid finding that conflicts have arisen between a ECHR right and an obligation arising under the UN Charter. Referring to Article 24 paragraph 2 of the Charter, the ECtHR has adopted a presumption that Security Council resolutions should be interpreted so as to avoid finding any incompatibility with human rights under the ECHR. This presumption may affect the ability of States to comply with a clear requirement of the SCR, and might impair the Security Council's discretion to take effective measure to maintain peace and security. Such a view would take little account of the international context in which the Security Council adopts measures under Chapter VII, which by definition are situations of a threat to international peace and security, a breach of the peace or an act of aggression.[256] However, the Grand Chamber in *Al-Dulimi* has sought to take into account the nature and purpose of the measures adopted by the Security Council by limiting the required scrutiny (under Article 6 of the ECHR) to arbitrariness (*Al-Dulimi*, § 146).

268. The same considerations of effectiveness are also relevant when considering the applicability of Article 103 to Council decisions authorising the use of force. As the ECtHR has recognised in the *Behrami* decision (see above), in the absence of agreements under Article 43 of the Charter enabling the Security Council itself to take enforcement action, the practice of authorising the use of force has become the only way that in practice the Council can take forcible measures to meet its responsibility to maintain international peace and security. To take a too narrow view of the word "obligations" in Article 103, so as to deny primacy to a Chapter VII authorisation of enforcement action by States simply because there is no mandatory obligation on States to participate in such action, risks undermining the ability of the Security Council to carry out its responsibility under the Charter.[257] Of course, giving primacy to an authorisation does not mean that the use of force is free from legal constraint, which will derive typically from the terms of the authorisation, the framework of international humanitarian law and other rules of international law that can be applied consistent with the effective performance of the authorisation. The interaction of the ECHR with international humanitarian law is considered in the following section of this report.

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[255] See *Lockerbie* case, Provisional Measures Order (1992), ICJ Rep 4, at p. ~~15~~16:
"…~~39~~42. Whereas both Libya and the United ~~Kingdom~~States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;"…

[256] The ECHR also allows for derogation from certain Convention rights under Article 15 in exceptional circumstances and to a limited extent.

[257] See for example Frowein and Krisch and also Lord Bingham in the *Al-Jedda* case in the House of Lords.

269. In relation to UN sanctions, the ECtHR has sought to emphasise that its judgments are addressed to actions of the member States implementing Security Council decisions rather than decisions of the Security Council themselves. In this respect a parallel may be drawn with the approach of the CJEU in cases such as *Kadi*,[258] which sought to focus on the EU measures taken to implement the relevant UN sanctions, and which the Strasbourg Court duly cited. The difficulty that such an approach can entail for States is that in relation to sanctions the obligations to freeze assets or impose travels bans etc. are obligations of result imposed by the Security Council. The discretion or latitude left to States by Security Council decisions is likely to be extremely limited on these matters, not least given the Council's concern to ensure consistency and effectiveness in the application of the sanctions.

270. A national judicial review of certain procedural or formal requirements, for example in relation to the identity of listed individuals or the ownership of relevant assets may be consistent with giving effect to a decision of the Council. Whereas the scope for any judicial review of the merits of a listing that is required in a decision of the Council is likely to be much more limited. It may depend on the nature of any remedial measures that may be required. If for example a judicial review resulted in a finding that the basis of a listing was lacking in some respect, it may be that an appropriate remedy – if permissible within the national legal system – would be to mandate the national authorities to seek delisting by the Security Council. However, it would be inconsistent with Article 25 and 103 of the UN Charter for a national or regional court to order the de-listing of a person who was listed as a requirement of a Security Council decision.

271. It is important to keep in mind that the Security Council is best-placed to ensure that its decisions are not only soundly based and properly substantiated, but also that appropriate mechanisms and review processes are in place for listing and delisting.[259] Although reaching agreement at the international level is complex, recent years have seen significant developments in the Council's practice in both respects. Member States of the Council, and notably those who are parties to the ECHR, are very much more stringent in ensuring an adequate evidential basis exists to justify listings. Procedures for delisting have also seen some improvements with the appointment of a focal point to which individuals can send delisting requests, and in the case of sanctions against ISIL (Daesh) and Al Qaeda the appointment of an independent and impartial Ombudsperson. Whilst there is room for further improvements, they are likely to be incremental as they depend on reaching agreement within the Security Council. It is also important that any such improvements are consistent with the competence of the UN Security Council under the UN Charter.

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[258] In a judgment of 3 September 2008 delivered in the joint cases of *Kadi and Al Barakaat International Foundation/Conseil* (C-402/05 P and C-415/05 P) the CJEU found that the fact that a Community regulation was limited to implementing Resolution 1390 (2002) of the Security Council of the United Nations did not deprive the Community judicature of the competence to control the validity of that regulation in the light of the general principles of Community law. On the merits the CJEU considered that the impugned regulation had manifestly disregarded the rights of the defence of the appellants, and notably the right to be heard.

[259] The ECtHR noted that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests are handled, had received very serious, reiterated and consistent criticisms so that access to these procedures could not replace appropriate judicial scrutiny (see *Al-Dulimi*, cited above ~~Grand Chamber judgment~~, § 153).

4. Interaction between international humanitarian law and the European Convention on Human Rights

a. INTRODUCTION

272. One of the areas in which the interaction of different bodies of international law has been most discussed in recent years is that between international human rights law and international humanitarian law (IHL). And it is no surprise that the case-law of the Strasbourg Court features prominently in those discussions. However before reviewing the evolving case-law of the Court, and considering challenges and possible solutions that may arise from it, it may be useful to frame that discussion with a few introductory words on the nature and application of IHL and the situations in which its interaction with the ECHR might arise.

273. International Humanitarian Law is the body of international customary and treaty based rules that specifically applies in armed conflict.[260] It does not cover internal tensions or disturbances such as isolated acts of violence that do not reach the threshold of an armed conflict. It has its own particular characteristics, but its primary aim is to limit the effects of armed conflict by ensuring that considerations of humanity continue to be weighed against the requirements of military necessity in armed conflict situations.

274. The content of IHL differentiates to some extent between: (a) situations of international armed conflict (IAC) (i.e conflict between two or more States); (b) situations of non-international armed conflict (NIAC) (conflict between one or more States on the one part and one or more non-State armed groups on the other part, or conflict between two or more non-State armed groups). The law of international armed conflict is also applicable in situations of belligerent occupation (i.e. where the armed forces of one State occupy territory belonging to another State, even if the said occupation meets with no armed resistance).

275. The Geneva Conventions and their Additional Protocols are at the core of IHL. In relation to IHL applicable to international armed conflicts, the most important rules of international law are now codified in the four Geneva Conventions of 1949 and in Additional Protocol 1 of 1977, which have been widely taken up by States. In addition there are a large number of other treaties that make up the corpus of IHL and may apply in a given situation, and customary international law is as well a significant source of the law applicable to international armed conflicts~~IAC~~. Of particular note for present purposes are the provisions of the Third Geneva Convention on Prisoners of War, the Fourth Geneva Convention on the Protection of Civilians (including in situations of belligerent occupation), and Protocol I which developed the law further on both subjects.

276. By contrast, in relation to non-international armed conflict much of the law remains uncodified, although there are important provisions in conventional law notably Common Article 3 of the Geneva Conventions and Protocol II of 1977. It is therefore often necessary to turn to customary international law to determine the content of the law in a situation of non-international armed conflict. The law is based on the same fundamental principles of necessity, humanity, precaution and proportionality as underlie the law on

[260] As such International Humanitarian Law (IHL), sometimes also called the Law of Armed Conflict (LOAC), has traditionally been divided into two branches: “Hague law” which is mainly concerned with how military operations are conducted, and “Geneva law” concerned with the protection of persons directly affected by the conflict.

international armed conflict. Recent years have seen a development of practice in the development and application of customary international law to situations of non-international armed conflict.
[The CDDH suggested reducing the recourse to abbreviations in this chapter to facilitate its reading].

277. The development of international criminal law in the last two decades has been particularly significant, following the establishment of a number of international criminal courts and tribunals, including the negotiation of the Rome Statute of the International Criminal Court. These courts and tribunals have produced an extensive jurisprudence in relation to the prosecution of breaches of IHL that can result in individual criminal liability. In that context there has been an observable trend towards applying standards first developed in relation to international armed conflict in the context of non-international armed conflict.

278. As noted above, IHL has developed as a body of legal standards applicable to the very specific context of armed conflict, to ensure respect for basic standards of humanity often in a context where ordering principles of society have broken down or are under threat deliberately through organised violence. Given that goal, and the fact that both IHL and international human rights law has significantly developed in the Post WW II period in reaction to the horrors that occurred during the immediately preceding period, it is notable that for a long time the two bodies of law developed in parallel but largely separately.

279. That separation has traditionally been explained by the specificity of the field of application of IHL. IHL applies in situations of armed conflict, governing primarily the conduct of hostilities and the protection of persons hors de combat. By contrast human rights law will apply in principle in times both of peace and conflict. In its first statement on the relationship between these two bodies of law the International Court of Justice said:

> "The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[261] ~~(Legality of the Threat or Use of Nuclear Weapons (1996), Advisory Opinion of the ICJ, at para 25)~~

280. In a similar vein in its Advisory Opinion on *The Construction of a Wall in the Occupied Palestinian Territory* the ICJ held:

> "[…] the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights

[261] Legality of the Threat or Use of Nuclear Weapons (1996), Advisory Opinion of the ICJ, § 25.

law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the questions put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law. "[262] ~~(I.C.J. Reports 2004, p. 178, para. 106).~~

281. The use of the term *lex specialis* in both of these Advisory Opinions may suggest the displacement of a general obligation by a more specific one, in line with the maxim *lex specialis derogat legi generali*. However in its subsequent decision in *DRC v Uganda*, the ICJ cited the above description of the relationship between the two bodies of law from *The Wall* Advisory Opinion, but without the final sentence referencing the *lex specialis* principle. It went on to find that activities of the Ugandan forces in occupation of DRC territory breached ~~both~~ obligations of both IHL and human rights law that were incumbent upon both Uganda and the DRC (including Articles 6 and 7 of the ICCPR and Articles 4 and 5 of the African Charter). In that context therefore the ICJ seems to have found that both bodies of law could apply to the same situation.

Comment [SE44]: Modified following a proposal by Greece

282. To the extent that both bodies of law may overlap, the key issues with respect to the ECHR are likely to include:

- how the right to life in Article 2 ECHR applies in the conduct of hostilities (including for example its interaction with the law on targeting);
- how Article 5 ECHR applies to the detention of prisoners of war or internment;
- how Article 15 ECHR can be invoked in situations of armed conflict;
- how Article 1 of Protocol 1 ECHR applies to persons displaced from their property by conflict;
- how far a Contracting Party has to apply the ECHR in situations of armed conflict beyond its own territory~~.~~.

b. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO SITUATIONS OF ARMED CONFLICT

283. Whilst there have been a considerable number of applications to the Strasbourg Court arising from situations of armed conflict, there are in fact relatively few in which the Court has had to consider the application of IHL and its relationship to the ECHR. There are at least two factors which may be adduced in the explanation of this. Firstly there may well be an unwillingness on the part of States to characterise a situation in their territory as one of non-international armed conflict. As a result a State may not seek to defend its actions before the Strasbourg Court by reference to IHL, but rather seek to rely on the right ultimately to use forcible means to enforce law and order. The second is that it is only in recent years that the Court has been more open to the application of IHL.[263] ~~.~~ A number of stages to that evolution have been identified.

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[262] I.C.J. Reports 2004, p. 178, ~~para.~~ § 106.

[263] See, for instance, L.A. Sicilianos, L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme, Revue Suisse de droit international et droit européen, Vol. 27, No. 1, 2017, pp. 3-17; and also W. Schabas, *The European Convention on Human Rights: A Commentary,* (2015) OUP, at pp. 153-158.

i. Cases concerning military activity without reference to IHL

284. **[former 13.]** At the starting point of this evolution, an apparent reluctance on the part of the Court to consider the provisions of IHL has been observed in some of its earlier case-law.[264] For example in the case of *Isayeva v. Russia* (concerning deaths and injuries to IDPs as a result of the military led response to Chechen separatist violence around Grozny) the Court determined the case on the basis of the ECHR alone, despite the applicants' submissions that the military action contravened IHL, and the Court's own reference to the situation as one of conflict.[265]
[This paragraph has not been provisionally adopted yet].

ii. Cases in which secondary reference is made to IHL

285. In some cases, the ECtHR has acknowledged provisions of IHL as part of the legal context in which the ECHR applies. In *Varnava and Others v. Turkey*[266] (concerning missing persons following Turkey's military operations in northern Cyprus in 1974), the Court considered the application of Article 2 ECHR against the context of IHL in the following terms:

> "185. […] Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict (see Loizidou, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.
>
> 186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In the light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted."

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[264] See the Contributions of Professor A. Kovler (DH-SYSC-II (2018)10) and Professor S. Touzé (DH-SYSC-II(2018)13). See also G. Gaggioli and R. Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, (2007) Israel Yearbook of Human Rights, pp. 115-163.
[265] See *Isayeva v. Russia*, no. 57950/00, § 167 and §§ 180 and 184, 24 February 2005; and also *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, § 157 and § 181, 24 February 2005.
[266] *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009.

iii. Cases which examine IHL, but exclude it

286. In the case of *Sargsyan v. Azerbaijan*[267] (concerning a claim by an IDP claiming that his inability to return to his home in a village (Gulistan) at the frontline of the Nagorno-Karabakh conflict was an interference with his right to property (Art. 1 Protocol 1) and his right to respect for his home (Art. 8)), the Court considered whether there was a basis in IHL for the Government's denial of access to his home, in the following passage:

> "230. The Government argued in particular that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under international humanitarian law, the Government relied mainly on interests of defence and national security and on their obligation under Article 2 of the Convention to protect life against dangers emanating from landmines or military activity.
>
> 231. The Government have not submitted any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in international humanitarian law. The Court observes that international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to home or other property. Article 49 of the Fourth Geneva Convention (see paragraph 95 above) prohibits individual or mass forcible transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased. However, these rules are not applicable in the present context as they only apply in occupied territory, while Gulistan is situated on the respondent Government's own internationally recognised territory.
>
> 232. What is rather of relevance in the present case, is the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own" (Rule 132 of the ICRC Study on Customary International Humanitarian Law – see paragraph 95 above). However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan."

287. The Court went on to find that whilst the applicant's home was in an area of military activity the respondent Government had not done sufficient to take alternative measures to restore his property rights or to provide him with compensation for his loss.

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[267] *Sargsyan v. Azerbaijan* [GC], no. 40167/06, 16 June 2015.

iv. Cases in which IHL has been directly applied by the Court

288. The case in which the Court has considered the relationship between IHL and the Convention in the greatest detail is the case of *Hassan v. the United Kingdom*[268]. The case concerned the detention of the applicant's brother in Iraq, Tarek Hassan, on suspicion of being a combatant or a civilian who constituted a threat to security on 22 or 23 April 2003. He was taken to Camp Bucca, a US-run detention facility in which the UK retained its own compounds. Following his interrogation by both British and US forces the Camp records showed that he was released on or around 2 May. However he did not contact his family on his release and in September 2003 he was found dead in the town of Samara. The applicant brought proceedings alleging that the UK had breached Article 2, 3 and 5 in respect of his brother. However as the claims under Articles 2 and 3 were not established on the facts, it was the claim under Article 5 that became central.

289. In responding, the UK argued first that the Convention did not apply extraterritorially during the active hostilities of an international armed conflict. However in the alternative it also argued that to the extent that the Convention did apply in such circumstances, it had to be applied to take account of IHL, which applied as the *lex specialis,* and might operate to modify or even displace a given provision of the Convention.

290. The Court did not accept the Respondent Government's arguments against the extraterritorial application of the Convention in these circumstances, on the basis that the applicant came within the physical control of UK forces on his detention, and remained under their authority and control even when he was subsequently transferred to US detention within Camp Bucca. The Court therefore emphasised that both IHL and the Convention were applicable in the circumstances.

291. The Court therefore had to face the difficulty that the legal bases for detention set out in Article 5(1) ECHR make no provision for some of the powers of detention that are permissible under the Third and Fourth Geneva Conventions (notably in relation to prisoners of war and the powers of internment necessary for reasons of security). The Court noted that this was the first occasion on which a State had requested it not to apply or to interpret Article 5 in the light of powers of detention permissible under IHL. The Court chose to seek an "accommodation" between these two apparently conflicting legal provisions through an interpretive approach based on the rules of interpretation in Article 31 of the Vienna Convention on the Law of Treaties. In particular paragraph 3 which permits that for the purposes of interpretation account shall be taken of:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

292. The Court found that there was no subsequent agreement for the purposes of paragraph (a). In relation to paragraph (b), the Court looked at the practice of the Parties to the ECHR and found their consistent practice was not to use the derogation

[268] *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014.

mechanism in Article 15 to modify their Convention obligations when undertaking military activity extra-territorially in an international armed conflict. In relation to (c) the Court underlined its previous case-law requiring an interpretation of the Convention "in harmony with" other rules of international law, which applied also to IHL (*Varnava v Turkey* cited above).

"... 103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above[…]).
It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness (see, for example, *Kurt v. Turkey*, 25 May 1998, § 122, Reports of Judgments and Decisions 1998-III; *El-Masri*, cited above, § 230; see also *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67-74, ECHR 2008, and the cases cited therein).

106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall

into one of the categories subject to internment under international humanitarian law is released without undue delay. […]" [269]

293. Lastly, note should be taken of the fact that the Court has on occasion been called upon to indirectly consider questions of IHL in the context of cases concerning the compatibility of a criminal conviction for war crimes and crimes against humanity – which can result from serious violations of international humanitarian law – with Article 7 ECHR and the principle of *nullum crimen sine lege*.[270]

Comment [SE45]: Modified following a proposal by Greece

c. CHALLENGES AND POSSIBLE SOLUTIONS

294. The desirability of establishing clarity as to the applicable law is of course a constant in all situations, but it has an obvious and particular importance in armed conflict situations. This underlines the need for ~~a~~ reconciliation between the different bodies of law to the extent that they are both applicable.

Comment [SE46]: Modified following a proposal by Greece

295. Any reconciliation must take account of the nature of conflict. These are situations in which the costs of both action and inaction can have profound consequences on the lives of those affected (both combatants and non-combatants); and where decisions may have to be made very quickly and at times on the basis of limited information, sometimes at the level of the individual soldiers, in the context of ongoing violence whether actual or threatened. In that sense the IHL is undeniably a *lex specialis* that has been fashioned specifically to be applied in conflict situations in order to uphold its underlying core principles.

296. The judgment in *Hassan* suggests a possible approach to the reconciliation of the two bodies of law, in the context of detention of prisoners of war and internment of individuals who constitute security threats in the context of an international armed conflict. The provisions of IHL in this respect are clear and well-established, enabling the Court to find that they were reconcilable with the fundamental purpose of Article 5(1) to protect the individual from arbitrary detention. It is imaginable that there are other areas of IHL in which the rules are similarly clearly established where a similar solution may be possible.

297. Adopting a similar solution in relation to non-international armed conflicts may be possible in some respects, but there may be additional complexities. A first set of complexities arises from very different circumstances in which non-international armed conflicts can occur. There may be threshold questions about the existence of a non-international armed conflict, for example States may be disinclined to characterise a situation on its own territory as a non-international armed conflict. Other complexities may arise where the forces of a contracting party to the ECHR are involved in a non-international armed conflict extraterritorially. Another complexity may arise from determining the content of some of the rules relating to non-international armed conflicts, which are still largely derived from customary international law. It should be noted,

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[269] See also the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, differing from the majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation. In their view the only way for a State to reconcile its obligations under Article 5 of the ECHR with the exercise of IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15.

[270] See the judgments in the cases of *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §§ 55 and 74, 18 July 2013; *Kononov v. Latvia* [GC], no. 36376/04, §§ 200 ss., 17 May 2010; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 86 ss., 19 September 2008.

however, that States are bound in any case by the fundamental principles of IHL (necessity, humanity, precaution and proportionality) as a minimum, and that States should operate on a clear framework to avoid arbitrariness. Any possible "accommodation" or "harmonious" interpretation of IHL and human rights obligations is likely to require this as a minimum.

298. It has been suggested that an alternative solution to the question of determining conflicts between (at least some) provisions of the two bodies of law is for a State to derogate from the ECHR in accordance with Article 15.[271]

299. However, as the judgment in *Hassan* noted, States have not derogated in relation to situations of international armed conflict in which they have engaged extraterritorially, and given the approach in that judgment the need to derogate would have to be weighed carefully.[272] It is conceivable that there may be cases where derogation may provide an appropriate route in relation to an extra-territorial conflict situation. There may be questions as to the applicability of Art 15, but to the extent that the Convention is applicable extra-territorially it would seem logical that Article 15 is also applicable. Any actual derogation would require justification in any event, but it would seem that the terms of Article 15 should be read sufficiently broadly to allow a derogation in principle when a State is acting extra-territorially.

300. A further set of questions might then arise as to the extent of possible derogations, again particularly in respect of extra-territorial application. For a start, there may be difficult issues in determining which ECHR obligations are applicable, arising from the notion of "dividing and tailoring" Convention rights in situations of extraterritorial application. Even where ~~a~~ derogation is permissible on the face of Article 15, it is not clear how far derogations may be permitted. Thus for example ~~a~~ derogation from Article 2 is permissible in respect of deaths resulting from lawful acts of war, however, as regards the scope of the procedural obligations under Article 2 ECHR, it is not necessarily clear how far they would apply.

Comment [SE47]: Modified following a proposal by Greece

301. All of this suggests that the invocation of Article 15 may assist in answering some questions, but it is also likely to raise further questions, and careful assessments would have to be made of its overall contribution to creating greater legal certainty.

[271] According to the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva in *Hassan*, this is the only possible solution under the Convention. Differing from the majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation, they argued that the only way for a State to reconcile its obligations under Article 5 of the ECHR with the exercise of IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15. It is notable too that the Human Rights Committee in General Comment No. 35 seems to accept the possibility of States derogating from the right to liberty in conflict situations under certain conditions, including conflict situations outside their own territories in which they are engaged (see §~~para.~~ 65).

[272] States in practice do not appear to derogate in situations of extraterritorial non-international armed conflict.

II. THE CHALLENGE OF THE INTERACTION BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS TO WHICH THE COUNCIL OF EUROPE MEMBER STATES ARE PARTIES

1. INTRODUCTION

302. The present Chapter deals with the interaction between the European Convention on Human Rights (ECHR) and other international human rights instruments to which the Council of Europe (CoE) member States are contracting parties. Those instruments may be universal in scope, or they may be regional. However, in accordance with directions given by the Steering Committee for Human Rights (CDDH), and in the light of the relevant paragraphs of the latter's 2015 Report on the longer-term future of the system of the European Convention on Human Rights,[273] it shall be limited to the interaction between the ECHR and human rights conventions adopted under the auspices of the United Nations. As instructed, this interaction shall be examined through the jurisprudence and the practice of the European Court of Human Rights (ECtHR) and the monitoring bodies created by the UN Conventions ("treaty bodies").

303. According to Article 1 § ~~(~~3~~)~~ of the Charter of the United Nations, the promotion and encouragement of the respect for human rights and fundamental freedoms, without discrimination, is one of the purposes of the United Nations. Articles 55 and 56 of the Charter make human rights an integral part of the international economic and social cooperation obligations of the Organization and its member States. Moreover, human rights fall within the mandate of the Economic and Social Council (ECOSOC) which established, in 1946, the UN Human Rights Commission (predecessor to the Human Rights Council). In 1948 the UN General Assembly adopted the Universal Declaration of Human Rights, the cornerstone for the international human rights system. It was understood that this Declaration would be followed by a legally binding instrument. The drafting process led to the adoption, in 1966, of the International Covenant on Civil and Political Rights (ICCPR) and its (First) Optional Protocol and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Comment [SE48]: Modified following a proposal by Greece

Comment [SE49]: Modified following a proposal by Greece

304. Already in October 1967, the CoE Committee of Ministers instructed the Committee of Experts on Human Rights to report on the problems arising from the co-existence of those three treaties,[274] identified as "the twofold risk that international procedures for the guarantee of human rights operate in different and possibly divergent ways; and that conflicts may arise on account of the different definitions given in the various legal instruments established for the protection of human rights and freedoms".[275] The concern seemed justified, given that at the time of their entry into force (1976), five of the then eighteen CoE member States were also parties to the Covenants while eight more had signed them and were considering ratification.

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[273] See DH-SYSC-II(2017)002, 31 July 2017, *Context of the Work of the DH-SYSC-II on the Future Report of the CDDH,* § 15 and CDDH(2015)R84 Addendum I, 11 December 2015, adopted by the Committee of Ministers at its 1252nd meeting (30 March 2016), especially §§182-184 and 188.

[274] CM/Del/Concl. (67) 164, Item VI (b).

[275] *Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights,* Memorandum prepared by the Directorate of Human Rights, Doc. DH/Exp-(67)-6, 6 October 1967.

305. Today all forty-seven CoE member States are simultaneously bound by the ECHR and the Covenants. Moreover, since 1966 several more UN human rights instruments have been adopted: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1966), the Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989) and its Optional Protocols,[276] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006)[277], and the Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006).
[Changes in footnotes on the basis of comments by the CDDH].

306. The compliance of States parties with these treaties is monitored by special bodies, composed of experts from all geographical areas. The experts are elected by the States Parties and shall be of recognised competence in the field of human rights, consideration being also given to legal experience.[278] Under the relevant instruments (the Conventions above or special Optional Protocols),[279] these monitoring bodies examine periodic reports submitted by the Contracting Parties and express their concerns and recommendations in the form of "concluding observations". Moreover, they adopt "General Comments" on matters they find of particular interest pertaining to the interpretation and the implementation of the respective convention. Some are also mandated to conduct confidential inquiries upon receipt of reliable information of systematic or serious violations. But most significantly, UN treaty bodies may receive and consider communications against contracting parties that have explicitly accepted their competence in this respect.[280] Such communications may be individual or, for most treaties, also inter-State; the present Chapter, however limits itself to communications submitted by individuals.

307. ~~However~~Nevertheless, it must be noted that the "Views" of the treaty bodies on individual communications contain recommendations to the States concerned and are not legally binding, as has been repeatedly underlined by CoE member States but also other States (also with respect to concluding observations on periodic reports). No equivalent of Article 46 ECHR is to be found in any of the relevant texts, Conventions or Optional Protocols. Follow-up to the "Views" of the UN treaty bodies consists of the initiation of a dialogue between the relevant treaty body and the State concerned, through the examination of periodic reports and special follow-up reports. This is not to argue that findings by the UN treaty bodies are not to be taken into consideration by States Parties. On the contrary, as indicated by the Human Rights Committee (CCPR) in its *General Comment no 33*,[281] its Views exhibit "some important characteristics of a judicial

Comment [SE50]: Modified following a proposal by Greece

[276] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and Optional Protocol to the Convention on the Rights of the Child on a communications procedure.
[277] See also the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
[278] See ICCPR, Articles 28 and 30. For a general presentation of the UN human rights treaty bodies see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice,* Cambridge University Press, 2013, xlvii, 730 p., at 181-218.
[279] In the case of the ICESCR, also ECOSOC Resolution 1985/17 of 28 May 1985.
[280] Almost all CoE Member States (44) have accepted the competence of the Human Rights Committee to receive individual communications and a significant majority has accepted the competence of the other treaty bodies, with the exception of the ICESCR (11) and the CED Committees (16). No CoE Member State has accepted the competence of the ICMW Committee, a mechanism which has not yet entered into force.
[281] (CCPR), *General Comment no 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 2008, CCPR/C/GC/33, §§ 11 and 17.

decision", including the impartiality and independence of its members, the "determinative character" of its findings on the question whether there has been a violation of the ICCPR, even the fact that failure by a State party to comply "becomes a matter of public record", through the publication of the Committee's decisions and the Annual Reports to the UN General Assembly, with obvious political repercussions for the State concerned. They should therefore be taken in good faith.[282] The same can be said of concluding observations on periodic reports and General Comments.[283] Nevertheless, the whole UN treaty body system relies on dialogue and the exchange of opinions on how legal obligations must be interpreted, and, although that does not diminish the significance of the UN treaty bodies' practice, it is therefore not comparable to the obligation to execute the Court's judgments. All these parameters should be kept in mind when discussing the coexistence of the ECHR with the UN human rights conventions and the possibility of conflicts between them.[284]

308. In light of the proliferation of universal human rights treaties binding upon the CoE member States, as well as of the bodies charged with monitoring the compliance of States parties under those treaties, the concerns expressed within the Council of Europe in the 1960s persist. As described by the CDDH, "since numerous Council of Europe member States are Parties to these UN treaties, there is a risk that a comparable human rights standard is interpreted differently in Geneva compared to Strasbourg".[285] Moreover, situations where procedural rules and related practice of the UN treaty bodies enable them to examine cases that have been previously heard by the ECtHR "may seriously undermine the credibility and the authority of the Court".[286] Accordingly, this Chapter will consider firstly the normative aspect of the subject at hand. Secondly, an indicative analysis of procedural and related questions shall be undertaken.

2. COEXISTENCE AND INTERACTION BETWEEN THE ECHR AND THE UN HUMAN RIGHTS CONVENTIONS THROUGH THE CASE-LAW AND THE PRACTICE OF THE ECTtHR AND THE UN TREATY BODIES

Comment [SE51]: Modified following a proposal by Greece

a. Coexistence of different normative sets: diverging interpretation of substantial rights

309. Ever since the adoption of the ECHR, it was envisaged that the coexistence with a universal treaty could be a source of normative inconsistency and a reason to align the regional to the universal: "If and when this United Nations Convention [i.e. the future ICCPR] comes into force, there may be a situation in which two sets of provisions on

[282] See the 2014 Report of the Venice Commission on the implementation of international human rights treaties in domestic law and the role of courts, CDL-AD(2014)036, p. 31.
[283] In that respect, see the ICJ's finding in its *Ahmadou Sadio Diallo* Judgment of 30 November 2010 (*ICJ Reports 2010,* p. 639, at § 66), with respect to the Human Rights Committee's Views and its General Comment no 15.
[284] Though not binding, Views of the treaty bodies may be influential. They may be taken into account by the ECtHR and the ICJ. See for example the ICJ's finding in its Ahmadou Sadio Diallo Judgment of 30 November 2010 (ICJ Reports 2010, p. 639, at § 66), with respect to the Human Rights Committee's Views and its General Comment no 15. See also the Advisory Opinion of the ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinial Territory", ICJ Reports 2004, p. 136, paras 109-110. Moreover, they could also be taken into account in rulings or decisions of the national courts. See, for example, the (unique, so far) case of *González Carreno v. Spain,* where the Spanish Supreme Court ruled the complainant should be compensated in compliance with the CEDAW Committee's views (no 47/2012, 16 July 2014) for the infringement of her rights under the CEDAW (Tribunal Supremo, sentencia núm. 1263/2018, 17 July 2018, particularly pages 23-28).
[285] CDDH 2015 Report, *op.cit*, § 182.
[286] *Ibid.,* § 184.

human rights differing perhaps in wording or substance have been accepted by those members of the United Nations that are also members of the Council of Europe. This [...] might be a case for revising the list of Human Rights and Fundamental Freedoms set out in Part I of the Convention now before us in order to bring it in harmony with the United Nations Convention". Nevertheless, it was also acknowledged that it was possible for the European States, with their common background, to assume wider and more precise commitments than those that could be incorporated in the United Nations Convention, intended to apply to countries of a widely heterogeneous character.[287]

310. Indeed, although both the ECHR and the ICCPR are comprehensive human rights treaties, they do not necessarily coincide. A certain alignment of the two texts as suggested above was achieved through the adoption of Protocols to the ECHR or through the evolution of the Court's jurisprudence.[288] However, there still are a certain number of rights and freedoms recognised by the Covenant that are not directly addressed by the ECHR and vice-versa: one could mention Article 27 ICCPR and Article 1 of Protocol No. 1 to the ECHR.

311. Additionally, differences exist in the definitions of certain rights that are protected by both the ECHR and the ICCPR.[289] These differences may be connected to the affirmation of the right itself or to the restrictions or limitations permissible. To give but a few examples:

(a) Article 2 § 2 ECHR sets out circumstances in which deprivation of life is permissible. There is no corresponding provision in the ICCPR.
(b) According to Article 7 ICCPR, "*no one shall be subjected without his free consent to medical or scientific experimentation*". There is no corresponding provision in Article 3 ECHR.
(c) Article 14 ECHR only prohibits discrimination in relation to other Convention rights, in contrast to Article 26 ICCPR, which has constantly been interpreted by the CCPR as guaranteeing non-discrimination in relation to all rights, including economic, social, and cultural rights. Protocol No. 12 to the ECHR of 2000, introducing a free-standing right to non-discrimination is binding upon less than half of the CoE member States.
(d) The restrictions allowed by Articles 10 and 11 ECHR seem more extensive than the ones in Articles 19, 21 and 22 ICCPR, inciting certain CoE member States to make reservations to the latter stating that their obligations under the particular Covenant Articles would be implemented in accordance with the corresponding provisions of the Convention.

312. In addition to the ICCPR, the other UN human rights instruments also introduce their own, special rights, or their own, subject-specific norms on rights that are protected, in broader, more general terms, under the Covenant and the ECHR, and are redefined in the context of each specialised instrument.

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[287] Points made by Mr Davies (United Kingdom) and Mr Schuman (France) at a meeting of the Committee of Ministers in Rome on the 3rd November 1950 (see Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention of Human Rights*, Martinus Nijhoff Publishers 1985, 347 p., at 28-32.

[288] Such examples are, respectively, the introduction of a free standing right to non-discrimination, comparable to Article 26 ICCPR, by Protocol 12 to the ECHR or the right to appeal to a higher tribunal in criminal matters (Article 14§5 ICCPR /Protocol no. 7 ECHR, Article 2) and the *lex mitior* rule, i.e. the right to application of a more favourable criminal law (Article 15 par. 1 ICCPR *in fine*). On the latter, compare the ECommHR decision of 6 March 1978 in the case of *X v. Germany*, no. 7900/77 to the Grand Chamber Judgment of 17 September 2009 in the case of *Scoppola v. Italy (no. 2)*, no. 10249/03, § 106.

[289] Compare the Table comparing the provisions of the ECHR to those of the ICCPR prepared in 1967 by the Committee of Experts on Human Rights, doc. DH/Exp(67) 7, 10 October 1967.

313. Different definitions are bound to make room for different interpretations and thus lead to diverging implementation. More complex appear to be situations where the normative texts are quite similar, but still they are approached in a divergent and possibly conflicting manner.

314. A thorough examination of the whole body of the jurisprudence and the practice of the ECtHR and the UN treaty bodies would be impossible to undertake within the context of this Report.[290] Diverging views have been adopted in the past in connection to matters such as abortion,[291] the right to self-representation in criminal proceedings,[292] the right to vote of persons under guardianship,[293] as well as the responsibility of States when implementing UN Security Council resolutions.[294] Still, there are fields, examined in more detail below, where centrifugal tendencies seem to be stronger, and in some cases attract the attention of the media and the general public. These cover the freedom to manifest one's religion (i), the right to liberty and security (ii) and the transfer of persons to another State (iii).

Comment [SE52]: Modified following a proposal by France

i. Freedom to manifest one's religion: the wearing of religious symbols and clothing

315. The Court qualifies the freedom of thought, conscience and religion (Article 9 ECHR) as one of the foundations of a democratic society, noting, however that when several religions coexist, it may be necessary to place limitations on the freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure the rights and freedoms of others. The particular circumstances of a State and its choices as regards secularism are also taken into consideration. With respect to Article 9, in general, and the freedom of religion, in particular, the ECtHR makes frequent reference to the margin of appreciation doctrine.

316. In the case of *Leyla Sahin v. Turkey*,[295] where a medical student complained about a rule prohibiting wearing a headscarf in class or during exams, the Grand Chamber accepted that institutions of higher education may regulate the manifestation of religious rites and symbols by imposing restrictions with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others. The Grand Chamber upheld the Chamber's position that "when

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[290] For a concise but thorough examination of the interaction of the ECtHR and UN treaty bodies, see L.-A. Sicilianos, "Le précédent et le dialogue des juges: L'exemple de la Cour européenne des droits de l'homme", pp. 225-241 in N. Aloupi et C. Kleiner (dir), *Le précédent en droit international, Colloque de Strasbourg de la Société Française pour le Droit international,* Pédone 2016.

[291] Compare (CCPR) *Siobhán Whelan v. Ireland,* no. 2425/14, 11 July 2017 (esp. §7.7) to ECtHR [GC], *A, B and C v. Ireland,* no. 25579/05, 16 December 2010, where Ireland's margin of appreciation with regard to the prohibition of abortion and the protection of the unborn came into play.

[292] See the case of *Correia de Matos v.* Portugal (dec.), no. 48188/99, 15 November 2001, *infra,* (II) (B) (i).

[293] Compare (ECtHR), *Alajos Kiss v. Hungary* (no. 38832/06, §§38, 41-42, 20 May 2010) where the Court admitted that a measure ensuring that only citizens capable of making conscious decisions participate in public affairs could be a measure pursuing a legitimate aim, though a blanket ban on voting irrespective of a person's actual faculties does not fall within an acceptable margin of appreciation to (CRPD) *János Fiala, Disability Rights Center v. Hungary* (4/2011, 9 September 2013, §9.4), where the CRPD Committee found that an exclusion of the right to vote on the basis of a psychosocial or intellectual disability, including pursuant to an individualized assessment, constitutes discrimination on the basis of disability (article 29 CRPD).

[294] See (CCPR), *Sayadi and Vinck v. Belgium,* 1472/2006, 22 October 2008, §7.2, a freezing of assets case where the Committee clearly differentiated itself from the *Bosphorus* doctrine (see ~~Theme~~ chapter I, sub-~~theme~~ chapter 2~~ii~~ and chapter III). It also found that Belgium was responsible for the violations resulting from placing the authors on the sanctions list even if it was unable to subsequently remove them (§10.1-11).

[295] *Leyla Şahin v. Turkey* [GC], no. 44774/98, 10 November 2005.

examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it".[296] The Court has found inadmissible a number of applications involving religious clothing of pupils and students in member States following the principle of secularism.[297]

317. Another set of cases concern religious symbols or clothing at the workplace. In respect of the public sector, the Court has observed that the fact that the applicant wore her veil was perceived as an ostentatious manifestation of her religion which was incompatible with the requirement of discretion, neutrality and impartiality incumbent on public employees in discharging their functions.[298] This goes in hand with the Court's view that a democratic State is entitled to require public servants to be loyal to the constitutional principles on which it is founded.[299] With respect to teaching staff in particular, "it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. […] it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect […] weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable".[300]

318. In a different context, concerning a member State with no legislation regulating the wearing of religious symbols, the Court has found that there had been a violation of Article 9 with respect to an airline employee suspended from work for wearing a cross in contravention of the company's uniform policy, but not with respect to a nurse who had been redeployed to a desk job for wearing a cross in disregard to the hospital's health and safety policy against necklaces.[301] In the first case (with respect to the UK's positive obligations, as the applicant's employer was a private company), the Court held that the British courts had failed to strike a fair balance as they had accorded too much weight to the company's wish to project a certain corporate image. In the second case, where the employer was a public institution and therefore directly required to conform to Article 9, the Court acknowledged the existence of a wide margin of appreciation in relation to health and safety matters and concluded that the measures adopted with regard to the applicant were not disproportionate.

319. A violation of Article 9 has also been found in cases concerning persons expelled from courtrooms and fined for wearing religious clothing, where no other disrespect towards the court had been evidenced.[302]

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[296] Judgment of 29 June 2004, § 108.
[297] For instance, *Köse and Others v. Turkey* (dec.), no. 26625/02,, 24 January 2006; *Kervanci v. France*, no. 31645/04, 4 December 2008; *Ranjit Singh v. France* (dec.) no. 27561/08, 30 June 2009.
[298] Ebrahimian v. France, no. 64846/11, § 62, 26 November 2015, concerning a social worker in a municipal psychiatric institution. See also *Kurtulmuş v. Turkey* (dec.), no. 65500/01, 24 January 2006, concerning an associate professor at a public University.
[299] *Vogt v. Germany* [GC], no. 17851/9126 September 1995.
[300] *Dahlab v. Switzerland* (dec.), no. 42393/98, 15 February 2001.
[301] *Eweida and Others v. United Kingdom,* nos. 48420/10, 59842/10, 51671/10, 36516/10, 15 January 2013. The other two applications did not involve the wearing of religious symbols.
[302] *Hamidovic v. Bosnia and Herzegovina,* no. 57792/15, 5 December 2017 (expulsion from the courtroom of a witness wearing a skullcap). Also *Lachiri v. Belgium,* no 3413/09, 18 September 2018 (prohibition of assisting at a trial because the applicant –and civil party to the trial- refused to remove her headscarf).

320. With respect to the wearing of religious symbols and clothing in public, in its 2010 judgment in *Ahmet Arslan and Others v. Turkey,*[303] the Court held that, since the aim of the legislation on the wearing of headgear and religious clothing in public had been to uphold secular and democratic values, the interference with the applicants' rights pursued a number of the legitimate aims listed in Article 9 § 2: public safety, public order and the rights and freedoms of others. It found, however, that the necessity of the measure in the light of those aims had not been established, particularly because there was no evidence to show that the manner in which the applicants had manifested their beliefs by wearing specific clothing constituted or risked constituting a threat to public order, a form of pressure on others or that they had engaged in proselytism.

321. However, in 2014, in *S.A.S. v. France,* concerning a legislative ban (Law no. 2010-1192) on the concealment of one's face in public places, the Grand Chamber found no violation of Article 9 with respect to the wearing of a full-face veil (niqab), reiterating that this Article does not protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in public in a manner dictated by one's religion or beliefs. The Court further found that respect for the conditions of "living together" in the society was a legitimate aim for the measure under scrutiny and that the State had a wide margin of appreciation as regards this issue on which opinions differ significantly.304 The case at hand was different from *Ahmet Arslan* in that the ban in question was not based on the religious connotation of the veil but solely on the fact that it conceals the face. This position was upheld in *Belcacemi and Oussar v. Belgium* and *Dakir v. Belgium*, where the Court found that the restriction imposed by the Belgian law sought to guarantee the conditions of "living together" and the protection of the rights and freedoms of others and that it was necessary in a democratic society.[305]

322. It is accepted that a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. The Court has thus dismissed cases concerning the obligation to remove religious clothing in the context of security checks,[306] to appear bareheaded on identity photos for use on official documents[307] or to wear a crash helmet.[308]

323. The wording of Article 18 ICCPR (especially § 3 on permissible restrictions) does not diverge significantly from Article 9 § 2 ECHR. Nevertheless, the Human Rights Committee has adopted a different approach on the issue, and, in general, does not appear to rely on a doctrine of margin of appreciation.

324. As a matter of principle, the Committee has declared that "the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is

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[303] *Ahmet Arslan and Others v. Turkey*, no. 41135/98, 23 February 2010,, concerning the conviction of members of a religious group (*Aczimendi tarikatÿ)* who came to Ankara for a religious ceremony, toured the city wearing the distinctive clothing of the group and, following various incidents were arrested and convicted for breaching the law on the wearing of headgear and religious clothing in public.

[304] *S.A.S. v. France* [GC], no 43835/11, §§ 125, 153, -1 July 201.

[305] Nos. 37798/13 and 4619/12, respectively, ~~Judgments of~~= 11 July 2017.

[306] See *Phull v. France* (dec), no. 35753/03, 11 January 2005, where airport authorities obliged a Sikh to remove his turban as part of a security check; also *El Morsli v. France* (dec), no. 15585/06, 4 March 2008, where the applicant was denied an entry visa to France as she refused to remove her headscarf for an identity check at the French consulate general in Marrakesh.

[307] *Mann Singh v. France* (dec), no. 24479/07, 13 November 2008, concerning the refusal by a practicing Sikh to take a bare-headed identity photograph for his driving license. Also *Karaduman v. Turkey* (dec), no. 16278/90, 3 May 1993 concerning the obligation imposed on a Muslim student to provide an identity photograph without a headscarf in order to receive her diploma.

[308] ECommHR, *X v. UK* (dec), no. 7992/77, 12 July 1978, concerning a practicing Sikh.

in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion".[309] Policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are also similarly inconsistent with article 18.[310] The freedom to manifest one's religion is not absolute and may be subject to limitations prescribed by law but strictly on the grounds specified in Article 18 § 3.[311] Moreover, limitations may be applied only for those purposes for which they were prescribed, must be directly related and proportionate to the need on which they are predicated and may not be imposed in a discriminatory manner.[312]

325. In *Bikramjit Singh v. France,* on the expulsion from school of a Sikh student for refusing to remove his head covering, the Committee recognised that the principle of secularism is itself a means by which a State party may seek to protect the religious freedom of its population, and that the adoption of a law prohibiting ostentatious religious symbols responded to actual incidents of interference with the religious freedom of pupils and sometimes even threats to their physical safety; thus, it served purposes related to protecting the rights and freedoms of others, public order and safety. However, the Committee held that the State party had not furnished compelling evidence that, by wearing his head covering, the author would have posed a threat to the rights and freedoms of other pupils or to order at school, nor had it shown how the encroachment on the rights of persons prohibited from wearing religious symbols was necessary or proportionate to the benefits achieved.[313] Interestingly, examining the applications of other Sikh students of the same high school, the ECtHR did not find a reason to depart from its previous jurisprudence which leaves a wide margin of appreciation to the national legislator when it comes to the relation between the State and the religions and declared them inadmissible.[314]

326. The Committee has also acknowledged a State party's need to ensure and verify, for the purposes of public safety and order, that the person appearing in the photograph on a residence permit is in fact the rightful holder of that document. However, in another Sikh turban case, it concluded that the limitation imposed upon the author was not necessary under Article 18 § 3 ICCPR, because the turban covered only the top of the head, leaving the face clearly visible. In addition, "even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks".[315]

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[309] *Raihon Hudoyberganova v. Uzbekistan*, 931/2000, 5 November 2004, at 6.2 concerning the expulsion of a University student wearing the "hijab".

[310] Also measures restricting access to medical care, employment or the rights guaranteed by article 25 (participation in public affairs) and other provisions of the *Covenant. General Comment no. 22, The freedom of thought, conscience and Religion (Article 18)*, CCPR/C/21/Rev.1/Add.4, 1993, § 5.

[311] *Hudoyberganova v. Uzbekistan, op.cit*cited above, at 6.2.

[312] *General Comment no. 22*, § 8.

[313] *Bikramjit Singh v. France*, 1852/08, 1 November 2012, §§ 8.6, 8.7.

[314] *Jasvir Singh v. France* (dec), no. 25463/08, 30 June 2009; *Ranjit Singh v. France* (dec), no. 27561/08, 30 June 2009.

[315] *Ranjit Singh v. France*, 1876/2009, 22 July 2011, § 8.4. The Committee reiterated its position in *Shingara Mann Singh v. France* (1928/2010, 26 September 2013), a case concerning the refusal to renew a man's passport for lack of a bareheaded identity card. That author had already filed an application with the ECtHR, concerning the refusal to renew his driver's license (see § para. 21 above), prompting France to comment that his decision to submit a communication to the Committee this time was "*motivated by a desire to obtain a decision from the Committee differing from the one already adopted by the Court*" (§ 4.3).

327. In *F.A. v. France* (known as the "Baby Loup" case), the Committee found that the dismissal for serious fault without indemnity of a private childcare centre employee that refused to abide by the centre's internal regulations imposing religious neutrality on employees and remove her headscarf at work constituted a disproportionate measure with respect to Article 18 ICCPR. The Committee held that no sufficient justification had been provided by the State party that would allow concluding that the wearing of a headscarf by an educator in a childcare centre in the particular circumstances of the case would violate the fundamental rights and freedoms of the children and parents attending the centre. The Committee did not spend much time on the argumentation by the French government, based on ECtHR case-law, including the *Leyla Sahin* and *Dahlab* cases, that the headscarf is "a powerful external symbol", asserting that the criteria used to arrive at this conclusion had not been explained and that "the wearing of a headscarf, in and of itself, cannot be regarded as constituting an act of proselytism". The Committee also found that the restriction in the centre's internal regulations affected in a disproportionate manner muslim women that chose to wear a headscarf, such as the author. There had thus been differential treatment of the author and her dismissal constituted intersectional discrimination based on gender and religion under Article 26 ICCPR.[316]

328. The recent Views in the cases of *Sonia Yaker v. France* and *Miriana Hebbadj v. France* openly conflict with the Court's *S.A.S.* jurisprudence concerning Law no. 2010-1192 of 11 October 2010 on the prohibition of the concealment of one's face in public and the possibility of imposing sanctions to persons not complying, including muslim women choosing to wear the full-face veil.[317] In this first case concerning the niqab before it, the Committee considered that a general ban was not proportionate to security considerations advanced by the respondent State or for attaining the goal of "living together" in society, a concept that it qualified as "very vague and abstract", quickly dismissing the ECtHR jurisprudence.[318] The Committee also found that the treatment of the authors constituted intersectional discrimination based on gender and religion under Article 26 ICCPR.[319]

ii. Right to liberty and security: involuntary placement or treatment of persons with mental disorder

329. Article 5 § 1 (e) ECHR provides for the lawful detention of "persons of unsound mind". According to the jurisprudence, however, the following three minimum conditions must be satisfied in order for an individual to be deprived of his liberty: "firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder".[320]

330. As to the second condition, "a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his/her condition, but also where the person needs control and supervision to prevent him/her from, for example, causing harm to him/herself or

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316 *F.A. v. France*, no. 2662/2015, §§ 8.8, 8.9, 8.12, 8.13, 16 July 2018~~, §§ 8.8, 8.9, 8.12, 8.13~~.
317 2747/2016 and 2807/2016, 22 October 2018.
318 *Yaker v. France,* cited above, §8.10, *Hebbadj v. France,* cited above, § 7.10.
319 *Yaker v. France,* cited above, §8.17, *Hebbadj v. France,* cited above, § 7.17.
320 *Winterwerp v. the Netherlands,* no. 6301/73, § 39, 24 October 1979~~-~~; *Stanev v. Bulgaria* [~~(~~GC~~]~~), no. 36760/06, § 145, 17 January 2012; and *Rooman v. Belgium* [~~(~~GC~~]~~), no. 18052/11, § 192, 31 January 2019~~.~~.

other persons".[321] Additionally, in principle the detention of a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose.[322] The lawfulness of the detention also requires the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness.[323]

Comment [SE53]: Footnote modified following a proposal from Greece

331. The Court has held that it is for the medical authorities to decide which therapeutic measures to use, if necessary forcibly, in order to preserve the physical and mental health of detained persons: no matter how disagreeable, therapeutic treatment cannot in principle be regarded as "inhuman" or "degrading" in the sense of Article 3 ECHR if it is persuasively shown to be necessary.[324]

332. Although the Convention on the Rights of Persons with Disabilities does not explicitly refer to involuntary placement or treatment of people with disabilities, its Article 14 (liberty and security of the person) clearly states that a deprivation of liberty based on the existence of disability would be contrary to that Convention.

333. **[former 32.]** In its General Comment no. 1 (2014), the CRPD Committee has advanced that mental health laws imposing involuntary measures even in circumstances of dangerousness to one's self or to others are incompatible with Article 14, are discriminatory in nature and amount to arbitrary deprivation of liberty. It has also considered that States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment and that forced treatment by psychiatric and other health professionals is a violation of the freedom from torture, the right to equal recognition before the law and personal integrity, as well as of the freedom from violence, exploitation and abuse (Articles 15-17 CRPD).[325] Likewise, in its Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities (2015), the Committee reiterated its view that Article 14 (1) (b)[326] prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria, such as risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis, are also used to justify the deprivation of liberty[327]. The Committee found a violation of article 14 (1) (b) of the Convention in *Marlon Jams Noble v. Australia,* where it was considered that the author's disability and the State party's authorities' assessment of its potential consequences was the "core cause" of his detention.[328] In the

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[321] *Ilnseher v. Germany*, nos. 10211/12 and 27505/14, § 133, 4 December 2018; *T.B. v. Switzerland,* no. -1760/15, § 54, 30 April 2019.

[322] *Stanev*, cited above, ~~*v. Bulgaria* [GC], no. 36760/06,~~ § 147, ~~17 January 2012~~ and the references therein; and *Rooman*, cited above, ~~*v. Belgium* [GC], no. 18052/11~~, § 193, ~~31 January 2019~~, where the Court reiterated that a significant delay in admission to an appropriate institution and in therapeutic treatment of the person concerned will obviously affect the prospects of the treatment's success, and may thus entail a breach of Article 5 (§ 198).

[323] *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, § 52, 3 November 2015; and; *Rooman* ~~*v. Belgium* [GC], no. 18052/11~~, cited above, § 190, ~~31 January 2019~~.

[324] *Naumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004.

[325] *General Comment no. 1*, 2014, §§ 40-42.

[326] "*1. States Parties shall ensure that persons with disabilities, on an equal basis with others: [...] Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*".

[327] *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities* (2015), §§ 6-7.

[328] Communication 7/2012, views of 2 September 2016, § 8.7.

same context, the CRPD Committee has on several occasions urged upon States parties to repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions and not to permit substitute decision-makers to provide consent on behalf of such persons.[329]
[This paragraph has not been provisionally adopted yet].

334. It must be noted that the Human Rights Committee has adopted a differing approach on the issue, leaving space for involuntary placement and treatment under the condition that they be necessary and proportionate for the purpose of protecting the individual concerned from serious harm or preventing injuries to others.[330] Indeed, "an individual's mental health may be impaired to such an extent that, in order to avoid harm, the issuance of a committal order may be unavoidable", even though "involuntary hospitalization must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law".[331]

335. These diverging interpretations manifest themselves notably in the difficulties in drafting new standards on this matter within the Council of Europe.[332]

iii. Transfer of persons to another State: non-refoulement, prevention of torture and the question of diplomatic assurances

336. Another point of divergence concerns assurances provided for the non-use of torture, when there is a real risk thereto, in the context of procedures such as extradition or deportation, or even in cases of forcible, extra-judicial transfers (for example, cases of "extraordinary renditions").[333] Non-refoulement cases are quite central to the work of the ECtHR but also of the UN treaty bodies, considering that relevant claims are by far the most common ones raised before all the treaty bodies and constitute over 80 per cent of the CAT's caseload.[334]

Comment [SE54]: Footnote added following a proposal from Greece

337. Extradition or expulsion of an individual may give rise to an issue under Article 3 ECHR (prohibition of torture and of inhuman or degrading treatment of punishment) where substantial evidence has been presented that the individual involved, if extradited or deported, faces a real risk of being subjected to treatment contrary to Article 3. "Substantial evidence" includes all material available, including an assessment of the foreseeable consequences of sending the individual to a particular country, bearing in mind the general situation in the country in question but giving emphasis to the individual's personal circumstances at the time of the extradition or expulsion or at the time of the examination of the case by the Court, if the extradition or expulsion have not taken place yet.[335] In such a case, Article 3 implies an obligation not to extradite or

Comment [SE55]: Footnote modified following a proposal from Greece

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[329] For instance, Concluding Observations CRPD/C/POL/CO/1/29.10.2018 §24, CRPD/C/MLT/CO/1/17.10.2018 §23, CRPD/C/SVN/CO/1/16.4.2018 §23, CRPD/C/GBR/CO/1/03.10.2017 § 35.
[330] *General Comment no. 35*, *Article 9 (Liberty and security of person),* CCPR/C/GC/35, 2014, § 19.
[331] (CCPR), *T.V. and A.G. v. Uzbekistan*, 2044/11, 11 March 2016, § 7.4.
[332] See the drafting work on the Additional Protocol to the Convention on Human Rights and Biomedicine (Oviedo Convention), ~~see~~ https://www.coe.int/en/web/bioethics/psychiatry/about.
[333] A similar issue would be that of the assurances given on the non-use of the death penalty. See, for instance, the case of *Al Nashiri v. Poland,* already referred to under ~~Theme 1~~chapter I of this Report. Also *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018.
[334] Basak Cali and Steward Cunningham, "A few steps forward, a few steps sideways and a few steps backwards: The CAT's revised and updated GC on Non-Refoulement", *EJIL: Talk!*, 20 March 2018.
[335] See *Saadi v. Italy* [GC], no. 37201/06, §§ 128-133, 28 February 2008~~.~~; *Kislov v. Russia*, no. 3598/10, § 89, 9 July 2019.

deport, including in cases where the protection of national security is at play.[336] It should, however, be noted that, in general, the Court "has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention"[337] and that it acknowledges that it is not its task to substitute its own assessment to the one made by the authorities of the respondent State, even if it must satisfy itself that the latter was adequate and sufficiently supported by domestic materials and materials originating from other reliable and objective sources.[338]

Comment [SE56]: Footnote modified following a proposal from Greece

338. In its *General Comment no. 31* (2004), the Human Rights Committee highlights also the obligation of States Parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant (right to life and prohibition of torture).[339] The Committee has indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.[340]

339. States are under the explicit obligation not to deport or extradite a person where there are substantial grounds for believing that he/she would be in danger of being subjected to torture under Article 3 of the Convention Against Torture. The second paragraph of that same Article provides that for the purpose of determining whether there are such grounds, the competent authorities of the States Parties shall take into account all relevant considerations including, where applicable, "the existence in the State concerned of a consistent pattern of flagrant or mass violations of human rights". Nevertheless, the existence of such a pattern does not of itself constitute sufficient reason for determining that a particular person would be in danger if returned to a particular country. Rather, the aim of such a determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country of return.[341] Although "considerable weight" is to be given to findings of fact made by organs of the State party on the individual's claims of risk of torture, the CAT Committee considers itself not to be bound by such findings, having instead the power, on the basis of Article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.[342]

340. In the ECtHR's case-law, importance is placed in the existence of assurances provided by the State to which a person is to be transferred in cases where there is a real

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[336] See *Soering v. the United Kingdom*, § 88, no. 14038/88, 7 July 1989; *Saadi,* cited above, §§ 117, 125; *Chahal v. the United Kingdom,* no. 46827/99, § 80, 15 November 1996; *A.M. v. France*, no. 12148/18, § 116, 29 April 2019.

[337] *Harkins and Edwards v. the United Kingdom,* nos. 9146/07 and 32650/07, § 131, 17 January 2012.

[338] See *J.K. and Others v. Sweden,* § 84, no. 59166/12, 23 August 2016.

[339] (CCPR), *General Comment no 31, Nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, § 12.

[340] See *X v. Denmark*, 2523/2015, inadmissibility, 1 April 2016, § 9.2; *A.R.J. v. Australia,* 62/1996, 28 July 1997, § 6.6, *X v. Sweden,* 1833/2008, 1 November 2011, § 5.18.

[341] For instance, (CAT), *M.C. v. The Netherlands,* 569/2013, 13 November 2015, § 8.2.

[342] (CAT) *General Comment no 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22*, CAT/C/CG/4, § 50; *I.E. v. Switzerland,* 683/2015, 14 November 2017, § 7.4; *Alp v. Denmark,* 466/2011, 14 May 2014, § 8.3. The CAT Committee has taken the view that in cases where "strong and almost unequivocal medical reports" on previous occurrences of torture are present, the respondent Government is warranted to conduct further medical examinations. For example, *M.C. v. The Netherlands, supra,* § 8.6, a case where the Dutch Government had nevertheless expressed its belief that the author's claims were not credible and that a risk was no longer present. At the same time, the ECtHR has ruled that if the applicant has made a plausible case of previous occurrences of torture, it is for the Government to prove that the situation in the country of transfer have changed so that such a risk no longer exists (*J.K. and Others v. Sweden,* cited above, § 102).

risk of torture or ill-treatment. In judgments such as *Chahal v. the United Kingdom* and *Mamatkulov and Askarov v. Turkey* (GC),[343] the Court has held that reliance can lawfully be placed on assurances provided by the State to which the person is to be transferred. Nevertheless, the weight to be given to these assurances depends on the circumstances of each case. There is a difference between relying on an assurance which requires a State to act in a way that does not accord with its normal law and an assurance which requires a State to adhere to what its law requires but may not be fully or regularly observed in practice. The ECtHR has acknowledged that assurances are not in themselves sufficient to prevent ill-treatment; therefore it examines whether they provide in their practical application a sufficient guarantee against ill-treatment in the light of the circumstances prevailing at the material time.[344]

341. In the case of *Othman (Abu Qatada) v. the United Kingdom* (deportation of a terrorist suspect to Jordan), the Court recognised that "there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security" ; however, it refrained from ruling upon the propriety of seeking assurances, or assessing the long-term consequences of doing so, maintaining that its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.[345] To do so, the Court follows several steps going from the preliminary task of examining whether the general human rights situation in the receiving State excludes accepting any assurances, to the task of assessing the quality of the assurances given and their reliability in light of the receiving State's practices.[346] To the Court's opinion, "it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances". A State's negative record vis-a-vis human rights, in particular the prohibition of torture, does not preclude accepting assurances from it; it is, however, a factor in determining whether these assurances are sufficient.[347]

342. In *Alzery v. Sweden* (removal ~~pursuant~~ following diplomatic assurances obtained from the Egyptian Government), the Human Rights Committee held that "the existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists".[348]

Comment [SE57]: Footnote modified following a proposal from Greece

343. The CAT Committee's approach to diplomatic assurances is more reluctant: "diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention".[349] For instance, in *Abichou v. Germany,* the German authorities "knew or should have known" that the country requesting the extradition routinely resorted to the widespread use of torture against detainees, and that the complainant's other co-defendants had been tortured.[350] In *Agiza v. Sweden,* the Committee referred to the 2004 Report to the General Assembly by the UN Special Rapporteur on Torture, who argued that, as a baseline, diplomatic

[343] Nos. 46827/99, 15 November 1996 and 46951/99, 4 February 2004, respectively.
[344] *Saadi*, cited above, § 148.
[345] *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 186, 17 January 2012.
[346] Ibid., §§ ~~paras~~ 188-189, including the case-law references therein, presenting the criteria the Court uses to evaluate each particular situation.
[347] Ibid., §§ 188, 193.
[348] 1416/2005, Views of 10 November 2006. Nevertheless, "at the very minimum, the assurances procured should contain a monitoring mechanism and be safeguarded by practical arrangements as would provide for their effective implementation by the sending and the receiving States" (*Valetov v. Kazakhstan*, 2104/2011, 17 March 2014).
[349] (CAT), *Abichou v. Germany,* 430/2010, 21 May 2013, §§ 11.5-11.7.
[350] *Ibid.*

assurances should not be resorted to in circumstances where torture is systematic, and that if a person is a member of a specific group that is routinely targeted, this factor must be taken into account.[351]

344. In *Pelit v. Azerbaijan,* the CAT Committee found a breach of Article 3 as Azerbaijan had not supplied the assurances against ill-treatment it had secured to the Committee in order for it to perform its own independent assessment of them, nor had it detailed with sufficient specificity the monitoring undertaken and the steps taken to ensure that it was objective, impartial and sufficiently trustworthy.[352] Whereas in *H.Y. v. Switzerland*, the Committee took note of the State Party's argument that it had obtained diplomatic assurances in support of the extraditing request, that its authorities would be able to monitor their implementation and that the requesting State had never breached its diplomatic assurances, however it still went on to find that in the circumstances of the case, those assurances could not dispel "the prevailing substantial grounds" for believing that the complainant's extradition would expose him to a risk of being subjected to torture.[353]

345. The question of assurances proved to be a major point of discord during the procedure of revising the CAT's General Comment No. 1 on the implementation of Article 3 of the Convention against Torture in the context of Article 22 (now General Comment No. 4). In the draft, the Committee proposed to explicitly state that diplomatic assurances are inherently contrary to the principle of non-refoulement. Notably almost all CoE member States that submitted comments challenged this position referencing the *Othman (Abu Qatada) v. the United Kingdom* judgment.[354] In the final text, a much softer position has been retained, namely that "diplomatic assurances from a State party to the Convention to which a person is to be reported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subject to torture in that State". This could be read in the sense that the CAT Committee may rely upon diplomatic assurances as long as it ascertains that they are not used as a "loophole".

346. A similar issue arises in relation to the return of asylum seekers under the Dublin system (currently Dublin III Regulation[355]). The ECtHR has, indeed, held, in an initial set of judgments on the issue, that there had been (or would be) a violation of Article 3 ECHR in cases where there were no individual guarantees that the applicants would be taken charge of in a manner respectful of international human rights standards and adapted to their specific circumstances. The context was the deficiencies in the reception arrangements for asylum seekers in the countries of first entry.[356] However, a string of cases has followed where the Court declared applications involving the Dublin

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[351] (CAT), *Agiza v. Sweden,* 233/2003, 20 May 2005, §§ 11.16, 13.4.
[352] 281/2005, Views of 29 May 2007, § 11.
[353] 747/2016, Views of 9 August 2017, §§ 10.6, 10.7.
[354] The written submissions of States parties, specialised entities, NGOs, Academia, etc. are accessible at https://www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx.
[355] *Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.*
[356] See *Tarakhel v. Switzerland* [GC], no. 29217/12, 4 November 2014: the Court concluded that there would be a violation of Article 3 if the Swiss authorities returned an Afghan couple and their six children to Italy without first obtaining guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together; also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, where the Court imposed upon the Belgian authorities to verify how asylum legislation was applied in Greece before taking the decision to return the applicant there.

system inadmissible.[357] At the same time, the UN treaty bodies consider that, in cases involving the Dublin Regulation, States parties should take particularly into account "the previous experiences of the removed individuals in the first country of asylum, which may underscore the special risks that they are likely to face and may thus render their return to the first country of asylum a particularly traumatic experience for them".[358] And, in *A.N. v. Switzerland,* the CAT Committee seems to suggest that it was the responded Government's obligation to not only undertake an individualised assessment of the personal and real risk that the complainant would face if returned to Italy, but to ascertain details such as whether appropriate rehabilitation centres were available there, and seek assurances from the Italian authorities that the complainant would have immediate and continuous access to treatment for as long as he needed it.[359]

b. Coexistence of different international mechanisms for the guarantee of human rights: diverging approaches to procedural matters

347. This part will endeavour to highlight any divergences between the two systems as regards issues related to procedural matters, mainly (i) admissibility but also (ii) the indication of interim measures.

i. Admissibility

348. By "admissibility", reference is made to the requirements that need to be present for a judicial organ (or, in the case at hand, the UN treaty bodies) to consider the substance of a given case.

349. Articles 34 and 35 ECHR set out the admissibility requirements with respect to individual applications. Those refer to (a) categories of applicants that may appear before the Court, (b) victim status, (c) procedural grounds for inadmissibility (anonymity, non-exhaustion of domestic remedies, applications submitted after the time-limit has expired, applications concerning the same matter as previous or parallel applications before other international organs, abuse of the right of application) and (d) inadmissibility based on the merits (applications incompatible with the provisions of the ECHR and its Protocols or manifestly ill-founded, applications that constitute an abuse of the right of individual application or where the applicant has not suffered a significant disadvantage). Questions of jurisdiction are also addressed.[360]

Comment [SE58]: Footnote modified following a proposal from Greece

350. There are significant points of convergence with respect to admissibility between the two systems, such as a similar approach to the recognition of the victim status,[361] the general rejection of *actio popularis,*[362] or the converging views, to some

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[357] See *A.S. v. Switzerland*, no 39350/13, 30 June 2015, or *H and Others v. Switzerland* (dec), no. 67981/16, 15 May 2018: the Court concluded that doubts previously expressed as to the capacities of the reception system for asylum seekers in Italy could not justify barring all removals to that country.
[358] (CCPR) *Hibaq Said Hashi v. Denmark*, 2470/2014, 28 July 2017, § 9.7.
[359] (CAT) *A.N. v. Switzerland*, 742/2016, 3 August 2018, §§ 8.6-8.8.
[360] See the Court's thorough *Practical Guide on Admissibility Criteria,* updated on 30 April 2019~~4th edition (2017)~~.
[361] For instance, both the ECtHR and the Human Rights Committee accept that close family members can bring complaints on behalf of deceased or disappeared relatives, concerning violations related to their death or disappearance.
[362] See ECtHR, *Klass and Others v. Germany,* no 5029/1971, § 33, 6 September 1978; (CCPR) *Aumeeruddy-Cziffra and other 19 Mauritian Women v. Mauritius,* 35/78, 9 April 1981, § 9.2; (CRPD), *Marie-Louise Jungelin v. Sweden,* 5/2011, 2 October 2014, § 10.2~~.~~; (CEDAW) *Dayras and others v. France,* 13/2007, inadmissibility, 4 August 2009, § 10.5.

extent, on jurisdiction, including extraterritoriality, different normative texts notwithstanding.[363]

351. There is, however, also an important degree of diversity, not only between the ECtHR and the UN treaty bodies, but also among the latter. An evident example is the time-limit for the submission of a complaint, going from 6 months (and soon to be 4) from the exhaustion of domestic remedies before the ECtHR to (~~maybe~~possibly) 5 years before the Human Rights Committee (3 years from the conclusion of another international procedure),[364] or even the absence of a time-limit, as before the CERD, the CEDAW, the CED or the CRPD Committees.[365] There are also examples of diversity in admissibility criteria that do not reflect textual differences: an example is the application by treaty bodies of the criterion of the exhaustion of domestic remedies.[366]

352. Nevertheless, not every difference with respect to admissibility criteria has the potential to present a threat to the coherence of human rights law. Diverging or even conflicting jurisprudence in a formal sense may only occur in cases of overlapping jurisdiction, where two or more organs have come to contradictory results concerning the same legal obligations applied in the same case. Therefore, this part shall focus on the question of the parallel examination of the same or very much similar matter.

353. The relevant rule of the ECHR (Article 35 § 2) reads: "The Court shall not deal with any application under Article 34 that: […] b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information". The same rule is to be found in the majority of the relevant texts of the UN human rights treaty bodies.[367]

354. In comparison, Article 5 § 2 (a) of the Optional Protocol to the ICCPR only bars the Human Rights Committee from examining communications which are *simultaneously* being heard by another international body, not *previously* considered elsewhere, even when a decision on the merits has already been issued.[368] It is thus

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[363] Compare Article 1 ECHR to Article 2§1 ICCPR, but see (CCPR) *Lopez Burgos v Uruguay*, 52/1979, 29 July 1981, § 12, as taken aboard by the ECtHR in *Issa and others v. Turkey,* no 31821/96, 16 November 2004. Cf. ~~Theme~~ chapter I, sub-~~theme (iii)~~chapter 3 of this Report.

[364] Rule 9~~6~~9 (c) of the Rules of Procedure of the Human Rights Committee: "[…] *a communication may constitute an abuse of the right of submission, when it is submitted after 5 years ~~from~~ after the exhaustion of domestic remedies by the author of the communication, or, where applicable, ~~after~~ 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication*".

[365] Also, Articles 3§1(a) of the Optional Protocol to the ICESCR and 7 (h) of the third OP to the CRC provide for an 1 year time-limit, unless the author demonstrates it was impossible to submit the communication earlier, while Rule 113(f) of the CAT's Rules of Procedure requires that "[…] *the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party*".

[366] In *N. v the Netherlands,* a non-refoulement case (39/2012, inadmissibility,17 February 2014), the CEDAW Committee was not barred from considering the complaint in spite of the fact that the author had not invoked sex-based discrimination domestically, because "*gender-based violence is a form of discrimination against women*" (§ 6.4). In *Quereshi v. Denmark,* 033/2003, 9 March 2005, the CERD Committee decided that the application of further domestic remedies would be unreasonably prolonged after a domestic process of less than 2 years (§ 6.4). The CAT Committee may find a communication admissible even when the victim has not exhausted domestic remedies if a State party's authorities have been informed, given that Article 12 CAT provides for the *ex officio* prosecution of torture (*Gallastegi Sodupe v. Spain,* 453/2011, 23 May 2012, § 6.4).

[367] CAT Article 22§4(a), OP-ICESCR Article 3§2(c), OP-CEDAW Article 4 § 2 (a), 3rd OP-CRC Article 7(d), ICMW Article 77 and OP-CRPD Article 2(c).

[368] CCPR, *Nikolov v. Bulgaria,* 824/1998, inadmissibility, 24 March 2000, § 8.2. But see *Polay Campos v. Peru,* 577/1994, 6 November 1997, where the Committee found a communication already filed with the Inter-American

possible, given its broad time-limit for the submission of an individual communication (*supra,* § 53), for the Committee to consider complaints already examined by the ECtHR or elsewhere. This applies also with respect to the CED Committee, where the same rule stands,[369] whereas the absence of a relevant rule in the CERD has led its Committee to hold that it may even consider communications that are simultaneously examined elsewhere.[370]

355. In order to prevent the possibility of successive applications, some CoE member States, following the suggestion of the Committee of Ministers,[371] have made reservations against the competence of the Human Rights Committee to re-examine communications already considered under an alternative international procedure, as well as against the competence of the CERD Committee to examine communications previously or simultaneously heard by another organ.[372] In numerous cases, these reservations have succeeded in rendering a communication inadmissible. In *Kollar v. Austria,* the Human Rights Committee confirmed that the Austrian reservation, which expressly applied to cases before the European Commission of Human Rights, would be read as applying to cases before the Court, since the latter body succeeded to the functions of the Commission.[373]

356. Generally speaking, treaty bodies examine three conditions to ascertain admissibility of a given communication: a) whether the author and the facts are the same as those of ~~a petition~~ an application before the ECtHR, b) whether the rights at play are the same in substance, and c) whether ~~inadmissibility was declared~~ an application had been declared inadmissible by the ECtHR solely on procedural grounds or whether the Court examined the merits as well.

357. In *Leirvåg et al v. Norway,* a case concerning the inclusion of a mandatory religious subject in the Norwegian schools' curriculum, also considered by the ECtHR in the case of *Folgerø and Others v. Norway,*[374] the Human Rights Committee reiterated its position that the words "the same matter" "*must be understood as referring to one and the same claim concerning the same individual*".[375] That is also the approach of the CERD Committee as expressed in *Koptova v. Slovaki*a and of the CEDAW Committee in *Kayhan v. Turkey*.[376] *I.E. v. Switzerland* was admissible before the CAT Committee because the complainant had submitted his application to the Court in connection to his first asylum application, not his second asylum application brought before the Committee.[377] In *Ali Aarrass v. Spain,* on the extradition of a terrorist suspect to Morocco, the case was admissible because the author's complaint under Article 3 ECHR referred to prison

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Commission on Human Rights to be admissible, because the latter had indicated that "*it had no plans to prepare a report on the case within the next 12 months*".

[369] Article 31 § 2 (c) CED.

[370] *Koptova v. Slovak Republic,* 13/1998, 8 August 2000. The CERD Committee noted that the author of the communication was not the applicant before the ECtHR and that, even if she was, "*neither the Convention nor the rules of procedure prevented the Committee from examining a case that was also being considered by another international body*" (§ 6.3).

[371] Resolution 70(17), 15 May 1970.

[372] 18 Member States with respect to the Human Rights Committee, 17 with respect to the CERD.

[373] *Kollar v Austria,* 989/01, inadmissibility, 30 July 2003, §§ 8.2-8.3.

[374] *Folgerø and Others v. Norway* [GC], no. 15472/02, 29 June 2007.

[375] *Leirvåg et al v. Norway,* 1155/2003, 3 November 2004, at 13.3. Before the Norwegian courts, the claims of the authors in *Leirvåg* and of the applicants in *Folgerø* had been joined. Some chose to submit their case to the ECtHR, while the rest submitted communications to the Human Rights Committee.

[376] *Koptova v. Slovakia,* ~~supra~~cited above; CEDAW, no. 8/2005, inadmissibility 27 January 2006.

[377] *I.E. v. Switzerland,* 683/2015, 14 November 2017, § 6.1.

conditions in Morocco in general, whereas his complaint under Article 7 ICCPR referred to the risk of being held incommunicado and tortured to extract a confession.[378]

358. In *Pindado Martínez v. Spain*, concerning Article 14 § 5 ICCPR (right to appeal in criminal matters), the Human Rights Committee recalled that "where the rights protected under the European Convention differ from the rights established in the Covenant, a matter that has been declared inadmissible by the European Court as incompatible with the Convention or its Protocols cannot be deemed to have been "examined" within the meaning of article 5, paragraph 2, of the Optional Protocol, such as to preclude the Committee considering it".[379] The matter is considered the same if the norm of the ECHR is sufficiently proximate to the protection afforded under the Covenant. Thus, in *Mahabir v. Austria*, the Committee found itself barred from considering the claims with respect to Articles 8 and 17 of the Covenant, "which largely converge with Articles 4 and 8 of the European Convention on Human Rights", but not with respect to Articles 10 and 26 of the Covenant, since "neither the European Convention nor its Protocols contain provisions equivalent" to them.[380]

359. In *Petersen v. Germany*, the Human Rights Committee reaffirmed its long-standing position "that where the Strasbourg organs have based a declaration of inadmissibility not solely on procedural grounds, but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been 'examined' within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol". [381] "Even limited consideration of the merits" of a case constitutes an examination within the meaning of the respective reservation.[382]

360. The Committee departed from this practice in *Maria Cruz Achabal Puertas v. Spain*, a case on torture and the lack of relevant effective investigations. Despite admitting that "the European Court has gone well beyond the examination of the purely formal criteria of admissibility when it declares a case inadmissible because it does not reveal any violation of the rights and freedoms established in the Convention or its Protocols", the Committee found that, in the particular circumstances of the case, "the limited reasoning contained in the succinct terms of the Court's letter" did not allow to assume that the examination included sufficient consideration of the merits. The Committee then found a violation of Article 7, independently and in conjunction with Article 2 § 3, namely the equivalent of the breaches of the ECHR previously claimed before the ECtHR.[383] The Committee has similarly declared admissible cases where the Court's (former) practice to dismiss an application by a general reference to Articles 34 and 35 ECHR did not allow to determine whether "the same matter" had been examined.[384]

361. This approach was echoed in *S. v. Sweden* before the CAT Committee, where it was held that the succinct reasoning provided by the ECtHR, sitting in single judge formation, did not allow verifying the extent to which the Court had examined the

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[378] *Ali Aarrass v. Spain,* 2008/2010, 21 July 2014, at 9.4.
[379] *Pindado Martínez v. Spain,* 1490/2006, inadmissibility, 30 October 2008. § 6.4. Spain was not yet bound by Protocol no. 7 to the ECHR. See also *Casanovas v. France*, 441/1990, 15 July 1994, § 5.1.
[380] *Mahabir v. Austria,* 944/2000, inadmissibility, 26 October 2004, § 8.6 See also *General Comment no 24 (52), Issues relating to reservations made upon ratification to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (1994), CCPR/C/21/Rev.1/Add.6, § 14.
[381] *Petersen v. Germany,* 1115/2002, inadmissibility, 1 April 2004, §§ 6.3-6.4.
[382] *Mahabir v. Austria,* § 8.3.
[383] *Maria Cruz Achabal Puertas v. Spain,* 1945/2010, 27 March 2013, § 7.3.
[384] For instance, *Yaker v. France* and *Hebbadj v. France, supra,* §§ 6.2 and 6.4, respectively.

application.[385] However, in *M. T. v. Sweden*,[386] on non-refoulement, the Committee arrived at the opposite conclusion, where the Court previously had declared the complainant's application inadmissible as it considered that "the material in its possession […] did not disclose any appearance of violation of the rights and freedoms set out in the Convention or its Protocols". The Committee considered that the decision of the Court was not solely based on mere procedural issues, but on reasons that indicated a sufficient consideration of the merits of the case.

ii -Interim measures

362. Interim measures are not provided for in the Convention; it is under Rule 39 of the Rules of Court that the ECtHR indicates to States parties (and, rarely, to applicants)[387] the interim measures it considers "should be adopted in the interests of the parties or of the proper conduct of the proceedings". Despite the absence of a relevant provision in the Convention text, according to the jurisprudence, interim measures are compulsory to the extent that non-compliance by member States constitutes a violation of Article 34 ECHR, in particular the obligation of the States Parties not to hinder in any way the effective exercise of the right of any person to have his/her case heard by the Court.[388] Non-compliance with interim measures indicated by the Court has been extremely infrequent.

363. -Rule 39 comes into play where there is an imminent risk of serious and irreparable harm. In fact, interim measures are indicated only in a limited number of areas, mostly expulsion and extradition, when it is assessed that the applicant would otherwise face a real risk of serious and irreversible harm in connection with Articles 2 and 3 of the Convention. Exceptionally, such measures may be indicated in response to certain requests concerning Article 6 (right to a fair trial)[389] and Article 8 (right to respect for private and family life)[390], including eviction orders,[391] or in other situations concerning different articles of the Convention, such as the deterioration of the health of an applicant in detention[392] or ~~the probable destruction of~~to preserve an element essential for the examination of the ~~application~~communication[393].

Comment [SE59]: Modified following a proposal by France

[385] CAT, *S. v. Sweden,* 691/2015, admissibility, 25 November 2016, § 7.5.
[386] CAT, *M. T. v. Sweden*, 642/2014, 7 August 2015, § 8.5. See also *U. v. Sweden*, 643/2014, 23 November 2015, § 6.2, and 6.4. ~~C.f. § 96 below.~~
[387] See *Rodic and Others v. Bosnia and Herzegovina,* no. 22893/05, 27 May 2008, calling upon the applicants to stop their hunger strike (§ 4).
[388] *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005; *Paladi v. the Republic of Moldova* [GC], no. 39806/05, 10 March 2009. The Court's initial position on the issue (compare *Cruz Varas and Others v. Sweden,* no. 15576/89, § 99, 20 March 1991) shifted after several international judgments, in particular the ICJ landmark Judgment in the *LaGrand (Germany v. USA)* case, 27 June 2001.
[389] See *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09 *supra*, on the risk of a "flagrant denial of justice" if the applicant was expulsed to Jordan (in connection to evidence obtained by torture).
[390] See *Soares de Melo v. Portugal,* no. 72850/14, 16 February 2016, where the Court granted the applicant a right of contact with her children that had been taken into care with a view to adoption.
[391] See *Yordanova and Others v. Bulgaria,* no. 25446/06, 24 April 2012, request to stay the decision to evict the applicants from a Roma settlement until such time as the authorities presented to the Court the measures undertaken for their alternative housing. See *Lahbil Balliri v. Spain*, no. 4577/19, request to stay the decision to evict the applicant and his family (the children were minors) from their house in Sabadell (Catalonia) until such time as the authorities presented to the Court the measures undertaken for their alternative housing.
[392] See *Kotsaftis v. Greece,* no. 39780/06, 12 June 2008, where the Court requested the transfer of the applicant to a specialisespecialised medical centre.
[393] See *Evans v. the United Kingdom* [GC], no. 6339/05, 10 April 2007, and the request to prevent the destruction of fertilized embryos until the Court was able to examine the case. See also the exceptional case of *Lambert and Others v. France* [GC], no. 46043/14, 5 June 2015: request to stay the execution of a decision to discontinue artificial nutrition and hydration of a patient in a chronic vegetative state~~in coma~~.

364. The Rules of Procedure of the Human Rights Committee also have a provision (Rule 92) enabling it to indicate interim measures, with the aim to "avoid irreparable damage to the victim of the alleged violation". In comparison to the Court, the Committee seems to have a broader approach with respect to interim measures. Thus, in addition to expulsion and extradition, and the stay of the execution of a death penalty, the Committee has issued interim measures in cases where an individual's health and well-being were at risk,[394] going as far as to request that the State party adopts "all necessary measures to protect the life, safety and personal integrity" of the author or his family;[395] in cases where evidence needed to be preserved;[396] where a new law could affect individuals who had or would maybe submit communications;[397] where there were threats to the traditional way of life of a community;[398] where the authors risked becoming homeless;[399] and, generally, in order to prevent imminent violations of other rights such as those under articles 17 (right to privacy), 18 (freedom of thought, conscience and religion), 19 (freedom of expression) or 27 (minority rights) ICCPR.

365. The CAT Committee also receives regularly requests for interim measures, mainly in non-refoulement cases. So do, with a varying frequency, other UN treaty bodies, with respect to non-refoulement but also other situations.[400] For instance, in *Mr. X v. Argentina,* the CRPD Committee has requested the State party "to consider taking steps to provide the care, treatment and rehabilitation that the author required because of his state of health";[401] or to take the necessary measures to ensure that the enteral feeding and hydration of a patient in a chronic vegetative state is not suspended during the examination of the communication.[402] The same body asked the State party to stay the authors' deportation in *O.O.J. v. Sweden,* as did the CRC Committee in *I.A.M. v. Denmark*.[403] In *M.W. v. Denmark,* the CEDAW Committee asked the State party to take measures to allow access of the author to her son.[404]

Comment [SE60]: Modified following a proposal by France

366. **[former 65.]** Likewise, the CRC (Committee on the Rights of the Child) and the CESCR (Committee on Economic, Social and Cultural Rights) often receive requests for the adoption of interim measures, which they automatically grant without a previous study of the substantive issues of the claim. In the first case, the requests normally refer to undocumented immigrants claiming to be unaccompanied minors and therefore requesting the special legal protection legally awarded to minors.[405] In the second case, the CESCR regularly receives requests for, – and automatically grants – interim

[394] For instance, requesting the State party to abstain from administering certain medication (*Umarova v. Uzbekistan,* 1449/2006, 19 October 2010), or to produce detailed medical reports to the Committee (*Sedic v. Uruguay,* 63/1979, 28 October 1981).
[395] *Fernando v. Sri Lanka,* 1189/2003, 31 March 2005.
[396] *Shin v. the Republic of Korea* (926/2000, 16 March 2004), where the State party was requested not to destroy the painting for the production of which the author had been convicted.
[397] *Boucherf v. Algeria,* 1996/2003, 30 March 2006, where the Committee requested the State party not to invoke the provisions of a new amnesty law with respect to victims of enforced disappearances.
[398] See *Länsman (Jouni) et al. v. Finland*, 1023/2001, 17 March 2005, concerning the traditional reindeer husbandry by the Sami threatened by intensive logging; and also *Ominayak (Lubicon Lake Band) v. Canada,* 167/1984, 26 March 1990.
[399] *"I Elpida"-The Cultural Association of Greek Gypsies from Halandri and Suburbs, and Stylianos Kalamiotis v. Greece,* 2242/2013, 3 November 2016.
[400] Interim measures are provided for in Rule 114 of the CAT's Rules of Procedure. More recent treaties, such as the CEDAW or the CRPD, have included an express basis for adopting interim measures (article 5 § 1 and article 4 § 1 of their Optional Protocols, respectively).
[401] (CRPD) 8/2016, 11 April 2014.
[402] 3 May 2019, consorts Lambert v. France no. 59/2019.
[403] (CRPD) 28/2015, 18 August 2017; (CRC) 3/2016, 25 January 2018.
[404] (CEDAW) 46/2012, 22 February 2016.
[405] See, for instance, CRC, resolution G/SO CRC-IC ESP(26) - CE/AB/mbe 40/2018; and resolution G/SO CRC-IC ESP(31)- APP/AB/mbe 57/2018.

measures in order to stay judicial evictions for humanitarian reasons (ill people or children living in the house which is the object of the eviction).[406] **[Comment by the CDDH: It is suggested that this statement is verified by the DH-SYSC-II and that, if possible, the percentage of requests for interim measures which are accepted is added.] [This paragraph has not been provisionally adopted yet].**

367. Interim measures pronounced by treaty bodies are, like their findings, not legally binding. Nevertheless, the Human Rights Committee has expressed the view that "implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications […] Quite apart then from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile […]".[407] It has also often been repeated, and finally consolidated in General Comment No. 33,[408] that "flouting of the Rule [92], especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol".[409] Similarly, the CAT Committee has argued that, by accepting its competence under Article 22 of the Convention against Torture, States parties have implicitly undertaken to cooperate with that Committee in good faith by providing it with the means to examine the complaints submitted to it; by failing to respect a request for interim measures, a tool that is "vital to the role entrusted to the Committee under that article", States parties "seriously fail" in their obligations.[410] However, several respondent States have expressed their firm opposition to such an interpretation of the Committees' competence to request interim measures and the nature of the latter.[411]

Comment [SE61]: Footnote modified following a proposal by Greece

Comment by the Secretariat: References to the Lambert case (see § 363 and footnote 393, § 365 and footnote 402, and the current § 367 and footnote 411) could perhaps be combined?

[406] See, *inter alia*, CESCR, resolution G/SO CESCR esp (67) – APP/MMM/mbe 75/2018; and resolution G/SO CESCR esp (68) – APP/MMM/mbe 76/2018.

[407] See *Piandiong et al v. The Philippines,* 866/1999, 19 October 2000, §§ 5.1-5.2.

[408] *General Comment no 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights,* CCPR/C/GC/33 § 19.

[409] *Weiss v. Austria,* 1086/2002, 3 April 2003, § 8.3.

[410] (CAT) *Brada v. France*, 195/2002, 17 May 2005, §§ 6.1-6.2, The CAT Committee has also suggested that the binding nature of its interim measures is based on the fact that Article 18 of the Convention explicitly vests the Committee with the competence to adopt its own Rules of Procedure, which then constitute an integral part of the Convention, including Rule 114 on interim measures. (CAT), *R.S. et al v. Switzerland,* 482/2011, 21 November 2014, § 7.

[411] In *Weiss,* it was the Vienna Regional Court that refused to comply with the interim measures pronounced by the Human Rights Committee on the basis that Rule 92 (then 86) of the Committee's Rules of Procedure "*may neither invalidate judicial orders or restrict the jurisdiction of an independent domestic court*". Additionally, Austria argued before the Human Rights Committee that a request for interim measures could not override a contrary obligation of international law, in that case its obligations under the US-Austria extradition treaty. In *Brada,* France indicated that the Convention against Torture did not provide the CAT Committee with the competence to pronounce interim measures, therefore State parties are only required to examine such measures carefully and in good faith and endeavour to enforce them when possible. Therefore, the choice not to follow such measures does not constitute "a failure to respect obligations". In *Dar v the State*, a decision of 16 April 2008, the Norwegian Supreme Court found that requests for interim measures made by the CAT Committee were not binding under international law. The Supreme Court noted in this context that, distinct from the ICJ and the ECtHR whose decisions were binding under international law on the parties to the case, the Committee was a monitoring body that issued non-binding opinions in respect of individual communications. Therefore, Norway was not obliged under international law to comply with the Committee's request for interim measures to protect the applicant. However, due weight was to be given to such requests and they were generally complied with insofar as possible. With the same reasoning, Dutch lower courts (President of the lower court of The Hague (26 March 1999) and Amsterdam (17 January 2019) decided that the State was under no legal obligation to follow interim measures of the CAT or HRC. In the case of *Lambert v. France*, the Paris Court of Appeal did order the State to ensure respect of the CRPD's request of 3 May 2019 to stay a new decision to discontinue Vincent

3. CHALLENGES AND POSSIBLE SOLUTIONS

368. Trying to identify challenges arising from the coexistence of the Court and the treaty body systems and evaluate whether they present a threat to the coherence of international human rights law, one should not loose from sight (a) what has already been stressed with respect to the binding nature, or absence thereof, of the Court's jurisprudence, on the one hand, and of the treaty bodies practice, on the other (supra §7), and (b) that complete convergence would be neither possible nor appropriate for reasons inherent in the relevant treaty provisions, in the different geographical scope of those treaties, but also because different bodies are involved. Keeping that in mind, cross-fertilisation between the ECtHR and the UN treaty bodies may serve as a tool for facilitating the achievement of the common goal, namely the protection of human rights and fundamental freedoms.

369. Examples of inspiration, explicit or implicit, have been briefly mentioned above, under (I), and many more could further illustrate the converging routes followed in many fields. For instance, both systems initially refused the application of Articles 9 ECHR and 18 ICCPR to conscientious objectors.[412] The Human Rights Committee was the first to change its position in 1991;[413] it was followed, albeit several years later, by the Court in *Bayatyan v. Armenia,* where the Grand Chamber, referring to the Committee's views and applying its own "living instrument" doctrine, held that Article 9 ECHR is applicable to conscientious objection, even if it does not refer to it explicitly.[414] The Court and the Committee have since a converging approach on the question of alternative service.[415]

370. The Court's jurisprudence has also significantly evolved through the influence of the UN specialised human rights conventions, and the practice of their monitoring bodies with respect to the subject-specific norms contained therein. This becomes evident with respect, inter alia, to the influence on the Court's jurisprudence of the CRC (for example, the concept of the "best interests of the child")[416] or the CRPD. In respect to the latter, and in the case of *Guberina v. Croatia,* the Court noted: "by adhering to the requirements set out in the CRPD the respondent State undertook to take its relevant principles into consideration, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal

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Lambert's artificial nutrition and hydration, an interim measure previously (30 April 2019) rejected by the ECtHR. Nevertheless, this decision was challenged by the French Government and overturned by the Cour de Cassation (see Plenary Judgment no 647 of 28 June 2019, pourvois nos 19-17.330 and 19-17.342). It should be noted that on 20 May 2019 the ECtHR had rejected a new request to indicate to the French State the immediate application of the interim measures demanded by the CRPD (application no. 21675/19, see Press Release ECHR 180(2019)/20.5.2019). The Court pointed out that the applicants had submitted no new evidence such as to induce it to change its position already expressed by its refusal of 30 April 2019 to accord interim measures and by its Grand Chamber Judgment of 2015 finding that there would be no violation of Article 2 of the Convention in the event of the withdrawal of Vincent Lambert's artificial hydration and nutrition.

[412] Inter alia, *Johansen v. Norway,* no 10600/83, (ECommHR), inadmissibility decision of 14 October 1985, at 4; (CCPR) *L.T.K. v. Finland,* 185/1984, inadmissibility decision of 9 July 1985, at 5.2.

[413] (CCPR), *J.P. v. Canada,* 446/1991, inadmissibility decision of 7 November 1991, at 4.2. Also *Yeo-Bum Yoon v. Republic of Korea* and *Myung-Jin Choi v. Republic of Korea,* nos. 1321/2004 and 1322/2004, 3 November 2006, at 8.3.

[414] *Bayatyan v. Armenia* [GC], no. 23459/03, at 110, 7 July 2011.

[415] See (ECtHR), *Adyan and Others v. Armenia,* no. 75604/11, 12 October 2017; (CCPR), *Shadurdy Uchetov v. Turkmenistan,* 2226/2012, 15 July 2016.

[416] See *Blokhin v. Russia* [GC], no. 47152/06, §219; 23 March 2016; *Mennesson v. France,* no. 65192/11, § 81, 26 June 2014.

participation in all aspects of social life [...] In the case in question, however, the relevant domestic authorities gave no consideration to these international obligations which the State has undertaken to respect."[417]

371. These evolutions in the jurisprudence are illustrative of the Court's fundamental belief that the Convention "cannot be interpreted and applied in a vacuum".[418] In line with Article 31 § 3 (c) of the Vienna Convention on the Law of the Treaties,[419] the Court seeks to interpret and apply the rights protected under the ECHR and its Protocols in a way that is in harmony not only with general international law, but in particular with the relevant universal human rights instruments. To that end, it uses the practice of the UN treaty bodies as a source of inspiration and argumentation in favour of its findings, in line with its "living instrument" doctrine.[420] The Court also refers to the case-law of other international jurisdictions such as the ICJ or the Inter-American Court of Human Rights (I-ACHR).[421]

372. By contrast, the UN treaty bodies, in particular the Human Rights Committee, rarely refer to the Court's case-law, although this does not necessarily mean that the latter is not considered, since it frequently serves as a basis for the arguments of the authors and/or the respondent States (even non-European);[422] additionally, an important number of Committee members are from European countries and thus familiar with the Court. On some occasions, the Human Rights Committee has fleetingly referred to the ECtHR jurisprudence on certain matters (for instance the freedom to express one's religion through the wearing of religious attire, *supra,* cf. in particular § 27) and then dismissed it.

373. When considering the interaction between the Convention system and treaty bodies system, it must also be noted that divergence may even exist within the treaty bodies system. This has been identified since the early years of the coexistence of UN human rights conventions: even accepting the uniqueness of each treaty regime, "it seems inevitable that instances of normative inconsistency will multiply and that significant problems will result. Among the possible worst-case consequences, mention may be made of the emergence of significant confusion as to the "correct" interpretation of a given right, the undermining of the credibility of one or more of the treaty bodies and eventually a threat to the integrity of the treaty systems", warned Philip Alston in the 1990s.[423] In a 2012 Report on Strengthening the UN human rights treaty bodies system, the UN High Commissioner on Human Rights acknowledged that "the nine core human rights treaties each have their own scope, but some or all share similar provisions and cover identical issues from different angles" and called upon the treaty bodies "to ensure consistency among themselves on common issues in order to provide coherent treaty

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[417] *Guberina v. Croatia,* no. 23682/13, § 92, 22 March 2016.
[418] ECtHR, *Loizidou v. Turkey (merits)*, cited above, § 43~~, 18 December 1996.~~.
[419] See ~~Theme~~ chapter I, ~~sub-theme (i)~~sub-chapter 1 of the present Report.
[420] See Sicilianos, ~~*op. cit.*~~cited above, pp. 225, 229.
[421] See §§~~paragraphs~~ 110-112 above.
[422] For instance, (CCPR) *Osbourne v. Jamaica* (759/1997, 13 April 2000), where the author used the ECtHR findings in its landmark *Tyrer v. United Kingdom* judgment (no. 5856/72, 25 April 1978) concerning corporal punishment; (CCPR) *P.K. v. Canada* (1234/2003, 3 April 2007), where the respondent Government referred to the European *Bensaid v. United Kingdom* judgment (no. 44599/98, 6 February 2001), in order to argue that a higher burden of proof of the risk of torture is required where the risk comes from a non-state actor.
[423] Report of the independent expert, Philip Alston, on enhancing the long-term effectiveness of the United Nations human rights treaty system, First Report A/44/668, 8 November 1989, Final Report Doc. E/CN.4/1997/74, 24 March 1997, §§ 127-128.

implementation advice and guidance to States. This consistency is also required under the individual communication procedures of all treaty bodies"[424].

374. The question, therefore, is, where does all that leave the States parties, in particular Council of Europe member States.

a. Legal uncertainty, forum-shopping and the threats to the authority of human rights institutions

i. An illustration: the *Correia de Matos v. Portugal* case

375. *Correia de Matos v. Portugal,* a case filed by a lawyer complaining that Portuguese legislation did not allow an accused person to defend him/herself in person in criminal proceedings, has occupied both the ECtHR and the UN treaty bodies for the past almost twenty years.[425]

376. The applicant's complaint of a violation of Article 6 § 3 (c) ECHR was dismissed by the ECtHR in 2001 as manifestly ill-founded.[426] Notwithstanding the respondent Government's warning of "the risk of inconsistency in international decisions",[427] it was subsequently admitted by the Human Rights Committee, which in 2006 found a violation of Article 14 § 3 (d) ICCPR.

377. The Portuguese legislation was not changed to give effect to the CCPR's Views; as a matter of fact, the Portuguese Supreme Court, in a judgment of 20 November 2014, held that the implementation of the Committee's Views, which were not legally binding, by means of amendment of the domestic law "would break with a legal tradition and cause innumerable and foreseeable disturbances".[428]

378. The applicant returned to the ECtHR in 2012 with a similar case, again claiming violation of Article 6 § 3 (c) ECHR. The Grand Chamber, reiterating that "the Convention, including Article 6, cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights", did consider the Views of the Human Rights Committee on the matter (without failing to note that the Committee had not explicitly addressed its own reasoning), as well as the General Comment no. 32 on Article 14 ICCPR. Nevertheless, stressing that even where the provisions of the two treaties are almost identical, the interpretation of the same right may not always correspond, the Court acknowledged the existence of a wide margin of appreciation of the States parties on the issue at hand, ascertained that the reasons provided by the respondent Government for the requirement of compulsory assistance overall and in the present case were both relevant and sufficient and concluded, once again, that there had been no violation of Article 6 § 3 (c) of the Convention.[429]

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[424] Navanethem Pillay, *Strengthening the United Nations human rights treaty body system*, 2012, p. 25.

[425] See on the issue of cases being dealt with by the Human Rights Committee after having been declared inadmissible by the ECtHR also the CDDH Report on "The longer-term future of the system of the European Convention on Human Rights" adopted on 11 December 2015, § 184.

[426] (ECtHR), *Correia de Matos v. Portugal* (dec), no. 4188/99, 15 November 2001.

[427] (CCPR) *Carlos Correia de Matos v. Portugal,* 1123/2002, 28 March 2006 at 4.1.

[428] (ECtHR) *Correia de Matos v. Portugal* [GC], 546402/12, ~~GC~~ 4 April 2018, at 72, quoting the Portuguese Supreme Court.

[429] (ECtHR) *Correia de Matos,* cited above, at 134, 67, 135, 159. But see the dissenting opinions of Judges Sajó, Tsotsoria, Mits, Motoc, Pejchal, Wojtyczek, Bosnjak and especially Pinto de Albuquerque, criticising the

379. In its fourth periodic report (2011), Portugal stressed its "concern about the differences arising between the case-law of the ECHR and the decision of the Human Rights Committee in this case, which place Portugal in a very awkward position regarding the fulfilment of its international human rights obligations".[430] This concern is entirely understandable, taking into consideration that the texts of Articles 6 § 3 (c) ECHR and 14 § 3 (d) ICCPR set out this particular right in identical terms.

ii. Analysis

380. As exemplified by the *Correia de Matos* case, the existence of parallel human rights protection mechanisms, normally a source of enrichment and enhancement of the universal protection of human rights, has also the potential of becoming a source of uncertainty for States parties on how to best fulfil their human rights commitments, not to mention for individuals as regards the exact scope of their rights, and a threat to the coherence of human rights law and the credibility of human rights institutions.

381. Theoretical concerns about the lack of normative harmony between the universal and the regional become practical through the real possibility of overlapping jurisdiction of the Court and the UN treaty bodies, one or possibly several of them, as a case may easily fall under both the comprehensive treaties (the ECHR and the ICCPR), but also under subject-specific conventions, such as the CEDAW (if the alleged victim is a woman), the CRPD (if she is also a person with disability), the CERD (if her complaint is linked to discrimination based on her descent), or the CAT (if torture or other inhuman and degrading treatment or punishment is involved in a particular case).

382. The flexibility encased within the relevant UN treaties or developed through the practice of their monitoring bodies with respect to admissibility, in particular their interpretation of "the same matter" criterion, but also other procedural requirements (time-limit, exhaustion of domestic remedies, etc.), as presented above, may lead to situations where more human rights bodies have competence to consider the same case or very similar ones. In the example used above, it is conceivable that the same case is examined firstly by the ECtHR and then by one or more UN treaty bodies.

383. Related concerns go beyond duplication and a waste of (deplorably scarce) resources. A communication to the UN treaty bodies of a case already dismissed by the ECtHR could appear to amount to a sort of "appeal", bound to undermine the authority of the Court. The absence of a strict time-limit requirement in the relevant texts of the treaty bodies is also worrying, since the longer the time period that has lapsed since the facts of a communication took place, the more difficult is to ascertain what really happened, including vis-à-vis the records of the Court. And of course, the lack of normative uniformity and the guarded approach by the UN treaty bodies to an equivalent of the "margin of appreciation" doctrine are conducive to divergent implementation of human rights standards.

384. Faced with divergence and even conflict, States parties may find it hard to have a legal certainty of the exact content and extent of their human rights commitments

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majority's use of the margin of appreciation doctrine in this case and warning against the Court being less rights protective than the Human Rights Committee.

[430] Fourth periodic report of Portugal, CCPR/C/PRT/4 (2011), at 274.

and even harder to adjust their domestic laws and policies.[431] At the same time, under Article 46 ECHR CoE member States must abide by the judgments of the Court. Contracting States to the UN conventions are not under a legal obligation to comply with treaty body Views, but even the dialogue-centered follow-up in respect of the latter inevitably puts a political burden on them.[432]

385. In addition, overlapping jurisdictions and conflicting findings enable human rights forum-shopping. One would expect that a potential victim would rather bring his/her case to the ECtHR, due to the binding nature of the Court's judgments, as well as the possibility of awarding just satisfaction. However, as it has often been observed, including by States parties, individuals may bring their complaints to UN treaty bodies instead, considering that the UN treaty bodies are more favourable to their cause.[433] The cause in question may be a broad one, related to policy issues, such as the wearing of religious clothing, or it may be very specific. Expulsion cases and the request for interim measures would be an illustration of the latter: in the current circumstances in Europe, persons whose requests for asylum in European countries fail are more and more inclined to apply for a stay of removal to the UN treaty body believed to be more favourable as a last hope to delay or even avert their return to their country of origin.

386. Finally, incoherent human rights case-law is conducive to a loss of respect for the institutions delivering it. A situation of diminished or no respect for institutions can only thwart the international protection of human rights, not only on a theoretical but on a very practical, specific level.

b. Possible ways of containing divergence

387. As it has already been underlined, the significant differences between the regional and the universal system exclude any realistic aspiration of absolute uniformity. Nevertheless, it is argued that there are ways to help contain divergence.

388. The effort by the judges of the ECtHR to ensure, to the extent possible, a harmonious interpretation of substantive rights protected under a multitude of simultaneously binding treaties renders the ECtHR a focal point for guaranteeing the coherence of international human rights law.[434] It is important that the Court stay true to this practice and continue endeavouring to interpret the Convention in harmony with other international rules for the protection of human rights, in particular those binding upon the CoE member States, such as the (majority of) the UN conventions, not allowing fragmentation of international law.

389. At the same time, more consistent reference by the UN treaty bodies to regional courts, and ~~uninhibited inspiration from~~ in-depth discussion of the latters' jurisprudence would facilitate the development of consistent international human rights

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[431] See *I.A.O. v. Sweden,* 65/1997, 6 May 1998, at 5.11, where Sweden argued that although the test applied by both the ECommHR and the CAT for determining whether to grant asylum to foreign nationals claiming a risk of torture was "in principle the same", in practice the CAT had applied it more liberally than the Commission, thus making it difficult for contracting parties to align themselves with inconsistent case-law.

[432] See on the legal nature of the Views of the UN treaty bodies ~~§paragraph~~ 307 [formerly 6] above.

[433] For instance, in *Bikramjit Singh,* ~~supra~~cited above*,* France referred to the similar ECtHR cases and submitted that the author had gone to the Human Rights Committee instead of the ECtHR because he "*evidently believed that the European Court's case-law would not be in his favour*"(§ 4.1). Also *Mann Singh v. France,* cited above~~*supra,*~~ at § 4.3.

[434] Sicilianos, cited above, ~~*op. cit.,*~~ p. 241.

principles.[435] It is true that the ECHR and the Court's jurisprudence do not apply to the majority of States Parties to the UN conventions. Nevertheless, as it has been demonstrated above, both authors and respondent Governments of non-European States do not hesitate to refer to the Court's jurisprudence in their argumentation.
[Change on the basis of comments by the CDDH].

Comment [SE62]: Footnote added following a proposal by Greece

390. One way to increase interaction between the two systems could be the intensification of encounters between the members of the Court and the UN treaty bodies. Working contacts between the two systems are already in place: on either side (UN/CoE), there is a focal point for exchanging information concerning the docket, in order to ensure that the same complaints are not dealt with at the same time both by the ECtHR and by the UN treaty bodies.[436] Meetings between representatives of the UN Human Rights Committee and delegations of judges have taken place, and in 2015 the Court hosted a meeting of regional human rights courts/mechanisms, intended to allow dialogue and exchange between different international and regional human rights bodies. This is a practice that should continue and expand.

391. At the same time, within the UN, inter-Committee Meetings and Chairpersons Meetings have been held since 2002 and 1988 respectively.[437] In addition, since 2014 the "Treaty Body Members' Platform", hosted by the Geneva Academy of International Humanitarian Law and Human Rights, connects experts of treaty bodies with each other as well as practitioners, academics and diplomats with a view to share expertise, exchange views and develop synergies.[438] Reform of the UN treaty body system has been on the agenda for several years now and measures to improve its effectiveness are actively sought, although the focus seems to be on the harmonization of working methods and procedures on the basis of UN General Assembly Resolution 68/268 (2014) on "Strengthening and enhancing the effective functioning of the human rights treaty body system". Notwithstanding, among the measures proposed is the strengthening of synergies with fellow treaty bodies but also other human rights mechanisms. It has also been stressed that sufficient means of functioning should be accorded to the UN treaty bodies in order to permit interaction. Consultations held with regional organs are already undertaken; it would be beneficial to include in the dialogue, on a regular basis, the ECtHR. In this respect, the Council of Europe states could play an active role in the further discussion to strengthen the functioning of the human rights treaty body system, to allow it to constructively interact with the Convention system.

392. Regular meetings between judges of the ECtHR and members of the treaty bodies would contribute to the mutual transfer of knowledge concerning relevant jurisprudence and may thereby foster greater understanding for the other institutions' approach to certain common problems. The "judicial dialogue" is a useful tool for avoiding the fragmentation of international law and should be further encouraged. Interaction of the legal staff of the institutions would also be highly advisable. In 2012 an exchange took place between the Registry of the ECtHR and the UN Office of the High Commissioner for Human Rights ("the OHCHR"), where a member of the Court's Registry spent 8 weeks at

[435] As advanced by Olivier de Frouville in his Individual Opinion (concurring) in *Seyma Turkan v. Turkey* (CCPR, 2274/13, 22 October 2018), "the Committee should be mindful of ensuring consistency between its interpretations and those of other courts, including regional courts, and should diverge from them only after thorough reflection and for nullifying reasons, which should, ideally, be set forth in the reasoning" (§ 11).
[436] All UN treaty bodies share the same Secretariat.
[437] See doc. A/73/140, 11 July 2018, *Implementation of the human rights instruments,* the Report of the Chairs of the treaty bodies on their 30th meeting. The next Chairpersons' meeting is to take place in 2020, in connexion with the 2020 review of the treaty bodies by the UN General Assembly.
[438] For details, see www.geneva-academy.ch/geneva-humanrights-platform/treaty-body-members-platform .

the OHCHR and two members of the OHCHR spent one month each in the Registry. In a Resolution adopted on 24 March 2017 the United Nations Human Rights Council (HRC) requested the OHCHR to expand its cooperation with regional human rights mechanisms by creating, as of 2018, a dedicated programme for the said mechanisms to gain experience in the United Nations human rights system in order to enhance capacity-building and cooperation among them. However, no further exchanges have taken place since 2012.

393. As underlined above, dialogue with States parties is a key element with regard to the UN treaty bodies. The 47 CoE member States, when interacting with treaty bodies (in connection to Views, periodic reports or in the drafting of General Comments, as illustrated with respect to CAT General Comment no 4), could continue to draw the treaty bodies' attention to the approach to core issues of the ECHR, as interpreted by the ECtHR. In addition, they could endeavour to foster a more intensive domestic dialogue on the opinions held by the UN treaty bodies, associating their national human rights institutions and the civil society, with a view to possibly readjusting their human rights policies. Dialogue in the Council of Europe, inclusive of UN institutions, for instance as in the process of drafting the Additional Protocol to the Oviedo Convention, is also a practice to retain.

394. While understanding that amending UN human rights treaties is not a realistic option,[439] a certain remodeling of the Rules of Procedure of treaty bodies in the general direction of adopting clearer, and to the extent feasible, uniform admissibility criteria, as far as allowed by the respective treaties and without curtailing individual rights, would reduce cases of overlapping jurisdiction. In turn, that would minimise the risk of contradictory interpretation of human rights standards and thus limit the possibility of forum-shopping. For instance, it would be beneficial to introduce, wherever possible, stricter time-limits for filing communications.

395. It is too soon to verify this, but the new (since 2016) practice of the Court with respect to inadmissibility decisions, namely to contain a succinct indication of the grounds on which the case was rejected instead of a general reference to Articles 34 and 35 ECHR, may assist in reducing cases of contradictory findings, by enabling the UN treaty bodies to ascertain that the "same matter" has indeed been previously sufficiently considered by the Court.[440]

396. In conclusion, achieving absolute harmony in international human rights law is not a probability. The existence of different human rights protection systems may be a source of enrichment for the protection and the promotion of human rights. Attention should nevertheless be given by international and regional implementing organs, be they judicial or monitoring, not to give the impression that they are competing and to work in the direction of containing, to the extent possible, conflict in their case-law. They should proceed, to the extent possible, in the direction of the harmonisation of their practice, excluding fragmentation of the international law of human rights.

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[439] See the 2018 Report of the Secretary General on the Status of the treaty body system, cited above, § 82.
[440] See the 2015 CDDH Report, at 188 and the 2015 Report *The Interlaken process and the Court,* p. 4.

III. THE CHALLENGE OF THE INTERACTION BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE LEGAL ORDER OF THE EUROPEAN UNION AND OTHER REGIONAL ORGANISATIONS

Comment [SE63]: Modified following a proposal from Greece

1. INTRODUCTION

397. The present Chapter examines the challenges posed by the interaction between the European Convention of Human Rights (ECHR) and the legal order of the European Union (the EU, the Union), and between the ECHR and the Eurasian Economic Union (the EAEU).

398. The 2015 Report on the longer-term future of the system of the European Convention on Human Rights (the Report) recalled the well-established position of the European Court of Human Rights (the ECtHR) that the principles underlying the ECHR cannot be interpreted and applied in a vacuum[441]. In this regard, the Report noted that the ever increasing institutional framework of international mechanisms operating in the field of (specific parts of) international human rights law increased the risk of diverging interpretations of one and the same or interrelated (human rights) norm(s), which, in turn, could lead to conflicting obligations for States under various mechanisms of international law. With respect to the EU and the EAEU, the Report stated, "[t]he risks of diverging interpretations of fundamental rights by the [Court of Justice of the European Union] and the Strasbourg Court are likely to undermine the coherence of the European legal space. Similar problems may also arise in the future on account of the activities of the [EAEU] and the emerging case-law of the Court of Justice of the EAEU which binds some of the Council of Europe member States"[442].

399. To address the issues identified in the Report, this Chapter will examine in separate sections the interaction between the ECHR and the legal order of the EU, and between the ECHR and the EAEU. Each section will first describe the main features of the respective regional organisation and the most relevant legal provisions and principles, and will then analyse the challenges, as well as identify possible responses.

2. INTERACTION BETWEEN THE CONVENTION AND THE EU LEGAL ORDER

a. Main features of the EU

400. The EU is an economic and political union of 28 member States, all of which are also Members of the Council of Europe.[443]

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[441] CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015, § 171.

[442] ~~CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015,~~Ibid., § 181.

[443] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

i. Origins and current structure of the EU as a legal order

401. The EU has evolved from the 1951 Treaty of Paris establishing the European Coal and Steel Community, and the 1957 Treaties of Rome establishing the European Economic Community and European Atomic Energy Community, all together known as the Communities. In 1987, the Single European Act entered into force; it amended the Treaties and established European political cooperation. The EU was established on 1 November 1993, when the Treaty on European Union, commonly known as the Maastricht Treaty, entered into force, bringing together the three Communities into a new entity – the "European Union".[444]

402. The current structure and competences of the EU are established by the Treaty of Lisbon, which was signed in 2007 and entered into force on 1 December 2009, and which amended and modified the existing treaties. The EU is the sole structure, and it inherited all of the powers of the Communities, including the legal personality and institutions. The amendments introduced by the Treaty of Lisbon also included a provision that the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties.

403. The main EU institutions are the European Parliament, which is elected directly; the European Council, which consists of the Heads of State or Government of the EU member States; the Council of the EU, which consists of the respective ministers from each EU member State; the European Commission, which is a politically independent executive body with 1 Commissioner from each EU member State; and the Court of Justice of the European Union (the CJEU). The CJEU, then known as the European Court of Justice, was created by the 1951 Treaty on the European Coal and Steel Community, while the term "Court of Justice of the European Union" was introduced by the Treaty of Lisbon.

ii. Sources of EU law, their application

404. There are two main sources of EU law: primary law and secondary law. Primary law consists of the Treaties establishing the EU, namely, the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU). Both Treaties set out the distribution of competences between the EU and the EU member States, as well as describe the powers of the EU institutions, and therefore are the basis for all EU action.

405. Secondary law consists of legal instruments based on the Treaties, in particular, legal acts listed in Article 288 TFEU: regulations, directives, decisions, opinions and recommendations. *Regulations* are legal acts adopted by the EU institutions; they have general direct application and are binding in their entirety. *Directives* are also legal acts adopted by the EU institutions, but, unlike regulations, directives are not directly applicable, but have to be transposed into national law. *Decisions*, depending on the institution adopting it, are either legal acts (when adopted by the European Parliament or the Council of the EU under the ordinary or special legislative procedure), or non-legislative acts (when adopted, for example, by the European Council or the European Commission). Decisions can specify their addressees (e.g., one or more EU member States, one or more companies or individuals), and such decisions can directly create

[444] See, *inter alia*, Michelle Cini, Nieves Pérez-Solórzano Borragán, *European Union Politics*, Oxford University Press, 2016, pp. 15-21.

rights and obligations for the addressees. Finally, *recommendations* and *opinions* are not legally binding.

406. As to the application of the EU law, the Treaties as primary law and regulations and decisions as secondary law are directly applicable, that is to say, they apply immediately as the norm in all EU member States and no other act by thes of member States are required. The directives, however, must be incorporated (transposed) into national law by the deadline set at the adoption of every directive. According to Article 288 TFEU, a directive is binding upon each member State to which it is addressed, as to the result to be achieved, while leaving national authorities the competence to choose the form and means to achieve this result.

Comment [SE64]: Modified following a proposal by Greece

407. Another concept relevant for the application of EU law is that of direct effect that enables individuals to invoke an EU law provisions directly before the national courts. member StatesIn the case of *Van Gend en Loos,*[445] the CJEU held that the Community constituted a new legal order of international law member States and that independently of the legislation of member States, Community law therefore not only imposed obligations on individuals but was also intended to confer upon them rights[446]. Direct effect can be vertical (an individual can invoke an EU law provision in relation to the member State) or horizontal (an individual can invoke an EU law provision in relation to another individual) under specific conditions. According to the jurisprudence, for a primary law (Treaty) provision to have direct effect, it must be precise, clear and unconditional and must not call for additional measures, either national or European. As to the secondary law, under Article 288 TFEU regulations always have direct effect. A directive also can have direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU member State has not transposed the directive by the deadline[447]. However, a directive can in principle only have direct vertical effect. Decisions may have direct vertical effect when they refer to an EU member State as the addressee[448].

Comment [SE65]: Modified following a proposal by Greece

408. Furthermore, the EU law has primacy over national law. In the *Costa v. E.N.E.L.* case[449], the CJEU reiterated that the Treaty on European Economic Community created its own legal system, which has become an integral part of the legal system of the member States and which their courts are bound to apply. According to the CJEU, such an integration makes it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. In other words, the CJEU held that the domestic legal provisions could not override the EU law without the latter being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

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[445] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, judgment of 5 February 1963.
[446] Ibid., part II.B.
[447] Case 41-74 *Yvonne van Duyn v Home Office*, judgment of 4 December 1974.
[448] Case C-156/91 *Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg*, judgment of 10 November 1992.
[449] Case 6/64 *Flaminio Costa v E.N.E.L.*, judgment of 15 July 1964.

iii. Role and competence of the Court of Justice of the European Union

409. Article 13 TEU lists the CJEU as one of the Union's institutions. Article 19 TEU further states that the main task of the CJEU is to "ensure that in the interpretation and application of the Treaties the law is observed". This Article also states that the competence of the CJEU is to (a) rule on actions brought by a member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the member States, on the interpretation of Union law or the validity of acts adopted by the EU institutions; (c) rule in other cases provided for in the Treaties.

410. The most common types of case before the CJEU are[450]:

a. interpreting the law (preliminary rulings) – cases where a national court of an EU member State has asked the CJEU questions on the interpretation or validity of EU law. Preliminary rulings are binding both on the referring court and on all courts in EU member States;
b. enforcing the law (infringement proceedings) – cases started by the European Commission or an EU member State against a national government for failing to comply with EU law;
c. annulling EU legal acts (actions for annulment) – cases where an EU member State, the Council of the EU, the European Commission or (in some cases) the European Parliament has asked the CJEU to annul an EU act if it is believed to violate EU Treaties or fundamental rights. In certain circumstances, natural or legal persons can also ask the CJEU to annul an EU act that directly concerns them;
d. ensuring the EU takes action (actions for failure to act) – cases where the EU member States, other EU institutions or (under certain conditions) individuals or companies claim that the European Parliament, the Council of the EU, the European Commission or the European Central Bank have failed to make certain decisions under certain circumstances;
e. sanctioning EU institutions (actions for damages) – any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff can take action against them through the CJEU.

411. The CJEU consists of 2 courts: the Court of Justice that deals with requests for preliminary rulings from national courts, infringement proceedings, and certain actions for annulment and appeals, including appeals on points of law against the judgments and orders of the General Court; and the General Court that rules *inter alia* on actions for annulment brought by individuals, companies and, in some cases, EU member States. The Court of Justice is composed of 28 judges (one judge from each member State) and the General Court is made up of at least one judge from each member State (46 judges in total). Their term of office is (a renewable term of) six years~~.~~.

iv. History of interaction between the ECHR and the EU legal order

412. Neither of the Treaties establishing the then European Communities ~~(see paragraph 401 [formerly 5] above)~~ included any references to fundamental rights. The focus on economic matters was also reflected in the early case-law of the CJEU, for

Comment [SE66]: Modified following a proposal by Greece

[450] https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

example, in cases like *Stork*, *Geitling* and *Sgarlata*[451] the CJEU refused to consider the application of human rights standards since they were not explicitly based on any Article of the Treaties[452]. However, from the early 1970s, in response to the concerns expressed by domestic constitutional courts that the supremacy of EU law might otherwise undermine the protection of fundamental rights under national constitutions[453], the CJEU has incorporated fundamental rights in its case-law. Thus in the *Nold* judgment of 14 May 1974, the CJEU held that "fundamental rights form an integral part of the general principles of law, the observance of which [the CJEU] ensures"[454]. As to the content of these rights, the CJEU stated as follows: "In safeguarding these rights, the [CJEU] is bound to draw inspiration from constitutional traditions common to the member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law"[455].

413. The *Nold* judgment does not explicitly refer to the ECHR, but it fell under the concept of "international treaties ~~/../~~ […] of which [member States] are signatories", and consequently the CJEU "sought to apply the [ECHR] as if it were part of EU law, within the framework of the EU"[456]. In 1989, the CJEU recognised the "special significance" of the ECHR in the EU legal order[457].

414. At the level of the primary law, the reference to the ECHR was first included in the preamble of the Single European Act, where the EU member States expressed their determination "to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member States, in the [ECHR] and the European Social Charter, notably freedom, equality and social justice". This institutional link between the ECHR and the EU initially established by the CJEU in its case-law was later codified in the Maastricht Treaty ~~see paragraph 401 [formerly 6] above)~~, where Article F (currently Article 6 TEU) stated that the EU "shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the member States, as general principles of Community law".

Comment [SE67]: Modified following a proposal by Greece

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[451] Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, judgment of 4 February 1959; joined cases 36, 37, 38 and 40/59 *Président Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, judgment of 15 July 1960; Case 40/64, *Marcello Sgarlata and others v Commission of the EEC*, judgment of 1 April 1965.

[452] Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433.

[453] Olivier De Schutter, *Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019.

[454] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974.

[455] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974, § ~~para~~ 13.

[456] Olivier De Schutter, ~~*Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019~~cited above, p. 2.

[457] Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, judgment of 21 September 1989, § ~~para.~~ 13.

415. A further step in the gradual constitutionalisation of fundamental rights in the EU legal order was the proclamation of the Charter of Fundamental Rights of the European Union (the EU Charter of Fundamental Rights) in Nice in December 2000. With the entry into force of the amendments brought by the Lisbon Treaty, as of 1 December 2009, the EU Charter of Fundamental Rights has the same legal force as the Treaties.

b. Overview of the relevant legal provisions and case-law

i. Main provisions and principles relevant for the interaction between the systems

416. The following paragraphs will look at the main legal provisions and main principles developed in the case-law of the CJEU and the ECtHR that are relevant for the interaction between the two systems but that do not directly address such interaction.

417. As regards the EU legal order, a number of provisions in the Treaties and in the EU Charter of Fundamental Rights are relevant. Firstly, paragraph 2, Article 4 TEU enshrines the principle of equality of the member States and provides, "[t]he Union shall respect the equality of member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". Secondly, paragraph 3 of the same Article establishes the principle of sincere cooperation and states, "[p]ursuant to the principle of sincere cooperation, the Union and the member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

418. Furthermore, paragraph 3, Article 6 TEU defines the place of fundamental rights in the EU legal order and states that "[f]undamental rights, as guaranteed by [the ECHR] and as they result from the constitutional traditions common to the member States, shall constitute general principles of the Union's law".

419. In addition to the above-mentioned legal provisions, the principles of mutual recognition and mutual trust are relevant for the interaction between the ECHR and the EU legal order. Both principles stem from the duty of sincere cooperation. Thus, under the principle of mutual recognition one EU member State will accept and enforce decisions from another EU member State as if they were its own. Mutual recognition as a method of cooperation and integration was developed in the context of the internal market, whereby the EU member States are obliged to recognise each other's rules with the consequence that lawfully manufactured products or professional qualifications obtained in one EU member State should be allowed to be commercialised or recognised in another member State[458]. Currently the concept of mutual recognition is extended also to the Area of Freedom, Security and Justice, and Article 67 TFEU envisages mutual recognition of the judgments in criminal matters, as well as the mutual recognition of judicial and extrajudicial decisions in civil matters.

[458] Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, European Papers, Vol. 2, 2017, No 1, pp. 75-92, http://www.europeanpapers.eu

420. The principle of mutual recognition is closely related to the concept of mutual trust. This notion is not mentioned in the EU Treaties, but in the *N.S.* case[459] the CJEU held that the *raison d'être* of the EU and the creation of an area of freedom, security and justice are based on mutual confidence and a presumption of compliance, by other member States, with EU law and, in particular, fundamental rights. In Opinion 2/13 on the accession of the EU to the ECHR,[460] the CJEU further stated that "the principle of mutual trust between the member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained". Furthermore, in accordance with the principle of mutual trust, the court in the EU member State in which recognition is sought is not allowed to substitute its own assessment of that of the court in the member State of origin[461]. However, in the *Aranyosi* case[462] that dealt with the execution of the European Arrest Warrant and surrender of a person from one EU member State to another, the CJEU confirmed that in exceptional circumstances, where the judicial authority of the executing member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing member State, the principle of mutual trust may be disregarded and the executing member State must evaluate the individual situation of the person[463].

421. As regards the EU Charter of Fundamental Rights, Article 52 § 3 states, "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." In order to promote consistency, the drafters of the EU Charter of Fundamental Rights sought to ensure that the rights and freedoms of the Charter that "correspond" to rights and freedoms listed in the ECHR would be interpreted in accordance with the case-law of the ECtHR; for example, the Explanations appended to the EU Charter of Fundamental Rights [464] provide the list of such correspondeances, distinguishing between those Articles of the Charter "where both the meaning and the scope are the same as the corresponding Articles of the ECHR", and the Articles "where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider"[465].

Comment [SE68]: Modified following a proposal by Greece

422. Article 53 of the EU Charter of Fundamental Rights states, "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the member States are party, including [the ECHR], and by the member States' constitutions."

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[459] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, judgment of 21 December 2011.
[460] Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014.
[461] Sacha Prechal, ~~*Mutual Trust Before the Court of Justice of the European Union*, European Papers, Vol. 2, 2017, No 1~~cited above,~~,~~ pp. 75-92~~,~~ ~~http://www.europeanpapers.eu~~
[462] C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru*, judgment of 5 April 2016.
[463] ~~C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru*, judgment of 5 April 2016~~Ibid., ~~§§ paras~~ 88-92.
[464] OJ C 303, 14 December 2007, ~~pages~~ p. 17-35.
[465] Olivier De Schutter, ~~*Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019~~cited above.

423. The effects of Article 53 of the EU Charter of Fundamental Rights were addressed by the CJEU in the *Melloni case*[466] that concerned the execution of the European Arrest Warrant and surrender of the person from Spain to Italy, where he was tried in absentia and convicted for bankruptcy fraud and where he would be required to serve the prison sentence. In the proceedings before the Spanish courts, the surrender was challenged on the grounds of the Spanish Constitution, which requires that, if a person has been convicted in his absence, a surrender for the execution of that conviction must be made conditional on the right to challenge the conviction in order to safeguard that person's rights of defence. The Spanish law therefore offered a higher protection that the relevant EU Framework Decision on the European Arrest Warrant, which allows the executing State to refuse the surrender or to make it conditional on the right to a retrial only in a limited number of situations. If the person convicted in his absence was defended and represented by a lawyer, as in the *Melloni* case, the Framework Decision does not allow the executing State to refuse the surrender.

424. In this context, the CJEU was asked to give a preliminary ruling on the question of whether the EU member States were allowed to impose a higher level of fundamental rights' protection for cross-border cooperation in criminal matters than the standard set by EU law. In the judgment the CJEU held that the Framework Decision effected a harmonisation of the conditions of execution of a European Arrest Warrant in the event of a conviction rendered *in absentia*, which reflected the consensus reached by all EU member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European Arrest Warrant[467]. The CJEU further held that "allowing a member State to avail itself of Article 53 of the [EU] Charter [of Fundamental Rights] to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing member State, a possibility not provided for under Framework Decision …, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision"[468]. As a result, the CJEU in essence ruled that Article 53 of the EU Charter of Fundamental Rights must be interpreted as not allowing the EU member States to apply a standard of protection of fundamental rights guaranteed by their Constitutions if that standard is higher than that deriving from the Charter[469].

425. As regards the ECHR system, Article 1 of the ECHR sets out the primary, legal obligation on the Contracting Parties to respect and protect the ECHR rights of those within their jurisdiction. In this regard, the principle of subsidiarity as developed by the ECtHR means that each High Contracting Party retains primary responsibility for finding the most appropriate measures to implement the Convention, taking into account national circumstances as appropriate. The doctrine of the margin of appreciation is an important aspect of subsidiarity. The jurisprudence of the ECtHR makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the ECHR, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the ECHR system is subsidiary to the safeguarding of human

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[466] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013.
[467] ~~Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013~~Ibid., ~~§ para~~ 62.
[468] ~~Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013, para~~ Ibid., § 63.
[469] See also Martin Kuijer, ~~*The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433~~ cited above.

rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions[470].

426. In turn, Article 53 on "Safeguard for existing human rights" of the ECHR states, "[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".

ii. Main principles as developed by the ECtHR with respect to the interaction between the ECHR and the EU legal order

427. The following paragraphs will examine the case-law of the ECtHR and the principles it has developed specifically concerning the interaction between the ECHR and the EU legal order. In this regard, three main issues can be identified: first, the responsibility of the member States after a transfer of competences to international organisations; second, responsibility of the member States for national measures giving effect to EU law; third, the "*Bosphorus* presumption" of equivalent protection.

428. As regards the first issue, namely, the responsibility of the member States after a transfer of competences to international organisations, in the case of *Matthews v. the United Kingdom*[471] the ECtHR examined the question of whether the United Kingdom could be held responsible under Article 1 of the ECHR for the absence of elections to the European Parliament in Gibraltar, that is to say, whether the United Kingdom was required to "secure" elections to the European Parliament notwithstanding the Community character of those elections. In this connection, the ECtHR noted that the ECHR did not exclude the transfer of competences to international organisations provided that the ECHR rights continued to be "secured". According to the ECtHR, member States' responsibility therefore continued even after such a transfer[472]. In the *Matthews* case it meant that the United Kingdom was responsible under Article 1 of the Convention for securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European. The measures taken by the United Kingdom to comply with the ECtHR's ruling were challenged by Spain before the CJEU. The CJEU, however, dismissed the action holding that "[i]n the light of that case-law of the European Court of Human Rights and the fact that that Court has declared the failure to hold elections to the European Parliament in Gibraltar to be contrary to Article 3 of Protocol No. 1 to the Convention in that it denied 'the applicant, as a resident of Gibraltar' any opportunity to express her opinion on the choice of the members of the European Parliament, the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom."[473]

429. The conclusion about the continued responsibility of the member States has been reiterated in the subsequent case-law of the ECtHR. For example, in the *Bosphorus* case[474] the ECtHR recalled that a Contracting Party was responsible under Article 1 of

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[470] Explanatory Report to Protocol No.15, § para 9; see also CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015, §§ paras 15-17.
[471] *Matthews v. the United Kingdom*, [GC], no. 24833/94, 18 February 1999.
[472] *Matthews* cited aboveIbid., § 32.
[473] C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, § para 95.
[474] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005.

the ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. The ECtHR further recalled that Article 1 made no distinction as to the type of rule or measure concerned and did not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the ECHR.[475]

430. The ECtHR addressed the issue of the responsibility of the member States for national measures giving effect to EU law in the case of *Cantoni v. France*[476]. In this case, the applicant complained under Article 7 of the ECHR and alleged that his conviction for unlawfully selling pharmaceutical products had not been foreseeable because the definition of a "medical product" found in the French legislation, which was based almost word for word on a Community directive, failed to afford the requisite foreseeability and accessibility. Commenting on the argument of the respondent Government that the respective provision of domestic law was based on EU law, the ECtHR held that this fact did not remove it from the ambit of Article 7 of the ECHR[477].

431. The "*Bosphorus* presumption" of equivalent protection originates from the above-mentioned *Bosphorus* case[478] where the applicant company complained that impounding its aircraft was a violation of Article 1 of Protocol No. 1 to the ECHR. The aircraft was seized under an EU regulation, which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). The domestic proceedings where the applicant company challenged the impounding included a preliminary reference to the CJEU, which examined the respective regulation also in terms of compliance with the applicant company's right to peaceful enjoyment of its possessions and its freedom to pursue a commercial activity.

432. In examining the legal basis for the impugned interference, the ECtHR concluded that once adopted, the regulation was "generally applicable" and "binding in its entirety", so that it applied to all EU member States, none of which could lawfully depart from any of its provisions. Therefore, the impugned interference was not the result of an exercise of discretion by the Irish authorities, but rather amounted to compliance by the Irish State with its legal obligations flowing from the regulation[479].

433. The ECtHR then turned to the question of whether, and if so to what extent the general interest of compliance with Community obligations could justify the impugned interference by the Irish State with the applicant company's property rights. In this regard the ECtHR recalled its conclusions from the *Matthews* case (see paragraph 428 [formerly 34] above) on the continued responsibility of the Contracting Parties under Article 1 of the ECHR for all acts and omissions of its organs after it has transferred part of its sovereignty, and noted that absolving Contracting Parties completely from their ECHR responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the ECHR, because the guarantees of the ECHR could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards[480].

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[475] ~~*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* cited above~~*Ibid.*, §153.
[476] *Cantoni v. France*, no.17862/91, 15 November 1996.
[477] ~~*Cantoni*, cited above~~*Ibid.*, § 30.
[478] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi,* cited above.
[479] ~~*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi,* cited above~~ *Ibid.*, §§ 145-148.
[480] ~~*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi,* citeda above~~*Ibid.*, § 154.

434. The ECtHR then held that the State action taken in compliance with legal obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty was justified as long as the relevant organisation was considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which could be considered at least equivalent to that for which the ECHR provides. The ECtHR underlined that by "equivalent" it meant "comparable", as any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued. The ECtHR also underlined that any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. The ECtHR concluded that if such equivalent protection was considered to be provided by the organisation, the presumption would be that a State had not departed from the requirements of the ECHR when it did no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was considered that the protection of ECHR rights was manifestly deficient[481].

435. As to the question of whether there was a presumption of ECHR compliance at the relevant time and whether any such presumption had been rebutted in the circumstances of the present case, the ECtHR noted that while the founding Treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the CJEU had subsequently recognised that such rights were enshrined in the general principles of [then] Community law protected by it, that the ECHR had a "special significance" as a source of such rights, and that the respect for fundamental rights had become "a condition of the legality of Community acts". Recalling that the effectiveness of substantive guarantees of fundamental rights depended on the mechanisms of control in place to ensure their observance, the ECtHR referred to the jurisdiction of the CJEU and found that actions initiated before the CJEU by the EU institutions or a member State constituted important control of compliance with Community norms to the indirect benefit of individuals. The ECtHR further noted that it was essentially through the national courts that the EU system provided a remedy to individuals against a member State or another individual for a breach of EU law[482].

436. In light of these considerations, the ECtHR concluded that the protection of fundamental rights by EU law could be considered to be, and to have been at the relevant time, "equivalent" to that of the ECHR system, and that, consequently, the presumption arose that Ireland did not depart from the requirements of the ECHR when it implemented legal obligations flowing from its membership of the EU[483]. Finally, the ECtHR considered that having regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime, and the ruling of the CJEU, there was no dysfunction of the mechanisms of control of the observance of ECHR rights. In the ECtHR's view, therefore, it could not be said that the protection of the applicant company's ECHR rights was manifestly deficient, with the consequence that the relevant presumption of ECHR compliance by the respondent State had not been rebutted.

437. Since the judgment in the *Bosphorus* case, the application of the presumption of equivalent protection has been examined in a number of cases. For example, in the case of *M.S.S. v. Belgium and Greece*[484] the ECtHR examined a complaint by an asylum

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[481] ~~*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi cited* above~~Ibid., §§ 155-156.
[482] Ibid.~~*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi, cited above*~~, §§ 159-164.
[483] Ibid.~~*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi, cited above*~~, ~~§~~para 165.
[484] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011.

seeker who had been transferred from Belgium to Greece under the so-called Dublin Regulation that establishes the EU member State responsible for the examination of the asylum application. The ECtHR recalled that a State would be fully responsible under the ECHR for all acts falling outside its strict international legal obligations, notably where it exercised State discretion[485], and considered that the Belgian authorities could have refrained from transferring an asylum seeker from Belgium to another EU member State if they had considered that the receiving country was not fulfilling its obligations under the ECHR[486]. For these reasons the ECtHR found that the presumption of equivalent protection was not applicable in this case, proceeded with the examination of the merits of the complaint, and concluded that Belgium had violated Articles 3 and 13 of the ECHR.

438. In the case of *Michaud v. France*[487] the ECtHR further clarified the presumption of equivalent protection and noted that this presumption was intended to ensure that a State Party was not faced with a dilemma when it was obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which was not party to the ECHR and to which it had transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the ECHR[488]. The ECtHR also noted that the presumption served to determine in which cases the ECtHR may, in the interests of international cooperation, reduce the intensity of its supervisory role, as conferred on it by Article 19 of the ECHR, with regard to observance by the States Parties of their engagements arising from the ECHR. It concluded that it would accept such an arrangement only where the rights and safeguards it protects are given protection comparable to that afforded by the ECtHR itself[489]. In this regard the ECtHR noted that its finding in the *Bosphorus* case about the EU offering equivalent protection of the substantive guarantees, applied *a fortiori* since 1 December 2009, the date of entry into force of Article 6 TEU, which conferred on the EU Charter of Fundamental Rights the same value as the Treaties and gave fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member States, the status of general principles of EU law. In examining the facts of the *Michaud* case, however, the ECtHR concluded that the case concerned France's implementation of directives that bound the EU member States with regard to the result to be attained, but left them free to choose the method and form. Considering this discretion and the fact that the *Conseil d'Etat* had decided not to request a preliminary ruling from the CJEU, which in turn meant that the relevant international machinery for supervision of fundamental rights, in principle equivalent to that of the ECHR, had been able to demonstrate its full potential, the ECtHR found that the presumption of equivalent protection was not applicable.

439. In the case of *Avotiņš v. Latvia*[490] about whether the enforcement in Latvia of a judgment delivered in Cyprus in the debtor's absence violated Article 6 of the ECHR, the ECtHR reiterated that the application of the presumption of equivalent protection in the legal system of the EU was subject to two conditions, namely, the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. In this case, the ECtHR held that the presumption of equivalent protection was applicable, as both conditions mentioned above had been satisfied. First, the relevant provisions of the applicable EU regulation allowed the refusal of recognition or enforcement of a foreign

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485 Ibid. ~~*M.S.S., cited above*~~, § 338.
486 ~~*M.S.S., cited*~~ Ibid. ~~*above*~~, § 340.
487 *Michaud v. France*, no. 12323/11, 6 December 2012.
488 ~~*Michaud, cited*~~*Ibid.* ~~*above*~~, § 104.
489 ~~*Michaud, cited*~~*Ibid.* ~~*above*~~, § 104.
490 *Avotiņš v. Latvia* [GC], no.17502/07, 23 May 2016.

judgment only within very precise limits and subject to certain preconditions, which in turn meant that the Latvian Supreme Court had not enjoyed any margin of manoeuvre. Second, the Latvian Supreme Court had not requested a preliminary ruling from the CJEU regarding the interpretation and application of the relevant provisions of the EU regulation, but the ECtHR noted that the applicant had not advanced any specific argument concerning the interpretation of the relevant provision of the regulation and its compatibility with fundamental rights such as to warrant a finding that a preliminary ruling should have been requested from the CJEU, nor had he submitted any request to that effect to the Latvian Supreme Court; for these reasons the ECtHR considered that the fact that the matter had not been referred for a preliminary ruling was not a decisive factor in the present case[491]. Having found the presumption of equal protection applicable, the ECtHR then concluded that the protection of fundamental rights afforded by the Latvian Supreme Court had not been manifestly deficient in the present case such that the presumption of equivalent protection was rebutted, with regard to both the provision of EU law that had been applied and its implementation in the specific case of the applicant, and therefore concluded that there had been no violation of Article 6 of the ECHR.

iii. Opinion 2/13 of the CJEU on the compatibility of the draft Accession Agreement of the EU to the ECHR with the EU Treaties

440. The possible accession of the EU to the ECHR has been discussed since the late 1970s. The objective of the accession is to further strengthen the protection of human rights, to contribute to the creation of a single European legal space, and to enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the ECHR system. Having examined the issue in 1996, the CJEU adopted Opinion 2/94[492] and ruled that as the Community law stood at that time, the Community had no competence to accede to the ECHR.

441. The amendments introduced by the Lisbon Treaty inserted a new provision in the Treaties (Article 6(2) TEU) requiring the EU to accede to the ECHR. This provision further specifies that such accession "shall not affect the Union's competences as defined in the Treaties". Additionally, Protocol (No. 8) stipulates that the agreement on the accession of the EU to the ECHR "shall make provision for preserving the specific characteristics of the Union and Union law". As for the ECHR, Article 59 paragraph 2 of the ECHR, as amended by Protocol No. 14 to the ECHR, provides that the EU may accede to the ECHR.

442. On 26 May 2010, the Ministers' Deputies adopted *ad hoc* terms of reference for the CDDH to elaborate, no later than June 2011, in co-operation with the representatives of the EU, legal instruments setting out the modalities of accession of the EU to the ECHR, including the EU's participation in the ECHR system, and, in this context, to examine any related issue. In accordance with these *ad hoc* terms of reference, the CDDH decided to entrust this task to an informal group of 14 members, chosen on the basis of their expertise (CDDH-UE). The CDDH-UE held in total eight working meetings between July 2010 and June 2011. The CDDH submitted a report to the Committee of Ministers on the work carried out by the CDDH-UE, with draft legal instruments appended, on 14 October 2011. On 13 June 2012, the Committee of Ministers gave a new mandate to the CDDH to pursue negotiations with the EU, in an *ad*

[491] ~~*Avotiņš,* cited above~~ibid., §§ 105-111.
[492] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 28 March 1996.

hoc group ("47+1"), with a view to finalising the legal instruments setting out the modalities of accession of the EU to the ECHR. In the context of the meetings of the CDDH-UE and of the "47+1" group three exchanges of views were held with representatives of civil society, who regularly submitted comments on the working documents. The "47+1" group held five negotiation meetings with the EU Commission[493].

443. The draft revised instruments on the accession of the EU to the ECHR were finalised on 5 April 2013. They consist of a draft Agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (draft Accession Agreement), a draft declaration by the EU, a draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party, a draft model of a memorandum of understanding and a draft explanatory report to the Accession Agreement.[494]

444. In accordance with Article 218(11) TFEU, the European Commission asked the CJEU's opinion on whether the draft Accession Agreement was compatible with the TEU and the TFEU.

445. On 14 December 2014 the CJEU delivered Opinion 2/13 ruling that the draft Accession Agreement was not compatible with Article 6(2) TEU and Protocol (No. 8). In the Opinion, the CJEU stated that the draft Accession Agreement was incompatible with the Treaties for the following reasons:

a. it was liable adversely to affect the specific characteristics and the autonomy of EU law in so far it did not ensure coordination between Article 53 of the ECHR and Article 53 of the EU Charter of Fundamental Rights, did not avert the risk that the principle of member States' mutual trust under EU law may be undermined, and made no provision in respect of the relationship between the mechanism established by Protocol No 16 to the ECHR (which allows the highest courts of a High Contracting Party to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights defined in the Convention or the protocols thereto) and the preliminary ruling procedure provided for in Article 267 TFEU;
b. it was liable to affect Article 344 TFEU in so far as it did not preclude the possibility of disputes between the EU member States or between the EU member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
c. it did not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the CJEU that enable the specific characteristics of the EU and EU law to be preserved;
d. it failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP (Common Foreign and Security Policy) matters in that it entrusted the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

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[493] Final report to the CDDH of the CDDH Ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, document 47+1(2013)008rev2, 10 June 2013.
[494] Final report to the CDDH of the CDDH Ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, document 47+1(2013)008rev2, 10 June 2013.

446. According to Article 218(11) TFEU, where the opinion of the CJEU is adverse, the agreement envisaged may not enter into force unless it is amended or the EU Treaties are revised.

447. In October 2015, the Council of the EU reaffirmed the EU's willingness to accede to the ECHR and invited the Commission to work on an analysis of the legal issues raised by the Court. On 15 May 2017 the EU Commission published the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 2016 Report on the Application of the EU Charter of Fundamental Rights"[495], and in the accompanying document it was recalled that there was an obligation on the EU to accede to the ECHR, emphasising that the EU accession to the ECHR remained a priority for the EU Commission. However, the document also noted that the CJEU's opinion of December 2014 raised a number of significant and complex questions. The EU Commission acknowledged that as a result, the draft Accession Agreement would have to be re-negotiated on a series of points. The EU Commission confirmed that in its capacity as EU negotiator, it continued to consult with the relevant Council working party on solutions to address the various objections raised by the CJEU.

448. Within the Council of Europe, in 2018, the Copenhagen Declaration[496] called upon the EU institutions to take the necessary steps in order to complete the accession to the ECHR as soon as possible. In December 2018, the Council of the EU took stock of the state of play and the next steps with regard to the EU's accession to the ECHR.

c. Analysis of the challenges

449. As indicated by the President of the ECtHR Dean Spielmann, *"[i]*n deciding that the Union would accede to the European Convention on Human Rights, the drafters of the Lisbon Treaty clearly sought to complete the European legal area of human rights; … They wanted above all to ensure that a single and homogenous interpretation of human rights would prevail over the entire European continent, thereby securing a common minimum level of protection*"*.[497] –However, the interaction between the two complex systems – that of the EU legal order and of the ECHR system – can raise a number of challenges in various areas. The following paragraphs will examine these challenges, using as examples the cases decided by both the ECtHR and the CJEU.

450. The first set of challenges may arise from the co-existence in the same geographic area of two human rights instruments. The co-existence of different human rights instruments can be a source of mutual enrichment. At the same time, it can create challenges if the different instruments are interpreted, in substance and in relation to methodology, in a manner which creates conflicting obligations for States. It can therefore potentially lead to fragmentation of international (human rights) law. Even though the ECHR and the EU Charter of Fundamental Rights are very close in substance, and Article 6(3) TEU and Article 52(3) of the Charter establish a strong link between them, they are not identical. Thus the EU Charter of Fundamental Rights includes rights and freedoms which were not yet acknowledged in the ECHR adopted in 1950, such as the

[495] https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59189
[496] The Copenhagen Declaration was adopted by the Member States of the Council of Europe at the High Level Conference in Copenhagen on 12 and 13 April 2018 on the reform of the system of the ECHR.
[497] Opening address of the President of the ECtHR Dean Spielmann in the course of the solemn hearing of the European Court of Human Rights at the occasion of the opening of the judicial year, Strasbourg, 30 January 2015.

right to good administration (Article 41 of the Charter), the right of access to documents (Article 42 of the Charter)[498], or the prohibition of the reproductive cloning of human beings (Article 3(2) of the Charter). Furthermore, some of the rights are worded differently, for example, the right to life (Article 2 of the ECHR and Article 2 of the Charter). As noted previously (see paragraph 422 [formerly 27] above), efforts have been made to promote consistency.

451. However, it has also been noted that as the EU legal order now has its own human rights catalogue, i.e., the EU Charter of Fundamental Rights, the CJEU is not referring as often to the case-law of the ECtHR as it did prior to the Charter obtaining the same legal force as the EU Treaties. Thus from 1998 to 2005, the ECHR was referred to 7.5 times more often than all other human rights instruments the CJEU relied on, including the EU Charter of Fundamental Rights. In the period between December 2009 and December 2012, the CJEU made reference to or drew on provisions of the Charter in at least 122 judgments, while to the ECHR – only in 20 cases[499]. Although it is natural for the CJEU to refer mainly to its own human rights instrument, the question arises whether fewer references by the CJEU to the ECHR and the case-law of the ECtHR weaken the link between the two systems, and are indicative of divergence, not convergence.

452. Moreover, the differences in wording of the relevant text coupled with fewer cross-references in the case-law could mean that human rights standards are interpreted differently in substance and as regards the methodology applied to them, which could result in different levels of protection for the individuals and in the lack of clarity for the member States about the content of their obligations. For example, in the cases raising an issue of compliance by the respective State with the principle of *non-refoulement*, the CJEU in a number of cases, has held that Article 4 of the EU Charter of Fundamental Rights on the "Prohibition of torture and inhuman or degrading treatment or punishment" must be interpreted as meaning that the EU member States may not transfer asylum seeker**s** to the member State that is responsible for the examination of the asylum application under the Dublin Regulation, "where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment" (emphasis added)[500]. The ECtHR, in comparable cases, for example, in the case of *Tarakhel v. Switzerland*[501] that concerned a transfer of a person from Switzerland to Italy, has constantly referred to the obligation of the respondent State to examine the individual situation of the person, in addition to the evaluation of the overall situation. According to the ECtHR, the source of the risk does nothing to alter the level of protection guaranteed by the ECHR or the obligations of the State ordering the person's removal. In other words, the fact that the overall situation is not found to be problematic, "does not exempt that State from carrying out a *thorough and individualised examination* of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established" (emphasis added)[502]. It could

[498] Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433.
[499] Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator*, New York University School of Law, Public law & legal theory research paper series, Working paper no.13-51, September 2013.
[500] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, judgment of 21 December 2011, paras 86-94.
[501] *Tarakhel v. Switzerland* [GC], no. 29217/12, 4 November 2014.
[502] ~~*Tarakhel,* cited above~~Ibid., §104.

therefore have been argued that from the perspective of the individual, the level of protection varies, which, in turn, would be at odds with the idea of a single European legal space. The CJEU, however, has recently taken into account the specific situation of an individual. Mentioning the case of *M.S.S. v. Belgium and Greece*, the CJEU has argued that the transfer of an asylum seeker might be precluded where an applicant has demonstrated the existence of exceptional circumstances that are unique to him and which would entail that after his transfer he might find himself in circumstances of extreme poverty.[503] This approach by the CJEU could be indicative of a successful judicial dialogue leading to greater consistency between the jurisprudence of the two courts.

453. From the perspective of an EU member State, the need to simultaneously comply with the principles of mutual recognition and mutual trust as developed in EU law, and with the obligation to carry out the above-mentioned individualised examination of the applicant's situation appears particularly challenging. As noted previously (see paragraphs 419-420 [formerly 24-25] above), mutual recognition and mutual trust in essence delimit the extent to which an EU member State can engage into individualised examination without running the risk of being found in breach of its obligations stemming from EU law. In the case of *Avotiņš v. Latvia* the ECtHR agreed that the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, was wholly legitimate in principle from the standpoint of the ECHR; nevertheless, the ECtHR further noted that

> "[…] the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67(1) of the TFEU. However, it is apparent that the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited. Hence, the CJEU stated recently in Opinion 2/13 that "when implementing EU law, the member States may, under EU law, be required to presume that fundamental rights have been observed by the other member States, so that [...], save in exceptional cases, they may not check whether that other member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU". Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient"[504].

454. The use of the presumption of equivalent protection could pose another set of significant challenges. Firstly, in order to establish whether the presumption is applicable and whether it is rebutted, the ECtHR is in fact required to interpret the provisions of EU law. Thus, in deciding whether the first condition for the application of the presumption of equivalent protection exists, namely, whether there was no margin of manoeuvre on the part of the domestic authorities, the ECtHR examines the substance of the applicable EU legal act. It could be argued that such a substantive examination of EU law provisions is formally outside the competence of the ECtHR as defined in Article 19 of the ECHR. This, in turn, might pose challenge regarding the authority of the ECtHR's case-law.

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[503] See case C-163/17.
[504] *Avotiņš*, cited above, §§ 113-114.

455. The application of the presumption of equivalent protection that allows the ECtHR in some cases to "reduce the intensity of its ~~supervision~~supervisory role"[505] and the need for the applicant to prove manifest deficiency constitute additional difficulties and could lead to a non-uniform level of protection of the rights of persons in different Member States of the Council of Europe. On the other hand, the rights of the applicants are protected under EU law.

456. Another set of challenges could arise regarding the admissibility of the cases that concern cross-border issues involving application of EU law where, in compliance with the principles of mutual recognition and mutual trust, the decisions and actions of one EU member State are intrinsically linked to, and dependent upon, the actions of another EU member State. Such situations occur, most notably, in the cases before the ECtHR where the applicant alleges that his/her rights under the ECHR have not been respected because of the way the European Arrest Warrant has been executed, or because of the way a judgment in criminal or civil matters of one EU member State has been recognised and enforced in another EU member State. In such cases, the requirement to exhaust the domestic remedies coupled with the six-month time-limit set by Article 35 of the ECHR, effectively means that the applicant can only challenge the decisions and actions of the executing EU member State, even if the source, at least partially, of the applicant's grievances are to be found in the issuing EU member State[506]. This could create a situation of "wrong respondent State", or at least make it more complex for the ECtHR to fully evaluate the causes of the alleged violation.

457. Finally, as regards the delay in the EU's accession to the ECHR, several different challenges could be identified. The most significant effect of the delay in the accession is that individuals cannot challenge before a human rights court those decisions and actions of the EU that affect their fundamental rights as protected by the ECHR. This has been a concern expressed by successive presidents of the ECtHR, both before and after Opinion 2/13.[507] Similar concerns have recently been made by Secretary General Jagland in 2019. He urged that, if the EU accession to the ECHR did not happen soon, there was a risk that two separate bodies of case-law would develop with regard to human rights, which would create a new and detrimental dividing line in Europe.[508] Therefore, as long as the EU is not a Contracting Party to the ECHR and therefore not subject to external scrutiny, it could be argued that a protection gap exists.

458. The delay in the accession also delays establishing a formal link between the proceedings before the ECtHR and the CJEU and the possibility to formally channel the views of the CJEU as the court competent to interpret EU law provisions into the ECtHR

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[505] See *Michaud v. France*, no. 12323/11, § 104, 6 December 2012.
[506] See, for example, the case of *Avotiņš*, cited above, § 4.
[507] See, in particular, the speech of the then President of the ECtHR Jean-Paul Costa at the opening of the judicial year in 2010, in "Dialogue between judges, European Court of Human Rights, Council of Europe, 2010", p. 32; the speech of the then President of the ECtHR Sir Nicholas Bratza at the opening of the judicial year in 2012, in "Dialogue between judges, European Court of Human Rights, Council of Europe, 2012", pp. 27-28; and the speech of the then President of the ECtHR Dean Spielmann at the opening of the judicial year in 2013, in "Dialogue between judges, European Court of Human Rights, Council of Europe, 2013", p. 29. Following the delivery of Opinion 2/13 by the CJEU, at the Opening of the Judicial Year in 2015, the then president of the ECtHR Dean Spielmann expressed his regret with regard to the Opinion 2/13 given by the CJEU, ~~having additionally highlighted the necessity to ensure that there is no legal vacuum in human rights protection on the ECHR's territory, whether the violation can be imputed to a State or to a supranational institution.~~ He underlined: "For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution", see "Dialogue between judges, European Court of Human Rights, Council of Europe, 2015", p. 46.
[508] Report by the Secretary General for the Ministerial Session in Helsinki, 16-17 May 2019, "Ready for Future Challenges – Reinforcing the Council of Europe", SG(2019)1, 1 April 2019, p. 10.

proceedings. As already argued (see paragraph 454 [formerly 58] above), the fact that the ECtHR itself interprets EU law provisions might pose a challenge regarding the authority of the ECtHR's rulings.

459. Another challenge relates to the arguments put forward by the CJEU in the Opinion 2/13 that need to be addressed without compromising the level of protection of fundamental rights. It has been suggested by some commentators that these arguments place the effectiveness of the EU system above the protection of fundamental rights.[509] It has also been suggested that accession of the EU to the ECHR in accordance with the CJEU's Opinion "would significantly diminish" the human rights protection in the EU legal order[510].

d. Possible solutions

460. Among the possible responses to the challenges outlined in the previous section, judicial dialogue should be mentioned as one of the most powerful tools to ensure harmonious cooperation between the ECtHR and the CJEU and enhance consistency of the case-law. Therefore, measures that strengthen such dialogue and allow constructive discussions on the recent case-law and developments within both systems, are welcome and should be promoted. In this regard, the working visit by a delegation from the CJEU to the ECtHR on 16 October 2017 should be mentioned as a positive example of the dialogue.

461. Next, in addition to the dialogue between the judges of the two courts, the Council of Europe member States that are also EU member States can play a constructive role both in raising awareness of the cases pending before the ECtHR that involve EU law, as well as in drawing the attention of the EU institutions to the jurisprudence of the ECtHR.

462. Furthermore, involvement of the EU institutions, namely, the EU Commission as a third party, as it happened most recently in the case of *Avotiņš v. Latvia*, could serve as a tool to assist the ECtHR in the cases that concern the interpretation and application of EU law provisions.

463. As regards the EU's accession to the ECHR, it should firstly be recalled that it remains an obligation provided for in the primary EU law instrument. Taken together with the assurances contained in the recent publications of the EU Commission and the Council of the EU (see paragraph 448 [formerly 52] above), it can be assumed that the consultations will be resumed in the near future. However, it remains to be seen how the concerns expressed by the CJEU in the Opinion 2/13 can be accommodated in the draft Accession Agreement, and to what extent possible changes to this draft Agreement could be accepted by the Council of Europe member States that are not member States of the

[509] See, *inter alia*, Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433, p. 7; and Martin Scheinin, 'CJEU Opinion 2/13 – Three Mitigating Circumstances', VerfBlog 2014/12/26, http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances/.

[510] Steve Peers, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, EU Law Analysis, 18 December 2014, http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html. Compare also Antoine Buyse, 'CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law', ECHR Blog 2014/12/20, http://echrblog.blogspot.nl/2014/12/cjeu-rules-draft-agreement-on-eu.html.

EU. Meanwhile, the instruments mentioned in the preceding paragraphs, namely, the judicial dialogue, the involvement of the EU institutions, as well as the efforts by the Council of Europe member States that are also EU member States, should be used to avoid fragmentation of the human rights law in Europe.

3. INTERACTION BETWEEN THE CONVENTION AND THE EURASIAN ECONOMIC UNION

a. Brief description of the EAEU

464. The EAEU is an international organisation for regional economic integration that consists of 5 member States[511], 2 of which – the Russian Federation and the Republic of Armenia – are also member States of the Council of Europe.

i. Origins and current structure of the EAEU

465. The EAEU was established by the Treaty on the Eurasian Economic Union that entered into force on 1 January 2015. The EAEU replaces the Eurasian Economic Community that existed from 2000 until the end of 2014.

466. The main EAEU institutions are the Supreme Eurasian Economic Council that consists of the Heads of the member States and acts as the main political body of the organisation; the Eurasian Intergovernmental Council that consists of the Heads of Governments of the member States; the Eurasian Economic Commission with 2 Commissioners from each member State that is a permanent supranational regulatory body of the EAEU and acts as the main executive institution; and the Court of the Eurasian Economic Union.

ii. Sources of EAEU law, their adoption and application

467. According to Article 6 of the Treaty on the EAEU, the sources of the EAEU law are as follows: the Treaty on the EAEU; international treaties within the EAEU; international treaties of the EAEU with a third party; and decisions and regulations of the EAEU institutions adopted within their respective competence. Furthermore, paragraph 50 of the Statute of the Court annexed to the Treaty on the EAEU stipulate that for the purposes of administration of justice, the Court of the EAEU also applies generally recognised principles and norms of international law; international agreements to which the States that are parties to the dispute are participants; and international custom as evidence of the general practice accepted as a legal norm.

468. Article 6 of the Treaty on the EAEU further establishes the hierarchy of the sources of the EAEU law and stipulates that in case of conflict between the international treaties within the EAEU and the Treaty, the latter prevails. Article 6 also states that the decisions and regulations of the EAEU must be consistent with the Treaty and international treaties within the EAEU, and that international treaties of the EAEU with a third party must not contradict the basic objectives, principles and rules of the functioning of the EAEU. Finally, Article 6 provides that the decisions of the EAEU institutions are enforceable by the member States according to the procedure provided for by their national legislation.

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[511] Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia.

469. The Treaty on the EAEU does not contain explicit rules on the application of the EAEU law in relation to the national legislation. However, the Court of the EAEU in its jurisprudence has established the principle of the primacy of the relevant provisions of the EAEU law. For example, in the *Kaliningrad transit* case [512] the Court found that one of the agreements applicable in this case was part of the EAEU law and had priority in customs control. In other words, the Court established that the member States had to apply the relevant provisions of the EAEU law instead of the national rules conflicting with the EAEU law[513]. In the same case, as well as in its Advisory opinion in the *Vertical Agreements* case[514] the Court also established direct applicability and direct effect of the relevant provisions of the EAEU law.

iii. Role and competence of the Court of the EAEU

470. According to Article 19 of the Treaty on the EAEU, the Court of the EAEU is a permanent judicial body of the EAEU. The Statutes of the Court annexed to the Treaty on the EAEU state that the objective of the Court's activities is to ensure that the member States and the institutions of the EAEU apply in a uniform manner the Treaty on the EAEU, international treaties within the EAEU, international treaties of the EAEU with the third parties, as well as the decisions of the EAEU institutions.

471. The Statutes of the Court provide that the Court resolves disputes arising in connection with the implementation of the Treaty on the EAEU, international treaties within the EAEU and/or decisions of the EAEU institutions. In doing so, the Court:

a. has jurisdiction over all disputes between the member States of the EAEU and between the member States and the EAEU institutions on the compliance with the EAEU law;
b. has jurisdiction to examine complaints brought by business undertakings (i.e., legal persons and natural persons registered as economic entities under the laws of an EAEU member State) about the compliance of the decisions or actions (omissions) of the EAEU Commission with the EAEU Treaty and/or international treaties within the EAEU, provided such decisions or actions (omissions) affect the rights and legitimate interests of the business undertakings;
c. can give advisory opinions on the interpretation and application of the Treaty on the EAEU and the decisions of the EAEU institutions.

472. The Court of the EAEU consists of 2 judges from each member State elected for a 9-year term.

b. Overview of the relevant legal provisions and the case-law

473. The Treaty on the EAEU does not contain express provisions on the protection of fundamental rights. However, the preamble of the Treaty states that the member States of the EAEU are "guided by the principle of the sovereign equality of states, the need for unconditional respect for the rule of constitutional rights and freedoms

[512] Case SE-1-1/1-16-BK, *Russia v. Belarus (Kaliningrad Transit)*, judgment of 21 February 2017.
[513] See also Opinion SE-2-3/1-17- БК, *Adilov*, 11 December 2017.
[514] Opinion SE-2-1/1-17-BK, *Vertical Agreements,* 4 April 2017.

of man and national". In the Opinion regarding the interpretation of the provisions concerning pensions of the employees of the EAEU institutions[515], the Court of the EAEU ~~CJEU~~ has referred to this preamble provisions to find that the level of protection of the rights and freedoms offered by the EAEU cannot be lower than the level of protection ensured in the member States[516].

474. As the regards the case-law, the above-mentioned lack of human rights provisions in the founding Treaty explains why the Court of the EAEU, as well as its predecessor, the Court of the Eurasian Economic Community, has rarely dealt with human rights issues. Nevertheless, the Court of the EAEU has referred to the practice of the ECtHR, albeit sporadically. For example, in the Opinion explaining certain provisions adopted by the Eurasian Economic Commission regarding the evaluation of employee performance[517], the Court of the EAEU referred to the ECtHR case of *Pellegrin v. France*[518] to argue that civil servants are exempted from the scope of labour law regulation[519]. Furthermore, on several occasions the judges of the Court of the EAEU have referred to the case-law of the ECtHR in their dissenting opinions[520].

475. So far the ECtHR has referred to the EAEU (more precisely, to its predecessor organisation) only in one case, namely, in the case of *Gyrlyan v. Russia*[521] concerning a complaint under Article 1 of Protocol No. 1 to the ECHR. The applicant in this case alleged that the decision of the domestic authorities in the administrative-offence proceedings to confiscate USD 90,000 of the applicant's money for having failed to declare the sum of USD 100,000 at customs had been excessive and disproportionate to the legitimate aim pursued. When describing the relevant domestic law, the ECtHR noted the treaty on the procedure for the movement by individuals of cash and/or monetary instruments across the customs border of the Customs Union approved by the Inter-State Council of the Eurasian Economic Community on 5 July 2010.

c. Analysis of the challenges

476. At the moment the interaction between the ECHR system and the EAEU, in so far as it concerns the adjudication of cases, is limited, and does not appear to raise immediate challenges in terms of fragmentation of human rights law.

477. However, should the Court of the EAEU continue to refer to the case-law of the ECtHR, it is necessary to ensure that the references are to the current case law. For example, with respect to the above-mentioned reference to the *Pellegrin* case it should be noted that the ECtHR's conclusions in that particular case concerning the applicability of

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[515] Opinion СЕ-2-2/7-18-БК, 20 December 2018.
[516] Opinion СЕ-2-2/7-18-БК, 20 December 2018, para 3.1.
[517] Opinion СЕ-2-3/1-16-БК, 3 June 2016.
[518] *Pellegrin v. France*, ~~(application~~ no. 28541/95~~)~~, ~~judgment of~~ 8 December 1999.
[519] Opinion СЕ-2-3/1-16-БК, 3 June 2016, para 12.
[520] For example, dissenting opinion of Judge Zholymbet Baishev on the ruling of the Court of the Eurasian Economic Community in the case no.2-4/8-2014 of 27 February 2014; dissenting opinion of Judge Denis G. Kolos on the judgment of the Court of the EAEU in the case no.СЕ-1-1/1-16-БК of 25 February 2017; dissenting opinions of Judge Tatiana N. Neshataeva on the ruling of the Court of the Eurasian Economic Community in the case no.1-6/1-2013 of 10 July 2013, on the ruling of the Court of the Eurasian Economic Community in the case no.2-4/10-2014 of 7 October 2014, on the judgment of the Court of the EAEU in the case no. СЕ-2-1/3-17-БК of 17 January 2018.
[521] *Gyrlyan v. Russia* [GC], no. 35943/15, 9 October 2018.

Article 6 of the ECHR have been superseded by those in the case of *Vilho Eskelinen and Others v. Finland*[522].

d. Possible solutions

478. As the interaction between the ECHR and the EU legal order, the interaction between the ECHR and the EAEU could benefit from strong and constructive judicial dialogue that would help the judges to exchange information about the relevant developments in the two systems, as well as would help ensure that both systems maintain proper cross-references.

479. Furthermore, the Council of Europe member States that are also member States of the EAEU could bring to the attention of the EAEU institutions, where appropriate, the relevant case-law of the ECtHR and in that way assist a harmonious development of the case-law in both systems.

[522] *Vilho Eskelinen and Others v. Finland* [GC], no.63235/00, 19 April 2007.

CONCLUSION

480. Europe's architecture of human rights protection has been described as a "crowded house"[523]. The existence of parallel protection mechanisms will normally be a source of enrichment and enhancement of the universal protection of human rights. However, where the interpretation of the provisions in the different human rights instruments is either perceived as unclear or as inconsistent, these mechanisms also have the potential of becoming a source of uncertainty for States Parties on how to best fulfil their human rights commitments and for individuals as regards the exact scope of their rights. This may in turn pose a threat both to the coherence of human rights law and the credibility of human rights institutions.

481. As the ECtHR itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.[524] Legal certainty as regards, in particular, the applicable rules regarding the interpretation of the ECHR as well as the applicable rules in the relationship with other rules of international law on State responsibility or international humanitarian law is of great importance for the States Parties, in particular in armed conflict situations.

482. In the light of significant differences between the regional and the universal systems of human rights protection, achieving absolute harmony in international human rights law is not a probability. In order to avoid a risk of fragmentation of the international legal order, the ECtHR, just as all other systems making up the European architecture of human rights protection, should, however, strive to develop their respective practice in full cognisance of the other systems. It would be desirable if the international and regional human rights organs, be they judicial or monitoring, proceed, to the extent possible, in the direction of a harmonisation of their practice. To that end, judicial dialogue is one of the most powerful tools to enhance consistency in the case-law and practice of these different organs and should be further encouraged.[525]

483. As regards, in particular, the risk that two separate bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, creating a dividing line in Europe, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

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[523] Jörg Polakiewicz, *EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?* 26 September 2013. Available at SSRN: https://ssrn.com/abstract=2331497 or http://dx.doi.org/10.2139/ssrn.2331497

[524] See, *inter alia*, *Correia de Matos v. Portugal* [GC], no. 56402/12, § 134, 4 April 2018.

[525] See in this vein already the findings in the CDDH Report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015, §§ 193 and 202.

APPENDIX: LIST OF ABBREVIATIONS

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	(UN) Human Rights Committee
CDDH	Steering Committee for Human Rights
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination on All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Court	European Court of Human Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DH-SYSC	Committee of experts on the system of the European Convention on Human Rights
DH-SYSC-II	Drafting Group on the place of the European Convention on Human Rights in the European and international legal order
EAEU	Eurasian Economic Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
IAC	international armed conflict
I-ACHR	Inter-American Court of Human Rights

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILC	International Law Commission
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IHL	international humanitarian law
ITLOS	International Tribunal for the Law of the Sea
LOAC	Law of Armed Conflict
“MRT”	“Moldovan Republic of Transdniestria”
NIAC	non-international armed conflict
PCIJ	Permanent Court of International Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
“TRNC”	“Turkish Republic of Northern Cyprus”
UK	United Kingdom
UN	United Nations
UNSCR	United Nations Security Council Resolution
WTO	World Trade Organization
VCLT	Vienna Convention on the Law of Treaties