DH-SYSC-II(2018)08rev

03/04/2018

STEERING COMMITTEE FOR HUMAN RIGHTS /

COMITE DIRECTEUR POUR LES DROITS DE L'HOMME

(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS /

COMITE D'EXPERTS SUR LE SYSTEME DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME

(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 /

GROUPE DE REDACTION SUR LA PLACE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME DANS L'ORDRE JURIDIQUE EUROPEEN ET INTERNATIONAL

(DH-SYSC-II)

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Comments on the draft chapter of Theme 1, subtheme ii) on State responsibility and extraterritorial application of the European Convention on Human Rights, and subtheme iii) on the interaction between the resolutions of the Security Council and the European Convention on Human Rights /

Commentaires sur le projet de chapitre du Thème 1, sous-thème ii) traitant de la responsabilité des Etats et extraterritorialité de la Convention européenne des droits de l'homme, et sous-thème iii) traitant de l'interaction entre les résolutions du Conseil de Sécurité et la Convention européenne des droits de l'homme

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Introduction

1. Following the decision of the Drafting Group on the Place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II) at its 2nd meeting, 20-22 September 2017,[1] the co-Rapporteurs on Theme 1 on the challenge of the interaction between the Convention and other branches of international law, including international customary law, Mr Alexei ISPOLINOV (Russian Federation) and Mr Chanaka WICKREMASINGHE (United Kingdom), prepared draft chapters on the subjects of State responsibility and extraterritorial application of the European Convention on Human Rights (subtheme ii) and of the interaction between the resolutions of the Security Council and the European Convention on Human Rights (subtheme iii).

2. The experts of the DH-SYSC-II were invited to send their written comments on the draft chapters by 12 March 2018. The present compilation contains these comments.

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Introduction

1. Suite à la décision du Groupe de rédaction sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international (DH-SYSC-II) lors de sa 2e réunion, du 20 au 22 septembre 2017[2], les co-Rapporteurs sur le Thème 1 sur le défi de l'interaction entre la Convention et d'autres branches du droit international, y compris le droit international coutumier, M. Alexei ISPOLINOV (Fédération de Russie) et M. Chanaka WICKREMASINGHE (Royaume-Uni), ont préparé des projets de chapitres sur la responsabilité des Etats et extraterritorialité de la Convention européenne des droits de l'homme (sous-thème ii) et sur l'interaction entre les résolutions du Conseil de Sécurité et la Convention européenne des droits de l'homme (sous-thème iii).

2. Les experts du DH-SYSC-II ont été invités à envoyer leurs commentaires écrits sur les projets de chapitres jusqu'au 12 mars 2018. La présente compilation contient ces commentaires.

[1] See doc. DH-SYSC-II(2017)R2, §18.
[2] Voir doc. DH-SYSC-II(2017)R2, §18.

Member States / Etats membres

FRANCE

Observations du Gouvernement français

Thème 1, sous-thème ii)

I. Responsabilité des Etats et extraterritorialité de la Convention

1. Le Gouvernement français tient à remercier les contributeurs et co-rapporteurs pour la qualité de leurs travaux. Le projet de rapport aborde l'ensemble des questions que soulève cette thématique. Pour autant, le Gouvernement français considère que le projet rapport ne peut en l'état être adopté et doit être restructuré et remanié pour les raisons qui suivent. .

- **Sur la forme**

2. Le Gouvernement français suggère que la structure du document soit modifiée afin de faire apparaitre pour chaque thématique trois parties, comme le prévoit le projet de structure détaillée : le constat, l'analyse des défis et les pistes d'action possibles. Sur ce dernier point, il apparait que le terme « piste d'action possible » n'est pas nécessairement adapté à certaines thématiques comme la partie sur la méthodologie de la Cour ou encore l'extraterritorialité. Aussi, cette troisième partie, que le Gouvernement française pense importante pour proposer des éléments de réflexions et tenter d'apporter des solutions aux difficultés analysés, pourrait plutôt s'intituler « pistes de réflexion » ou « réponses possibles »
3. De manière générale, afin de ne pas allonger le rapport et d'en faciliter la lecture, le Gouvernement français est d'avis que les éléments relatifs à la jurisprudence de la Cour EDH devraient être raccourcis en limitant les citations et en essayant d'en résumer les apports principaux (en renvoyant aux § utiles de l'arrêt) sans dénaturer le sens de l'arrêt.
4. Par ailleurs, dans le cadre de la présentation de la jurisprudence de la Cour comme de la discussion de l'analyse des défis, il parait important de ne pas utiliser des formules trop critiques vis-à-vis de la Cour et de nuancer et d'étayer les conclusions que l'on peut tirer des différents arrêts cités. (par ex : il convient de nuancer le §15 « au mépris de la ressemblance frappante des circonstances factuelles », le§ 19 « questions concernant la clarté et la pertinence des limitations » , § 25 « arrêt controversé » ; « *inconsistent and insufficiently reasoned case law of the ECtHR will result in unpredicatbility and uncertainty among the States* » §71 ; en putre les conclusions tirées aux §§28, 30, 67, 68 et 73 paraissent également devoir être nuancées).De la même façon si le rapport fait référence à des commentaires doctrinaux il convient de

citer ces sources et de s'assurer de la diversité de leur origine et du fait qu'elles expriment une analyse partagée (cf par ex § 28 du projet « for many commentators »)

5. Enfin, le Gouvernement français note des erreurs de formulation et de traduction dans la version française du document qui rendent sa compréhension malaisée. Par exemple, le § 7 est difficilement compréhensible (*« D'emblée, il convient de noter qu'en vertu de l'article 1 de la Convention, le terme « juridiction » se réfère à des situations dans lesquelles une personne jouit des droits issus de la Convention et l'État partie correspondant a des obligations corrélatives issues de la Convention vis-à-vis de ces droits. Comme relevé par la Cour, l'exercice de la juridiction est une condition nécessaire pour qu'un Etat contractant puisse être tenu pour responsable des actes ou omissions qui lui sont imputables et qui donnent lieu à une allégation de violation des droits et libertés énoncés dans la Convention »*). Il conviendra de s'assurer de la qualité de la traduction française lors de la traduction finale du rapport.

- **Sur le fond**

Sur la partie introduction du projet :

6. En premier lieu, s'agissant de l'introduction, de l'avis de Gouvernement français, il paraitrait opportun de compléter l'introduction du projet de rapport relatif à la notion de juridiction (p.2 et 3 du projet de rapport) en soulignant que cette notion de juridiction au sens de la CEDH est une notion spécifique mais qui s'inscrit dans le cadre plus général du droit international. A cet égard il paraitrait opportun de présenter brièvement l'approche de la Cour internationale de justice sur la notion de juridiction afin d'illustrer les similitudes de raisonnement entre les deux cours (cf avis sur les *Conséquences juridiques de l'édification d'un mur dans les territoires palestiniens occupés*) De manière générale, le projet de rapport devrait davantage s'appuyer sur la jurisprudence de la Cour internationale de justice, voire sur d'autres organes internationaux (comités ONU).

7. En outre, l'introduction pourrait être complétée par des éléments de présentation sur la notion de responsabilité des Etats en droit international (partie B du projet de rapport) Il parait en effet opportun de définir les règles de droit international applicables en ce domaine en introduction, afin de mieux comprendre, dans le cadre du constat et de l'analyse des défis, l'application que fait la Cour de ces différentes notions dans sa jurisprudence. A cet égard, la présentation du projet d'articles sur la responsabilité des Etats pour fait internationalement illicite de la Commission du Droit International (CDI) (ARSIWA, 2001) est très largement développée dans le projet de rapport et pourrait être davantage résumée. En effet même s'il s'agit d'une source de droit importante qui fait autorité et à laquelle la Cour fait référence dans ces arrêts, il convient de rester centré sur le sujet de l'analyse du présent rapport et de ne pas faire une présentation trop académique.

8. Une telle introduction complétée permettrait de présenter tous les éléments qui sont développés par la suite dans le cadre de la partie « constat » (qui pourrait reprendre

les éléments du projet de rapport sur la jurisprudence de la Cour EDH sur ce point § 41-66) et « analyse des défis » (qui pourrait reprendre les éléments du projet figurant dans la partie discussion du projet §§ 67 notamment)

Sur la partie A) « extraterritorial application of the ECHR »

9. Sur la partie relative à la notion de juridiction et d'extraterritorialité, la France estime que la présentation de la jurisprudence de la Cour (à intégrer dans la partie « constat » du projet de rapport) devrait être plus objective.
   En effet, ce n'est qu'au stade de l'analyse des défis que des conclusions devraient être présentées sur l'analyse de cette jurisprudence. Ainsi les expressions telles que « *landmark decision* » s'agissant de la décision *Bankovic* devraient être évitées tout comme les termes « *controversial judgement* » (§25 en parlant de l'arrêt *Catan)*. Si le Gouvernement français considère également que l'affaire *Bankovic* est importante, l'évolution de la jurisprudence sur cette question doit être analysée de façon complète et neutre.
10. Sur le choix des arrêts présentés dans le projet de rapport, le Gouvernement français partage la présentation faite dans le projet de rapport et estime que les principaux arrêts y figurent. De manière générale on peut distinguer trois périodes : *Bankovic* (relative au conflit en ex Yougoslavie) ; *Al Skeini*, puis la période post *Al Skeini.*
    Le Gouvernement français s'interroge sur l'utilité de maintenir les arrêts *Issa* et *Pad* (§§14 et 15) dans la mesure où ils ne sont pas beaucoup exploités. En outre, si l'affaire *Pad* était retenue, il conviendrait de bien distinguer l'affaire *Pad* et de l'affaire *Bankovic*, en particulier en ce que la première concerne une intervention militaire avec contrôle effectif et l'autre sans contrôle effectif.
    S'agissant de la période post *Al Skeini*, le Gouvernement français suggère de préciser de façon plus explicite le type de situation d'extraterritorialité qui est en cause dans chaque cas et l'application faite par la Cour des critères *Al Skeini* : action en haute mer (*Hirsi Jamaa,* pourrait être ajouté *Medvedyev*) ; action militaire extraterritoriale (*Jaloud*) ; influence militaire, politique et économique (*Catan, Mozer, Chrirago* et ajout de *Minas Sargsyan c Azerbaidjian*). Enfin l'arrêt *ND et NT contre Espagne*, qui fait l'objet d'un renvoi en Grande chambre (audience le 4 juillet prochain) pourrait utilement être intégré à la présentation de la jurisprudence.
11. Par ailleurs, le Gouvernement français ne partage pas le constat effectué au § 28 et au § 30 du projet de rapport selon lequel l'arrêt *Bankovic* serait l'arrêt le plus clair de la Cour sur la notion d'extraterritorialité. En effet, cette affirmation nie l'évolution de la jurisprudence intervenue depuis cet arrêt, qui se situe dans le contexte spécifique du conflit en ex Yougoslavie. On ne peut nier l'évolution du contexte international (à l'aune notamment du conflit en Irak) qui a amené la Cour à faire évoluer sa jurisprudence plus récente, vers une interprétation plus extensive de l'article 1er de la Convention. De l'avis du Gouvernement français, l'arrêt *Al Skeini* constitue l'arrêt de référence clarifiant la position de la Cour sur cette question. Le Gouvernement français partage néanmoins l'analyse des co-rapporteurs au terme de laquelle l'application de ces critères par la Cour peut parfois manquer de clarté et qu'une clarification pourrait effectivement être souhaitable pour une plus grande sécurité juridique, une meilleure exécution des arrêts et ainsi un renforcement du système conventionnel.

12. De la même façon, le Gouvernement français ne partage pas les conclusions faites au § 31 selon lesquelles dans beaucoup des situations dans lesquelles la Cour a conclu à l'application extraterritoriale de la Convention l'Etat défendeur n'avait que des pouvoirs limités ne lui permettant pas d'appliquer les standards de la Convention. En effet, cette notion de capacité pour l'Etat défendeur d'appliquer les standards de la Convention est une question qui est certes en lien avec celle de l'extraterritorialité mais qui s'en distingue et qui parait davantage liée à la question des règles de droit international applicables à certaines situations d'extraterritorialité et notamment aux conflits armés et parait donc davantage relever du thème relatif aux rapports entre DIDH et DIH.
13. Dans le même sens, les conclusions des §§ 32-34 paraissent devoir être nuancées et ne pas mélanger la question de l'articulation des différentes normes internationales éventuellement applicables et celle de l'extraterritorialité de la Convention.

Sur la partie « state responsability in international law »

14. Comme indiqué précédemment, le Gouvernement français considère que la présentation et l'explication des règles applicables à la responsabilité des Etats et notamment la présentation du projet d'articles sur la responsabilité des Etats pour fait internationalement illicite de la CDI (ARSIWA, 2001) est tout à fait opportune mais devrait être remontée plus haut, dans l'introduction et davantage résumée.
15. Certains développements de cette partie du rapport (§41-67) pourraient, de l'avis du Gouvernement français, être utilisés dans la partie « analyse des défis » pour présenter les difficultés liées au fait que la Cour, dans certains de ses arrêts, ne distingue pas clairement la notion de juridiction et la notion d'attribution qui sont pourtant deux notions de droit international bien distinctes. A cet égard pourraient être citées l'opinion séparée de la juge Gyulumyan dans l'arrêt *Minas Sargsyan c Azerbaidjian* ainsi que celle de la juge Ziemele, qui souligne notamment les écarts de raisonnements entre la Cour EDH et la Cour internationale de justice.
16. Sur ce point, le Gouvernement français partage certains des constats effectués par les co-rapporteurs sur le besoin de clarification de la jurisprudence de la Cour sur les notions d'attribution et de juridiction et sur l'usage que fait la Cour du projet d'articles sur la responsabilité des Etats pour faits internationalement illicites de la CDI. Pour autant, le Gouvernement français considère que les conclusions des §§68 - 71 doivent être atténuées afin d'axer le propos sur la nécessité de clarifier la jurisprudence dans le but d'éviter une fragmentation de l'ordre juridique et de renforcer le système conventionnel.

Thème 1, sous-thème iii)

II. Sur l'interaction entre les résolutions du Conseil de sécurité et la Convention EDH

- **Sur la forme**

17. Comme pour la thématique précédente, le Gouvernement français suggère que la structure du document soit modifiée afin de faire apparaitre pour chaque thématique trois parties, comme le prévoit le projet de structure détaillée : le constat, l'analyse des défis et les pistes d'action possibles.
18. Par ailleurs, de manière générale, de l'avis du Gouvernement français, il serait opportun de citer de façon explicite les sources d'articles de doctrine et de s'assurer de l'actualité et de la diversité de leur origine et du fait qu'elles expriment une analyse partagée (un seul article de doctrine est cité en page 15 et date de 1998, soit avant toute la jurisprudence pertinente de la Cour EDH sur la question de l'interprétation des résolutions du Conseil de sécurité).
19. Enfin, dans le cadre de la discussion de l'analyse des défis, il parait important de ne pas utiliser des formules trop critiques vis-à-vis de la Cour et de nuancer et d'étayer les conclusions que l'on peut tirer des différents arrêts cités.

- **Sur le fond**

20. S'agissant la première partie, présentant le Conseil de sécurité, le Gouvernement français n'a pas d'observations majeures à formuler. Il pourrait néanmoins être opportun d'ajouter une partie consacrée à présenter de façon plus détaillée l'article 103 de la Charte.
21. Par ailleurs au §3 : il est indiqué que seules les résolutions sous chapitre VII sont obligatoires. Or l'article 25 de la Charte précise simplement que « Les Membres de l'Organisation conviennent d'accepter et d'appliquer les décisions du Conseil de sécurité conformément à la présente Charte ». Il est admis que le Conseil de sécurité peut adopter, en dehors des hypothèses prévues par le chapitre VII de la Charte, des mesures obligatoires, au sens où celles-ci s'imposent aux membres des Nations Unies comme des décisions juridiquement contraignantes. Dans son avis sur la Namibie, la Cour internationale de justice a ainsi indiqué que : «Etant donné le caractère des pouvoirs découlant de l'article 25, il convient de déterminer dans chaque cas si ces pouvoirs ont été en fait exercés, compte tenu des termes de la résolution à interpréter, des débats qui ont précédé son adoption, des dispositions de la Charte invoquées et en général de tous les éléments qui pourraient aider à préciser les conséquences juridiques de la résolution du Conseil de sécurité ».

22. S'agissant du §4 le Gouvernement français fait la proposition de suppression suivante : « 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 Charter~~ ». En effet, la Charte ne précise pas les mesures concrètes qui peuvent être adoptées par le CSNU, cela relève du pouvoir discrétionnaire de ce dernier.

23. S'agissant de la deuxième partie, sur la jurisprudence de la Cour EDH, le Gouvernement français partage pleinement le choix qui a été fait par les co-rapporteurs de distinguer les cas relatifs aux résolutions prévoyant le recours à la force et les résolutions prévoyant des sanctions économiques. Il pourrait être opportun, à la lumière de l'intervention du Vice-président Sicilianos lors du séminaire de brainstorming lançant les travaux du Groupe, d'opérer une distinction supplémentaire entre opérations de maintien de la paix des Nations unies (qui sont des organes subsidiaires de l'ONU) et opérations militaires des forces multinationales autorisées par résolution du CSNU (qui ne sont pas des organes subsidiaires des nations Unies dans l'hypothèse où l'organisation exerce un contrôle exclusif). Et de bien préciser que les questions juridiques en jeu sont bien différentes dans les deux cas.
24. S'agissant de la présentation de la jurisprudence relative aux résolutions du CSNU relatives au recours à la force, le Gouvernement français estime qu'elle devrait davantage mettre en lumière l'évolution de la jurisprudence entre *Behrami* et *Al Jedda* en soulignant que la Jurisprudence *Al jedda* est davantage en lien avec les règles du Droit international et notamment le projet d'articles de la CDI sur la responsabilité des Etats pour acte international illicite[3]. Il pourrait être également utile de rappeler que l'arrêt *Al jedda* ne s'appuie pas sur l'article 103 de la Charte des Nations unies dans la mesure où il ne peut y avoir de conflit d'obligation dans les cas où la résolution du CSNU ne fait que donner une autorisation. Cf §109 *Al Jedda* : « En définitive, la Cour considère donc que la Résolution 1546 du Conseil de sécurité, en son paragraphe 10, **autorisait** le Royaume-Uni à prendre des mesures pour contribuer au maintien de la sécurité et de la stabilité en Irak, **mais que ni cette résolution ni aucune autre résolution adoptée ultérieurement par le Conseil de sécurité n'imposait expressément ou implicitement au Royaume-Uni d'incarcérer, sans limitation de durée ni inculpation, un individu qui, selon les autorités,** constituait un risque pour la sécurité en Irak. En l'absence d'obligation contraignante de recourir à l'internement, il n'y avait aucun conflit entre les obligations imposées au Royaume-Uni par la Charte des Nations unies et celles découlant de l'article 5 § 1 de la Convention. »
25. S'agissant de la présentation de la jurisprudence sur les sanctions économiques, de l'avis du Gouvernement français, il conviendrait de bien distinguer les cas où l'Etat

[3] Cf projet d'articles et commentaires de la CDI sur la responsabilité des organisations internationales chapitre II introduction § 5 : À l'instar des articles sur la responsabilité de l'État pour fait internationalement illicite, les présents projets d'articles ne prévoient que des critères positifs d'attribution. Ils n'indiquent donc pas de cas où un comportement ne puisse pas être attribué à l'organisation. C'est ainsi qu'ils ne disent pas, et ne font que sous-entendre, que le comportement des forces militaires d'États ou d'organisations internationales n'est pas attribuable à l'Organisation des Nations Unies lorsque le Conseil de sécurité autorise des États ou des organisations internationales à prendre les mesures nécessaires en dehors d'une chaîne de commandement reliant ces forces aux Nations Unies.

est membre de l'Union européenne (alors la jurisprudence *Bosphorus* s'applique, l'article 103 n'est pas en cause puisque le droit de l'Union européenne fait écran entre la résolution et le droit national) ou s'il ne l'est pas. En outre l'arrêt *Kadi* de la CJUE mériterait d'être davantage développé. Cet arrêt peut en effet être interprété comme répondant à l'arrêt *Bosphorus* de la Cour EDH. En effet, dans cet arrêt, la CJUE a jugé que la circonstance qu'un règlement communautaire se borne à mettre en œuvre la résolution 1390 (2002) du Conseil de sécurité des Nations Unies ne privait pas le juge communautaire de sa compétence pour contrôler la validité de ce règlement au regard des principes fondamentaux de l'ordre juridique communautaire. Sur le fond, la CJUE a considéré que le règlement litigieux avait manifestement méconnu les droits de la défense des requérants, en particulier celui d'être entendu[4].

26. S'agissant de la troisième partie, « discussion », le Gouvernement français souhaite formuler les observations suivantes.
27. En premier lieu, l'affirmation selon laquelle la Cour EDH n'offre qu'une jurisprudence « inégale » en ce qui concerne les interactions entre les décisions du Conseil de sécurité des Nations unies et la Convention EDH parait devoir être tempérée. L'objet du présent rapport est dans un premier lieu de décrire la jurisprudence de la Cour de façon neutre et objective puis, dans la partie « analyse des défis » d'en tirer des conclusions sur les risques de fragmentation et d'affaiblissement du système conventionnel.
28. En deuxième lieu, le Gouvernement considère que les conclusions du § 22 dans lequel il est indiqué que, dans les décisions postérieures à *Behrami*, la Cour EDH s'est davantage tournée vers l'appréciation des décisions nationales de mise en œuvre des résolutions du Conseil de sécurité que sur les décisions du Conseil de sécurité elles-mêmes (*per se*) doivent être précisées. En effet, il résulte des arrêts cités dans le projet de rapport que la Cour s'est au contraire attachée, conformément à la Convention de Vienne, à procéder à une interprétation des résolutions, dans un souci d'harmonisation systémique ; partant du principe que, eu égard aux objectifs des Nations Unies (que la Cour EDH prend bien en compte), il existait une présomption de conformité à la

[4]Par la suite, la CJUE viendra préciser la nature exacte de son contrôle dans un arrêt « *Kadi II* » du 18 juillet 2013 dans lequel elle précise que le juge de l'Union européenne doit exercer un contrôle en principe complet, c'est-à-dire un contrôle sur le caractère suffisamment précis et concret des motifs de désignation invoqués et sur l'existence d'une base factuelle suffisamment solide. Le contrôle juridictionnel exercé par la CJUE ne doit pas être limité à l'appréciation de la vraisemblance abstraite des motifs invoqués, mais porte sur le point de savoir si ces motifs, ou, à tout le moins, l'un d'eux considéré comme suffisant en soi pour soutenir cette même décision, sont étayés. A ce titre, la CJUE précise dans cet arrêt que le juge de l'Union doit *contrôler « notamment, le caractère suffisamment précis et concret des motifs invoqués dans l'exposé fourni par le comité des sanctions ainsi que, le cas échéant, le caractère établi de la matérialité des faits correspondant au motif à la lumière des éléments communiqués »* (point 135 de l'arrêt).

CEDH. Ces principes, conformes au droit international[5], ont pour objet d'éviter tout conflit d'obligation et toute fragmentation de l'ordre juridique international.

29. Pour autant le Gouvernement français rejoint les commentaires du projet de rapport au § 25 et considère qu'il est important de souligner les interrogations que peut soulever l'application de ce principe dans certains cas, comme cela a été le cas dans l'affaire *Al Dulimi c Suisse*. A cet égard le rapport pourrait rappeler les opinions séparées et notamment celles de la juge Nuβberger[6] ou de la juge Keller[7] qui ont indiqué qu'en l'espèce le langage de la résolution était claire et ne laissait place à aucune marge d'appréciation aux Etats et qu'il existait dès lors un conflit d'obligation que la Grande chambre n'a pas traité. Le rapport pourrait relever qu'en limitant ainsi les hypothèses de conflit d'obligations, la Cour EDH limite la portée de l'article 103 de la Charte des Nations Unies. comme l'a relevé le juge Sicilianos (§16 de son opinion concordante).
30. En troisième lieu, le Gouvernement français considère que les conclusions des §§ 25-28 doivent être plus nuancées. Pour autant, le Gouvernement français est d'avis qu'il est en effet important de mettre en évidence les questions qui restent ouvertes à ce

[5] Cf le rapport de la Commission du droit international (CDI) sur la fragmentation du droit international qui énonce que « *en droit international, une forte présomption pèse contre le conflit normatif* ».

[6] la juge Nuβberger estime que « *le conflit entre les obligations découlant de l'article 6 de la Convention et celles découlant de la Résolution 1483 (2003) des Nations Unies n'aurait pas dû être artificiellement nié, mais aurait dû être placé dans le contexte du droit international général en vigueur dont l'article 103 de la Charte des Nations Unies est l'un des piliers fondamentaux* » (p. 153 de l'arrêt). Elle ajoute qu'il est impossible à son sens de « *nier que les obligations conventionnelles auxquelles la Suisse était confrontée en l'espèce étaient conflictuelles, mais aussi qu'elles s'excluaient mutuellement* » (p. 148) « *l'obligation d'énoncer clairement et explicitement ce qui est prévu est transformée en une présomption selon laquelle ce qui n'est pas clairement et explicitement formulé n'est pas prévu* » (p. 150 de l'arrêt). De la même façon, les juges Pinto de Albuquerque, Hajiyev, Pejchal et Dedov relèvent dans leur opinion concordante, « *au lieu d'interpréter le texte de la Résolution 1483, la majorité l'a réinventé, en en étendant le sens et le libellé, et, pire encore, l'a décontextualisé* » (§ 45 de leur opinion concordante).

[7] Ainsi, la juge Keller relève que « *si la résolution des conflits d'obligations est certainement difficile, il n'est plus possible d'éviter le problème : la Cour aurait dû prendre position sur les questions qui se posent lorsqu'un Etat membre du Conseil de l'Europe doit faire face à un conflit insurmontable entre ses obligations au titre de la Convention et celles qui lui incombent en vertu de la Charte de l'ONU* » (p. 131).

jour, en l'état de la jurisprudence de la Cour notamment à la suite de l'arrêt Al Dulimi[8].

31. La question principale est celle de l'étendue du contrôle de l'arbitraire que doivent opérer les autorités nationales. Il serait utile que la Grande chambre soit amenée à clarifier sa position dans la mesure où, en l'état de la jurisprudence *Al Dulimi*, on peut s'interroger sur les nouvelles mesures que devraient mettre en place les autorités suisses pour exécuter cet arrêt, tout en respectant leurs obligations au regard des Nations Unies. De manière générale, on peut se demander si les incertitudes quant à l'étendue d'un tel contrôle n'induit pas un risque de divergences dans la mise en œuvre des résolutions du Conseil de sécurité des Nations Unies en fonction des critères retenus par chaque Etats parties, ce qui serait de nature à fragiliser grandement le système des sanctions des Nation unies[9].
32. Enfin, le Gouvernement français est d'avis que les développements du projet de rapport du §29 pourraient être intégrés dans la partie « pistes d'action possibles ». Le rapport pourrait en effet souligner les réformes intervenues pour améliorer le système de sanctions des Nations unies (création d'un point focal et d'un médiateur) tout en faisant apparaitre que ces réformes ne paraissent pas suffisantes au regard de la jurisprudence[10] de la Cour et déterminer dans quelles conditions un dialogue serait envisageable entre la Cour et le Comité des sanctions./.

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[8] Comme le relève la juge Nußberger dans son opinion dissidente, « *l'arrêt de la Cour va probablement perpétuer cette situation de vide juridique pendant de nombreuses années* », situation qui « *est préjudiciable tant à la protection des droits de l'homme qu'à l'efficacité des résolutions du Conseil de sécurité des Nations unies prises en application du chapitre VII de la Charte des Nations Unies* ».

[9] Comme le relève le juge Ziemele, « *ce serait le début de la fin de certains éléments de la gouvernance mondiale qui émerge dans le cadre des Nations Unies* ». Par ailleurs, le risque existe, si un contrôle juridictionnel national était autorisé, que surviennent des « divergences dans la mise en œuvre de la résolution en fonction des critères retenus par chaque pays ». Ainsi, on arrivera à des situations où en fonction de la variété des systèmes juridiques de chaque Etat, « *une même personne figurant sur les listes établies par le comité des sanctions pourrait être sanctionnée dans une juridiction et pas dans une autre* » (p. 149 de l'arrêt du 21 juin 2016).

[10] Et par la CJUE dans l'arrêt Kadi II qui a critiqué le système du médiateur comme ne répondnat pas aux critères du recorus juridictionnel.

GEORGIA / GÉORGIE

Comments of the Government of Georgia

Having studied the comments submitted by France, Latvia, Greece, Poland, Romania and Russia with respect to the Draft chapter of the Theme 1, subtheme ii (State responsibility and extraterritorial application of the Convention), the Government of Georgia notes that it shares the concerns of the majority of these States. Mainly, with respect to the following issues:

- ***Language used in the text and the necessity to use the neutral approach***

Georgia shares the position of France, Greece and Romania regarding the language used in the text. We support that it is essential to adopt more objective and neutral approach to the issues under examination. The goal of the report should not be to dictate the ECtHR how it should act, but to provide an overview of its case-law and of any possible points of divergence between it and general rules of international law. Georgia also joins with the Government of Latvia that the descriptive parts of the text should avoid value statements. Further, as pointed out by Greece and Romania the report should evaluate the issues without overly criticizing the case-law of the Court and prejudging the judgments of the Court on pending cases.

- ***The issue of Bankovic case and the need to use other extensive case-law of the Court***

As noted by the majority of abovementioned states certain terms used by the co-rapporteurs with respect to the *Banković* decision, such as "landmark judgment", "clearest statement of principle of extraterritorial application of the Convention", also "bright line", and the term "controversial judgment" used with respect to the *Catan* and *El-Masri* judgments, should be reconsidered and more neutral approach should be adopted.

The evolution of the case-law on the issue of extra-territorial application should be analyzed in a complete and neutral way. We support the suggestion that the *Al-Skeini* judgment constitutes reference judgment which is clarifying the position of the Court with respect to the issue in question. Furthermore, Georgia agrees with Romania that the view of the co-rapporteurs in respect of the use of the lower threshold are based on the misconception of the reasoning followed by the ECtHR, because "decisive influence" or "military, economic and political support" are not in themselves used as thresholds, **but as means of proof**; the test for jurisdiction itself is not any lower, but remains stringent. Thus, Georgia considers that the assessment presented in the text in this respect appears to be quite subjective. Furthermore, the jurisprudence of the Court has not been fully reflected in the text and has been presented in a selective manner. For example, very important parts of *Catan* and *Ilascu* judgments are not reflected in the draft sufficiently.

- ***Tests for jurisdiction and State responsibility***

As Romania submitted, it has been clearly elaborated in the Court's jurisprudence that the test for the existence of jurisdiction is different from the test for the establishment of State responsibility and the exercise of jurisdiction is precondition which should be ascertained prior to assessing whether a State is responsible for breaches of the Convention. In particular, the Court found in the case of *Ilascu* the following:

> *"It follows from Article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their 'jurisdiction'.*

> *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."* [11]

As also noted by Romania, the Court also addressed the issue of existence of different thresholds for the establishment of jurisdiction and responsibility respectively, in the context of assessing the arguments put forward by the Russian Federation in the case of *Catan and Others v. Moldova and Russia.* The relevant paragraph of the judgment reads as follows:

> *"115. The Government of the Russian Federation contend that the Court could only find that Russia was in effective control if it found that the "Government" of the "MRT" could be regarded as an organ of the Russian State in accordance with the approach of the International Court of Justice in the Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro (see paragraph 76 above). The Court recalls that in the judgment relied upon by the Government of the Russian Federation, the International Court of Justice was concerned with determining when the conduct of a person or group of persons could be attributed to a State, so that the State could be held responsible under international law in respect of that conduct. In the instant case, however, the Court is concerned with a different question, namely whether facts complained of by an applicant fell within the jurisdiction of a respondent State within the* ***meaning of Article 1 of the Convention. As the summary of the Court's case-law set out above demonstrates, 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****."* [12]

Hence, the finding of the co-rapporteurs that the Court has conflated these two concepts seems to be not accurate. There is a need to ensure more objective and balanced arguments are presented in reflecting on the Court's case-law.

Moreover, it is Georgia's view that the case-law of the Court is consistent with the international law on State responsibility. Like other states we do not share the conclusion of the co-rapporteurs that "*the case law of the Court demonstrates that the ECtHR has taken rather varied and uneven approach to the rules on attribution reflected in the ARSIWA, in some case following them expressly, whilst in others it appears to have departed from those rules"* and that *"on occasion the Court has sought de facto to create on a case-by case basis its own lex specialis regime of State responsibility under the Convention, whilst claiming at the same time that it follows the rules of general international law"*.

Georgia supports the position of the Governments of Romania and Latvia that while analyzing the Court's jurisprudence the particular regard should be had to the special character of the Convention as a human rights treaty. According to Romania (also shared by Georgia) the Court has not sought to develop a different set of rules on State responsibility to be used as *lex specialis* (as argued by the co-Rapporteurs). Rather, it has taken into account the relevant rules of international law, but applied them within the context of a system of human rights protection.

- The venue and forum to address any potential diverging interpretations of international law is the Court itself

Georgia agrees with the view of Romania that instead of telling the ECtHR in this report how it should act, it "is for the State Parties involved in human rights related proceedings both before the ECHR and before other jurisdictions to present in front of the Court their positions concerning any potential diverging interpretations of international law between the ECHR and other jurisdictions, thus providing the Court in Strasbourg with a better image of international law and

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11 *Ilaşcu and Others v. Moldova and Russia (GC),* application no. 48787/99, judgment of 8 July 2004, § 311.

12 *Catan and Others v. Moldova and Russia (GC),* applications nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 115.

the manner in which various notions are interpreted by other jurisdictions. Such a conduct from the part of State Parties would also help the development of judicial dialogue".

GREECE / GRECE

Preliminary observations on subthemes (ii) and (iii).

As a general observation, we would like to stress the need to choose a neutral approach to the issues under examination. Our group should not be seen as overly criticizing the case law of the Court and should not be seen as prejudging the judgments of the Court on pending cases.

Theme 1, subtheme ii)

As regards drafting, this subtheme deals with State Responsibility. It is suggested that the general subject could be State Responsibility (with an introduction that could be formulated on the basis of paras. 36-38 of the draft), and the two chapters would be: a) the existence of a breach of an obligation of the State – article 1 and the discussion on extraterritorial application would be linked to that, and b) attribution of that wrongful act.

A very useful presentation (and organization) of the Court's case law, including the most recent cases, both on the obligation to respect human rights as well as on the concept of jurisdiction and imputability is to be found on the "Guide on Article 1 of the European Convention on Human Rights" (updated on 31 December 2017).

a) extra-territorial application:

This is indeed one of the most complex subjects, on its own merits but also in connection to upcoming decisions of the Court. In any case, in line with the mandate of the Group, it would be advisable to choose a more neutral approach. Certain phrases should also be reconsidered.

Furthermore:

-Concerning the Bankovic case, with respect to the four categories of extra-territorial jurisdiction highlighted in the draft subtheme (page 6), and in particular (iii), the rest of para. 71 of the Bankovic decision states "through the effective control … or through the consent, invitation or acquiescence of the Government of that territory, exercises *all or some of the public powers* normally to be exercised by that Government". It would be useful to include here the whole paragraph, as it highlights a fifth category.

- This also applies to the Issa case (para. 14 of the draft): the first part of its para. 71 is also interesting ("a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state *but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully in the latter state*").

- Concerning the Jaloud case (para. 22 of the draft), a small correction: the applicant was not the person that "met his death when a vehicle…".

- The Ilascu case is referred to on several occasions in paras 25ff, in connection to the "military, economic, financial and political support" and further cases related to Transnistria; it would seem reasonable to consider elaborating more on it here.

- Paras. 28 –to the end will be, of course, extensively discussed during the next meeting of the Group.

- Overall, and in line with the decision of the Group last September ("to adopt a comparative approach on the question…"), one could consider mentioning relevant case law of other international bodies, and in particular of the ICJ concerning extra-territorial application of human rights obligations (the Advisory Opinion on the Wall, DRC v. Uganda, etc, even the Namibia Advisory Opinion) or the UN Treaty Bodies.

b) Attribution

- A comparative approach (besides ARSIWA) could also be useful here as well.

- The conclusions on whether the Court follows ARSIWA (para. 65, paras.67 and following) need to be further discussed.

Theme 1, subtheme iii)

Firstly, an editing suggestion would be to use references for the Court's judgments and maybe, if this is considered necessary by the Group, giving a few details or a short description about each case mentioned. That could be helpful for the reader who is not an expert to get an idea of what every case was about. This is already done with respect to some cases.

Another editing suggestion would be to include, somewhere before the presentation of the case law, a brief presentation of Article 103 of the UN Charter (or move there paragraph 24 of the "Discussion", elaborating as needed), always with the view to make the report easier to understand by non-experts.

In page 9, where the citation of the Bosphorus judgment is, it is suggested that paragraph 156 of the judgment continues in order to highlight that the Court clearly stated that the presumption based on the "equivalent protection" provided by the organization imposing obligations (in that case the EU) is rebuttable if it is considered that the protection of human rights was "manifestly deficient" ("However, any such presumption can be rebutted if, in the circumstances of a particular case…").

Concerning the conclusions, the discussion within the Group is certain to be very interesting. As a starting point, it could be argued that the Court's jurisprudence is not that uneven, taking into account that a) SC Resolutions authorizing multinational operations use much broader terms than Resolutions imposing economic sanctions, b) the first cases in both chapters

(Behrami and Saramati, on the one hand, Bosphorus, on the other) differ clearly from the following (Al-Jedda / Nada and Al Dulimi, respectively) due to their specificities (the first case was on jurisdiction, in the second the respondent was an EU Member State, c) the Court deals with the primacy rule of Article 103 of the Charter going from the presumption that the Security Council acts without intention to violate human rights to the "systemic harmonization" of the obligations approach.

LATVIA / LETTONIE

Comment by Latvia on draft chapters of Theme 1 covering subthemes ii) and iii)

Latvia thanks co-Rapporteurs and Contributors for their work on the draft chapters. In our opinion, the texts form a very good basis for future discussions.

At this stage, Latvia wishes to submit several general comments on the texts presented.

Regarding draft chapters on both subthemes:

1. Latvia supports the approach taken with respect to the structure of the text, namely, to commence with an introductory part setting out the context and international law background, and then in the subsequent text separate description of the Court's case law from discussion and comments on the Court's approach to the issues examined in the respective chapters.

2. Latvia considers that the descriptive parts of the text should avoid creating an impression that the DH-SYSC-II attempts to revisit Court's conclusions in the cases referred to in the text. For this purpose, the descriptive parts should avoid value statements, which are more suitable for the discussion part.

3. The draft chapters currently present the case law of the Court mostly from the perspective of the States, which is in line with the intergovernmental nature of the DH-SYSC-II. However, the Court has held that the Convention has a special character "as a treaty for the collective enforcement of human rights and fundamental freedoms" (*Ireland v. the United Kingdom*, judgment of 18 January 1978, § 239), and that for this reason "any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (*Soering v. the United Kingdom*, judgment of 7 July 1989, § 87). Latvia considers that these conclusions of the Court should be reflected in the discussion parts of the draft chapters to ensure to the extent possible balanced representation of various arguments.

Regarding draft chapter covering subtheme ii):

4. Latvia considers that the work of DH-SYSC-II and the final report will be of interest to many, lawyers and non-lawyers alike. In order to assist the reader, introductory part in the **draft chapter A. "Extra-territorial Application of the ECHR" of subtheme ii)** might benefit from additional elements addressing concept of jurisdiction in international law. In other words, the introductory part could contain a mostly factual description of the link between State's jurisdiction and State's sovereignty, the forms of jurisdiction, as well as the basis for establishing jurisdiction. In such a way, this part would set a background and provide context for the subsequent description of the Court's case law on Article 1 of the Convention, and for the discussion on the extraterritorial application of the Convention.

POLAND / POLOGNE

Theme 1, subtheme iii)

The Relationship of the ECHR and UN Security Council Resolutions

1. 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 the 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[13] and the European Convention on Human Rights.[14]

[13] 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.

[14] See the preamble to the Convention:
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;

1. The Security Council

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

> 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)

3. 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. In respect of the latter decisions of the Council are legally binding (Article 25) and Council has the power determine whether action is to be taken by all or some member States of the UN (Article 48). Under Article 103 in case of any conflict between obligations arising on the member States under the Charter and obligations arising under other international agreements, Charter obligations should prevail.

4. 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 expressly provides for the Council (a) to use military force and (b) to impose economic sanctions, 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 Charter. Thus, for example, the Council has used these powers 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 security and a unique source of legitimacy.[15]

Comment [KH1]: It is unclear – what kind of legitimacy?

(a)The Security Council and the use of military force

5. 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). The reality has been however that States have not been willing to enter into such agreements with the UN. 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". Such authorisations may be given to member States acting directly on behalf of the Council in so–called "coalitions of the willing" or it may be to a force either established by the UN itself or another organisation (eg NATO, the African Union etc).

[15] 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 Einsiedal, D Malone, and B Stagno Ugarte (ed.s) *The UN Security Council in the 21st Century* (2016) pp771-792; M. Mattheson *Council Unbound* (2006). Other works have focused primarily on the legal limitations 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).

(b) The Security Council and economic sanctions

6. 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~~s~~ can include but are not limited to economic sanctions. There is now a considerable body of Council practice where sanctions have been imposed by the Council, which has been developed largely in the post-Cold War period. Of particular note has been the Council's efforts to minimise the impact of sanctions on individuals who have little to do with the threat to the peace in question through the use of targeted sanctions against individuals identified for their involvement/ ability to influence the situation. It should be noted that purpose of sanctions is to induce the individual to change his or her behaviour and to comply with decisions of the Council, rather than punishment.

2. The caselaw of the European Court of Human rights and Security Council resolutions

(a) the use of military force

7. 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 Convention is applicable has turned on the Court's interpretation of relevant Security Council resolutions.

8. The first was the Grand Chamber decision in the *Behrami* case, concerning claims against France and Norway, in relation to their participation in KFOR in Kosovo in 2000-2002. 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

Comment [KH2]: We suggest to give the full names if the abbreviation occurs for the first time in the text.

Grand Chamber made the following observations about the relationship between the Convention and the UN acting under Chapter VII of its Charter:

> 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

> 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.

9. In the contrasting case of *Al Jedda*, the Court took a rather narrower approach to the interpretation of a UN Chapter VII mandate in the circumstances 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.

11. 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. In contrast to its approach in *Behrami* the Court held as follows:

Comment [KH3]: It would be also advisable to refer to the important case of Stichting Mothers of Srebrenica and Others v. the Netherlands, in particular its paragraph 154.

> 1. 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 subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and 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 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. (Emphasis added)

12. In line with this approach, the Court 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)

(b) Economic sanctions

13. The starting point for any discussion of the interaction of UN sanctions and the ECHR is the *Bosphorus* case. 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 Convention, rather than a careful examination of the relationship of UN law and the Convention. 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 protection" of fundamental rights to the ECHR, the Contracting Party will not incur liability under the Convention.

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.

14. 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* the applicant was subject to a travel ban imposed on him pursuant to what the then sanctions regime against the Taliban and Al Qaeda, under 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 to have been denied access to healthcare infringing his rights under Article 8 and without a remedy in Swiss law contrary to Article 13.

15. 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 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 Court was on national implementation measures, rather than seeking to resolve an apparent conflict between the requirements of the UNSCRs and the ECHR. The Court 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 Court 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 Court 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 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.

16. The Court then considered the requirement of 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 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 (see, mutatis mutandis, Lord Hope, in the main part of the Ahmed and others judgment, §§ 81-82, paragraph 96 above).

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.

17. Most recently, the Court has considered the interaction of the ECHR and UN sanctions in *Al Dulimi v Switzerland*. The case concerned targeted sanctions against named persons associated the former regime in Iraq, 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 whether the applicants should have been included on the list was a question exclusively for the Security Council, and therefore outside the jurisdiction of the Federal Court

18. A Chamber (Second Section) of the Court, 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. The Second Chamber again stressed 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. Before reaching its decision on the merits, the majority considered whether the delisting process of the UN Security Council offered "equivalent protection" to the protections of the Convention, concluding that they did not. And when it came to the merits the majority found that until there was an effective and independent judicial review process available at the UN level, it was essential that listed persons should be able to bring a judicial review of measures taken pursuant to the sanctions regime. The non-

availability of judicial review of the measures in Switzerland resulted in a disproportionate interference with the applicants' of access to a court under Article 6, and there was therefore a violation of the Convention. It might be added that there were strong dissenting and partly dissenting opinions.

19. Subsequently the Grand Chamber had little difficulty in agreeing with the Chamber on the question of admissibility *ratione personae*. On the merits, the Grand Chamber certainly sought to set out the international legal basis of the sanctions measures, and accepted that Article 103 of the Charter was one of the "basic elements of the current system of international law". However the Court then considered whether there was in fact a conflict between the Convention and the requirements of the relevant Security Council resolution. The Court'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, § 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.

20. The Court noted the seriousness of the consequences for the listed persons and the importance of the Convention 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

Comment [KH4]: In our opinion it would be worth commenting and analysing the ECtHR's judgment in more detail and to consider other aspects (which had led to a substantive discussion in the legal doctrine), for instance, how it influences the State-Parties' implementation of the Security Council's resolutions, the impact of the Court's findings vs the powers of the Security Council or the issues the domestic courts might be confronted with when trying to reconcile the obligations under the SC's resolutions and the Court's jurisprudence. The above-mentioned judgment could be also compared to the position taken by the Court more recently in the case of Stichting Mothers of Srebrenica and Others v. the Netherlands.

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.

3. Discussion:

21. The above survey of the Court's decisions demonstrates that the interaction of the Convention and binding decisions of the UN Security Council raises complex questions in relation to which the Court has taken a variety of different approaches. It is also notable that in a number of cases individual Judges have attached separate and dissenting Opinions, often rather trenchantly expressed. As a result the body jurisprudence on these issues is somewhat uneven, and suggests that the Court as a whole has yet to settle on a legal theory or explanation of these interactions that is fully satisfying.

22. In some cases, notably for example in the quotation above from the *Behrami* case, the Court 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 a reciting relevant provisions of the UN Charter, this kind of systemic understanding of Security Council is less apparent in much of the subsequent caselaw. That may in part be explained by the fact that the Court has sought in those subsequent cases to focus its enquiry on the decisions at the national level in implementing the Security Council

decisions, rather than the Council decisions per se. 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 divergence of legal obligations.

23. In the words of one leading author writing on the interpretation of Security Council resolutions:

> "Two central themes are, first, the need, when interpreting SCRs, to have particular regard to the background, both the overall political background and the background of related Council action; and, second, the need to understand the role of the Council under the Charter of the United Nations, as well as its working methods and the way SCRs are drafted."[16]

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.

24. 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

[16] M Wood, "The Interpretation of Security Council Resolutions" Max Planck Yearbook of UN Law (1998) vol 2, pp. 73-95, at p.74

established in the jurisprudence of the International Court of Justice that binding decisions of the Security Council are obligations arising under the Charter for these purposes.[17]

25. In some of its caselaw, rather than applying Article 103 to give precedence to obligations under a UNSCR, the Court seeks to avoid accepting that a conflict has arisen between a Convention right and an obligation arising under the UN Charter. In this respect the Court has adopted a presumption that Security Council resolutions should be interpreted so as to avoid finding any incompatibility with human rights under the Convention. If the proper goal of the interpreter is to reflect the intentions of the Council it is not clear what basis such a presumption has. If, as the Court's caselaw appears to suggest, its effect is that States' compliance with a SCR is thereby conditioned by observance of Convention rights, even where that affects the ability of States to comply with a clear requirement of the SCR, then it will impair the Security Council's discretion to take effective measure to maintain peace and security. Such a view takes 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. It hardly needs saying that situations of his type that occur at the national level, are likely to entitle a State to derogate from many of its ordinary human rights obligations.

26. 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 Court has recognised in the *Behrami* decision (see above), in the absence of agreements under Article 43 of the Charter enabling the Council itself to take enforcement action, the practice of authorising the use of force has become a prominent feature in the Council's practice. To take too a narrow view of the word "obligations" in Article 103, so as to deny primacy to a Chapter VII authorisation of

[17] See Lockerbie case Provisional Measures Order (1992) ICJ Rep 4, at p15:

> "…39. Whereas both Libya and the United Kingdom, 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;"

enforcement action by States simply because there is no mandatory obligation on States to participate in such action, risks undermining the ability of the Council to carry out its responsibility under the Charter.[18] 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.

27. In relation to UN sanctions, the Court 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,* 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.

28. A national judicial review of certain procedural or formal requirements, for example in relation to the identity of listed individual 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 in such a case 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 whose was listed as a requirement of a Security Council decision.

[18] See for example Frowein and Krisch ... also Lord Bingham in the AL Jedda case in the House of Lords

29. On a positive note, it is important to note that the Security Council is best-placed to ensure that ~~that~~ its decisions are soundly based and that appropriate process are in place for listing and delisting. Recent years have seen significant developments in the Council's practice in both respects, 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.

Theme 1, subtheme ii)

STATE RESPONSIBILITY AND EXTRATERRITORIAL APPLICATION OF THE CONVENTION

This contribution was prepared at the request of the drafting group II on the follow-up to the CDDH report on the longer-term future of the system of the Convention (DH-SYSC-II). The co-rapporteurs are grateful to the contributors for their valuable input.

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(iii) Cases concerning attribution in situations in which one or more states and an

international organization were involved in the underlying facts.

Discussion

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

Introduction

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

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

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

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

5. The term "jurisdiction" is not elaborated further by the Convention. Interpretation of the term is one of the most pressing and still unresolved challenges both for the ECtHR and the States Parties to the Convention. The landmark ECtHR decision in the *Banković*[19] *case* affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial". Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR contracting parties' obligations may potentially extend beyond their territory.

6. In the case of *Cyprus v. Turkey*[20] the Court reiterated that:

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

7. From the outset, it should be noted that under Article 1 of the Convention the term "jurisdiction" relates to situations in which an individual enjoys Convention rights and the relevant State Party has correlative Convention obligations with respect to these rights. As the Court noted, the exercise of jurisdiction by a Contracting State is a necessary condition for that State to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.[21]

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

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

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

The case law

Bankovic

8. In its case law the ECtHR has affirmed that the state's jurisdiction as referred to by Article 1 is "primarily territorial". In its leading *Banković* decision the Court found that "State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts like the case in question".[22] The Court relied also on the *travaux préparatoires* of the Convention refusing to apply to Article 1 its own concept of the interpretation of the Convention as a "living instrument". The Court also refused to refer to the practice of other international human rights bodies.

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

10. The ECtHR noted four categories of extraterritorial jurisdiction in its caselaw, each of which should be "exceptional and require special justification"[23]:

> (i) Extradition or expulsion cases involving the extradition or expulsion of an individual from a Member State's territory which give rise to concerns about possible mistreatment or death in the receiving country under Articles 2 or 3 or, in extreme cases, the conditions of detention or trial under Articles 5 or 6;
>
> (ii) Extraterritorial effects cases where the acts of State authorities produced effects or were performed outside their own territory (based on the Drozd and

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

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

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*[24] and *Cyprus v. Turkey*[25] cases stemming from the occupation of the Northern Cyprus by the Turkish military forces); and

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

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11. In this context it is recalled that in *Banković*, which concerned the bombing by NATO air forces of the objects in the territory of Yugoslavia (which at the material time was not a party to the Convention), the Court made it clear that "the Convention is a multilateral treaty operating …in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States" and the Federal Republic of Yugoslavia "clearly does not fall within this legal space" not being a signatory state of the Convention. Furthermore, the Court insisted that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory was one that, but for the specific circumstances, would normally be covered by the Convention" ('*espace juridique*' of the Convention).[26]

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12. Finally, the Court held that "the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and

[24] ECtHR, Loizidou v. Turkey [GC], 18 December 1996, § 62, Reports 1996-VI.
[25] ECtHR, Cyprus v. Turkey, 10 May 2001, Reports of Judgments and Decisions 2001-IV.
[26] Banković and Others v. Belgium and Others, cited above, para. 80

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"[27]

The caselaw leading to *Al Skeini*

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

14. In its decision in *Issa* dealing with the alleged killings of Iraqi shepherds by Turkish soldiers, the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[28] The Court reached that conclusion relying on the very same decision of the Human Right Committee that it refused to apply in *Banković* case.

15. In its decision in *Pad and others v. Turkey*[29], the Court dealt with the applications of Iranian nationals that concerned death of their relatives killed by a Turkish military helicopter

27 Ibid, para 75
28 ECtHR, Issa v. Turkey, Judgment, App. no. 31821/96 16 Nov. 2004
29 ECtHR, Pad and others v. Turkey (dec.), 28 June 2007

near the Turkish border. Following its reasoning in the *Issa* judgment the Court held that Turkey could potentially be liable under the personal model of jurisdiction in a clear departure from the *Banković* decision and despite striking resemblance of factual circumstances with the *Banković* case.

16. In its *Al-Skeini* judgment[30] the Grand Chamber sought to elaborate further on the concept of the extraterritorial jurisdiction under the Convention. The case concerned the applications of six Iraqi nationals brought in respect of actions of UK forces in Iraq in 2003, when the latter were seeking to establish security and support civil administration in and around Basra. On the issue of "jurisdiction" for the purposes of Article 1, the Court drew a number of significant conclusions implying that Article 1 could also be the subject of an evolutive interpretation by the Court. However, in doing so, the Court purported not to reverse its reasoning in the *Banković* decision. On the contrary, the Court reiterated the approach it had set out in *Banković* that extraterritorial jurisdiction shall be exceptional and justified by general international law.

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

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

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

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

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

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

The Court described its personal model of jurisdiction as the "exercise of physical power and control" and hence of jurisdiction of the State through its agents outside its territory "over the person in question". The Court held that "the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".[31]

(b) Cases of <u>effective control over an area</u> (the spatial model of jurisdiction)

Describing the spatial model of jurisdiction, the Court held that this "occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory." The Court added that "where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration". It went further by holding that

> "…The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see Cyprus v. Turkey, cited above, §§ 76-77).

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

> 139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see Loizidou (merits), cited above, §§ 16 and 56, and Ilaşcu and Others, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see Ilaşcu and Others, cited above, §§ 388-94)."

The Court distinguished Article 56 of the Convention regarding unilateral declarations of the States on the applicability of the Convention to their dependent territories from the situation of "effective control" exercised by the State over a part of the territory of another State, holding that the effective control principle of jurisdiction does not replace the system of declarations under Article 56.[32]

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

The caselaw since *Al-Skeini*

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

20. In its judgment in *Hirsi Jamaa and Others v. Italy*, the Court concluded that the

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

applicants "were under the continuous and exclusive de jure and de facto control of the Italian authorities."[33] The Court based its finding that Italy had *de jure* control on the fact that the applicants were brought on board naval vessels flying the Italian flag. It observed that by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This basis for finding jurisdiction was not part of the categories referred to by the Court in its *Al-Skeini* judgment.[34]

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

> "… met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its "jurisdiction" within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint."[35]

23. Whilst not entirely clear, this finding may suggest that the Court was applying the "State agent authority" test. If so, it is unclear what role the existence of the checkpoint played. It has been suggested by commentators that this was intended as factor limiting the application

[33] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 81, ECHR 2012.
[34] Although the Court did refer to it in its decision in *Banković and Others v. Belgium and Others*.
[35] *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, ECHR 2014.

of the "State agent authority" test,[36] but the Court does not make clear whether this was indeed the intention and if so, how the limitation operates.

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

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

> "106. Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration…. The controlling

[36] See e.g. A. Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility *in Jaloud v. Netherlands*: Old Problems, New Solutions?', (2014) 53 *The Military Law and the Law of War Review*, 287.

State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.

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

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

26. In a series of further cases arising from the situation in Transdniestria the Court, basing itself on the findings it made in Ilascu in 2004 (see paras 45ff below) and without further inquiry into the circumstances of Russian involvement, has held the Russian Federation

responsible for all acts of the "MRT", including unlawful detentions, poor medical treatment in prisons and even confiscation of agricultural produce by MTR customs officials.[37]

27. Similarly in cases relating to Nagorno-Karabakh such as *Chiragov v. Armenia*[38] the Court appears to have diluted its criteria of effective control by adopting a rather broad and unspecific criterion of "military and economic support" in place of the relatively undisputable factor of mass military presence.

Discussion

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

29. Secondly the finding in Bankovic on the Convention's vocation as regional instrument operating within the "espace juridique" of the territories of the Contracting States accorded with the primary territorial approach to "jurisdiction" and the scheme of the Convention

[37] See *Soyma v Moldova, Russia and Ukraine* No. 1203/05, 30 May 2017; *Vardanean v Moldova and Russia* No. 22200/10, 30 May 2017; *Apcov v. Moldova and Russia* No. 13463/07, 30 May 2017; *Eriomenco v Moldova and Russia* No. 42224/11, 9 May 2017; *Paduret v. Moldova and Russia* No.26626/11, 9 May 2017.
[38] ECtHR, *Chiragov and Others v. Armenia*, no. 13216/05

(including Art 56). Likewise the Court's finding that Article 1 required that the rights under the Convention should be guaranteed as a whole, rather than divided and tailored can be considered as seeking to ensure the coherence and integrity of the Convention system.

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

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

result of the "dividing and tailoring" of the Convention in these circumstances is likely to do increase the legal uncertainty, rather than provide effective protection of Convention rights.

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

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

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

34. Whilst the relationship between international humanitarian law and human rights will be considered in greater depth elsewhere, it is striking that threshold for the application of the

law of occupation (which in some respects sets out a less onerous set of obligations on an occupying power than human rights law) appears to be set higher than the threshold for the application of the Convention. This is particularly so in the case where the Court purports to dilute the standard of "effective control" to issues relating to non-military factors such as political and economic influence. In the words of leading one commentator that "in its post *Al-Skeini* trend the Court is now likely to find Article 1 jurisdiction and is being increasingly generous on threshold questions of the Convention's extraterritorial application".[39]

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

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

B. State Responsibility in International Law

Comment [KH5]: We suggest starting the document with presenting the general rules of state responsibility under international law, and only then to pass to the Court's case-law.

Introduction

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

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

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

38. 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"[40]).

39. For the purposes of the current consideration of "jurisdiction" for the purposes of Article 1 of the Convention, the primary issue of State responsibility that arises is that of "attribution". The ECHR does not contain any provision referring to criteria for the attribution of conduct to a High Contracting Party. There is thus no *lex specialis* in the Convention in relation to such attribution (indeed, issues of attribution are often taken as part of the consideration of "jurisdiction" for the purposes of Article 1). Therefore, it would seem to be a logical step for the Court to turn to ARSIWA as the *lex generalis*. However it must be remembered that those Articles are concerned only with the responsibility of States towards other States and international organizations. Article 33 (2) of the ARSIWA makes clear that the Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States. In contrast, the ECtHR primarily considers cases on individual applications. One may thus ask whether Articles developed for application between States are the appropriate framework. The ECtHR has suggested that the answer to that question is broadly "yes", as it has frequently referred to the ARSIWA.

Caselaw

41. In its caselaw, the ECtHR generally does not explicitly address the question of the attribution of the conduct that is alleged to have violated the ECHR to the respondent State. However in a relatively small number of cases (which very largely relate to extraterritorial jurisdiction) the issue of attribution has been addressed, usually when a Respondent State has

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

raised it, although on occasion the Court has inquired into attribution of its own accord.[41]

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

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

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

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

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

43. In *Loizidou v. Turkey*, the Court dealt with the question of whether the applicant fell within the jurisdiction of Turkey in the sense of Article 1 ECHR in its judgment on preliminary objections. The question whether the matters complained of were imputable to Turkey and gave rise to that State's responsibility was determined by the Court at the merits phase.[42] The Court has described the relevant standard for determining attribution as follows:

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

[41] See e.g. *Stephens v. Malta (no. 1)*, no. 11956/07, § 45, 21 April 2004.
[42] *Loizidou v. Turkey*, *supra* note 50, § 64.

(see the above-mentioned Loizidou judgment (preliminary objections), ibid.)."[43]

44. In assessing the evidence with a view to determining whether the continuous denial of access to the applicant's property by the authorities of the "TRNC" and the ensuing loss of all control over it was imputable to Turkey, the ECtHR held:

> "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (see paragraph 16 above) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" (see paragraph 52 above). Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1)."[44]

45. In the case of *Ilaşcu and others v. Moldova and Russia*, the Court was concerned with conduct of the "Moldovan Republic of Transdienstria" (MRT) allegedly violating the ECHR. Much of the judgment was devoted to a discussion of the relationship between the MRT and the Russian Federation, both before and after the moment of ratification of the ECHR by the latter.

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

> "the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of

[43] *Loizidou v. Turkey*, *supra* note *13* § 52
[44] Ibid., § 56.

Transdniestria, which is part of the territory of the Republic of Moldova.

The Court also notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime (see paragraphs 111-61 above), thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova."[45]

47. With respect to the period after ratification of the ECHR by the Russian Federation, the Court held:

"392. All of the above proves that the "MRT", set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

393. That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.

Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.

394. In conclusion, the applicants therefore come within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of."

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

48. In its discussion of State responsibility in *Loizidou* the Court appears to have found that all actions of the TRNC were attributable to Turkey. If this is the correct reading, this would constitute a fairly straightforward application by the Court of the principle of attribution set out in Article 8 ARSIWA, dealing with conduct of a person or a group of persons directed or controlled by a State. Indeed, the ILC commentary to this article refers to the Loizidou judgment in a footnote in its commentary to article 8.[46]

49. In *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. It has been argued that the Court conflated the two.[47] With respect to the issue of attribution, it does not appear that the Court considered the MRT as an organ of the Russian Federation. As a consequence, article 8 ARSIWA was the relevant principle of attribution. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a significantly lower threshold than, the "direction or control" criterion used by the ILC.[48]

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

[46] ILC, Draft Articles on State for Internationally Wrongful Acts, with commentaries 2001 YILC, Vol. II (Part two).The footnote [160] states: "The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by […] the European Court of Human Rights: […] Loizidou v. Turkey, Merits, Eur. Court H.R., Reports, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310, p. 23, para. 62 (1995)."
[47] See *Ilaşcu and others v. Moldova and Russia, supra* note *70*, dissenting Opinion by Judge Kovler.
[48] Se also in this respect the findings of the International Court of Justice in *Nicaragua v. USA* [1986] ICJ Rep. 14, at pp 62 and 64-5, paras 109 and 115; and also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep. 42, at pp. 207-211, paras 398-407

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

51. Other examples include the case of *Rantsev v. Cyprus and Russia*[49], and *Stojkovic v. France and Belgium.*[50] The approach of the Court in those cases, in which it was clear on whose behalf particular persons or entities were acting, is consistent with the principle of independent responsibility that underlies the ARSIWA.[51]

52. In a number of other cases, the ECtHR was confronted with conduct by a State organ that had been placed at the disposal of another State. In these cases it was not clear from the outset to which State conduct of that organ must be attributed. Illustrative of these cases is the Court's judgment in *Drozd and Janousek v France and Spain.* At issue in this case was the attribution of the conduct of French and Spanish judges carrying out judicial functions in Andorra. On this point, the Court accepted the arguments of the respondent Governments. It held that:

> "Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not

[49] *Rantsev v Cyprus and Russia*, no. 25965/04, ECHR 2010.
[50] *Stojkovic v France and Belgium*, no. 25303/08, 27 October 2011.
[51] See M. Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights', (2012) 04 *ACIL Research Paper (SHARES Series)*, at 18.

> 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."[52]

53. In a more controversial category of cases, the ECtHR has attributed the conduct of one State to another. Thus in the case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, the applicant alleged, in particular, that he had been subjected to a secret rendition operation, namely that agents of the respondent State had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated until he was returned to Germany via Albania.

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

> "… the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, § 318, ECHR 2004-VII)."[53]

55. It also held that the Former Yugoslav Republic of Macedonia must be considered directly responsible for ill-treatment by the US in the respondent State, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary

[52] Ibid., § 96.
[53] Ibid., § 206.

in the circumstances of the case to prevent it from occurring.[54]

56. The Court held the respondent State responsible for the applicant's subsequent detention in Kabul. It referred in this regard to "attribution of responsibility" to that State.[55] It considered that:

> "239. …The Macedonian authorities not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004 (see, mutatis mutandis, Rantsev v. Cyprus and Russia, no. 25965/04, § 207, ECHR 2010).
>
> 240. Having regard to the above, the Court considers that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law (see paragraphs 95 and 100 above). The applicant's "enforced disappearance", although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity (see Varnava and Others, cited above, § 148). In this connection the Court would point out that in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see Ilaşcu and Others, cited above, § 321, and see also paragraph 97 above)."[56]

57. The case of *Al-Nashiri v. Poland* arose from comparable facts. Mr. Al-Nashiri was captured in Dubai, and transferred to the custody of the CIA. He was subsequently transferred

[54] Ibid., § 211.
[55] Ibid., § 215.
[56] *I*bid., § 239-240.

to a CIA 'black site' in Poland where he was subjected to various forms of ill-treatment. After this he was transferred several more times, ultimately ending up in Guantanamo Bay. The Court reiterated that:

> "… in accordance with its settled case-law, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities (see Ilaşcu and Others, cited above, § 318; and El-Masri, cited above, § 206)."[57]

58. As regards the State's responsibility for an applicant's removal from its territory, the Court held that removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination.[58] It explained that:

> "… In so far as any liability under the Convention is or may be incurred, it is liability incurred by the sending Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment or other violations of the Convention (see Soering, cited above, §§ 91 and 113; Mamatkulov and Askarov, cited above, §§ 67 and 90; Othman (Abu Qatada), cited above, § 258; and El-Masri, cited above, §§ 212 and 239)."[59]

59. The Court concluded that Poland, on account of its "acquiescence and connivance" in the US program must be regarded as responsible for the violation of the applicant's rights under Article 3 of the Convention committed on its territory (see paragraph 452 above and *El-Masri*, cited above, §§ 206 and 211). This was so even despite findings that Poland was not directly involved in the interrogations (and, therefore, the torture inflicted in Poland), and that

[57] A*l-Nashiri v. Poland*, no. 28761/11, § 452, 24 July 2014.
[58] Ibid., § 453.
[59] Ibid., § 457.

it was unlikely that the Polish officials witnessed or knew exactly what happened inside the facility, Poland's responsibility was based on having facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring.

60. 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.[60]

61. In the case of *Nasr v. Italy*, the Court was similarly confronted with a case of extraordinary rendition by the US, in this instance from Italy to Egypt. The Government admitted that the US agents were assisted by one carabinieri, but argued that he had been acting in an individual capacity and not on behalf of Italy. For the rest, Italy denied involvement in the impugned conduct.[61]

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

> "la responsabilité de l'État défendeur est engagée au regard de la Convention à raison des actes

[60] Ibid., § 518.
[61] *Nasr and Ghali v. Italy*, no. 44883/09, § 217 – 218, 23 February 2016.

commis sur son territoire par des agents d'un État étranger, avec l'approbation formelle ou tacite de ses autorités (Ilaşcu et autres c. Moldova et Russie [GC], no 48787/99, § 318, CEDH 2004-VII : El Masri, précité, § 206 et Al Nashiri, précité, § 452)."[62]

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

"Aux termes des articles 1 et 3 de la Convention, les autorités italiennes étaient dès lors tenues de prendre les mesures appropriées afin que le requérant, qui relevait de leur juridiction, ne soit pas soumis à des actes de torture ou à des traitements ou peines inhumains et dégradants. Or, tel ne fut pas le cas, et l'État défendeur doit être considéré comme directement responsable de la violation des droits du requérant de ce chef, ses agents s'étant abstenus de prendre les mesures qui auraient été nécessaires dans les circonstances de la cause pour empêcher le traitement litigieux (El Masri, précité, § 211 et Al Nashiri, précité, § 517)."[63]

64. The Court thus appears to have held Italy responsible based on the omissions of its own agents, rather than the conduct of US agents. The Court also appears to have extended this approach to the transfer of Nasr from Italy,[64] and in respect of his detention in Egypt.

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

Comment [KH6]: While fully agreeing with this conclusion, we suggest to stress more strongly that in those cases attribution of conduct under ARSIWA would be very difficult to prove.

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

66. The question of whether particular conduct should be attributed to either a (member)

[62] Ibid., § 241.
[63] Ibid., § 289.
[64] Ibid., § 290.

State or the international organization, or to both, was addressed by the Court in the landmark cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* and *Al-Jedda v. the United Kingdom*. These concerned military operations authorized by the United Nations. These are considered in the section of the report on the relationship of the Convention with binding resolutions of the UN Security Council.

Discussion

67. The case law of the Court demonstrates that the ECtHR has taken rather varied and uneven approach to the rules on attribution reflected in the ARSIWA, in some case following them expressly,[65] whilst in others it appears to have departed from those rules. The latter include cases related to attribution of conduct in situations that would be covered by the rules of customary international law as contained in ARSIWA. In other words, it appears that in these cases the Court departed from general international law on State responsibility. It is interesting to note that in a number of cases in which the ECtHR departed from general international law, it did so despite having referred to specific ARSIWA articles when listing relevant provisions of international law. The citation of the ARSIWA Articles in this context could be understood as the Court suggesting that it would apply them. But in reality, this was not always what the Court actually did. This leads to a reasonable conclusion that on occasion the Court has sought *de facto* to create on a case-by case basis its own *lex specialis* regime of State responsibility under the Convention, whilst claiming at the same time that it follows the rules of general international law.

68. Such an approach could present a number of problems. The current case-law of the Court has developed the Convention to a point that is markedly different from the prevailing

[65] Eg. *Loizidou*

understanding and interpretation of the ECHR at the time when most of the States joined this treaty. This clearly needs careful and sensitive consideration given the consent-based underpinnings of Convention obligations in the international law of treaties. This situation is probably common to the development of the law by a number of international tribunals if we remember that any case law is subject to change, but equally it should be understood that some treaty-regimes are more sensitive than others and may require more diligent analysis.

71. An additional concern may arise where the ECtHR deviates from general international law without doing so in a consistent and coherent manner way.[66] This concern is compounded where explanation of the underlying reasoning for why and how it does so is also absent. This creates uncertainty for the Contracting Parties to the Convention, as they unable to predict the way in which the Court will interpret the rules on attribution in future cases and thus in practice they are left unaware of scope of their obligations under the ECHR (often matters of the greatest political and/or security sensitivity).

Comment [KH7]: Perhaps it would be also desirable to add a part concerning relation of the ECtHR's case-law to the International Court of Justice's jurisprudence on the interpretation of the ARSIWA.

72. Another conclusion that can be drawn from the case law of the ECtHR is that it does not always clearly distinguish between "jurisdiction" the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. The Court has expressly acknowledged that there is a conceptual distinction between the two, most recently in its judgment in the *Jaloud case*.[67] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised

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

jurisdiction in the sense of Article 1 ECHR over the applicant on the other. It has been argued that the Court conflated the two. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a lower threshold than, the "direction or control" criterion used by the ARSIWA.

73. Apparent inconsistencies in the ECtHR's interpretation of "jurisdiction" make it difficult for a High Contracting Party to the ECHR to determine whether the Court will consider a person to be within its jurisdiction. Inconsistent and insufficiently reasoned case law of the ECtHR will result in unpredictability and uncertainty among the States as to how their actions might be qualified by the ECtHR. Providing legal certainty is central to the legitimacy of the ECtHR and the maintenance of its effectiveness and authority as an independent and competent judicial institution, which is authorised to control proper fulfillment of obligations of the States under the Convention and effectively guarantee the rights of those within their jurisdiction.

ROMANIA / ROUMANIE

Theme 1, subtheme ii)

1. Main conclusions of the co-Rapporteurs

The main thrust of the argument of the co-Rapporteurs is that the jurisprudence of the Court is at variance with the international norms governing State responsibility. They argue that "the ECtHR has taken rather varied and uneven approach to the rules of attribution reflected in the ARSIWA [*Articles on State Responsibility for International Wrongful Acts*]"[68] and that in some cases "the Court departed from general international law on State responsibility"[69]. The co-Rapporteurs repeatedly assert that the Court „not always clearly distinguishes" or that it „conflates" issues of jurisdiction and attribution of conduct[70] . They also find fault with the Court because the criteria of "decisive influence" and "surviving by virtue if the military, economic, financial and political support" used by the Court in the context of deciding questions of jurisdiction and State responsibility "appear to depart from, and set a lower threshold that, "the direction or control" criterion used by the ARSIWA"[71].The co-Rapporteurs further state that "the Court has sought *de facto* to create on a case-by case basis its own *lex specialis* regime of State responsibility". The co-Rapporteurs conclude that "the ECtHR deviates from general international law without doing so in a consistent and coherent manner way (*sic*)"[72]; they seem to ask for a radical overhaul of the jurisprudence, warning that "inconsistent and insufficiently reasoned case law of the ECtHR will result in unpredictability and uncertainty among the States as to how their actions might be qualified by the ECtHR"[73].

Romania is not persuaded that such criticism of the Court' case law is warranted, as explained below. Moreover, the report is rather narrative, lacking sufficient arguments that would persuade the conclusion the co-rapporteurs argue for.

2. The Relation between Jurisdiction and State Responsibility in the ECtHR's Caselaw

The interplay between the exercise of jurisdiction within the meaning of Article 1 of the European Convention on Human Rights and respectively the attribution of conduct to a State was analysed by the ECtHR in the *Ilaşcu* case, where the ECtHR found that

> " [*i*]t follows from Article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their 'jurisdiction'.

[68] Draft chapters of Theme 1, subtheme ii) State responsibility and extraterritorial application of the Convention, (*further reffered to as Draft chapters*), para 67
[69] Draft Chapters, para 67
[70] Draft Chapters, para 49 and 72
[71] Draft Chapters, para 49 and 72
[72] Draft Chapters, para 71
[73] Draft Chapters, para 73

> 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. "[74]

Somewhat surprisingly, although this *dictum* sets out the view of the ECtHR on the relationship between the two concepts (jurisdiction and State responsibility), and although it was reaffirmed in subsequent jurisprudence, it is only obliquely alluded to, but not quoted, let alone analysed, in the Draft Chapter.

The findings of the ECtHR quoted above are straightforward: the exercise of jurisdiction is a pre-condition which needs to be ascertained prior to assessing whether a State is responsible for breaches of the Convention. In light of this clear pronouncement, the criticism of the co-Rapporteurs about the Court „conflating" issues of jurisdiction and State responsibility even in the *Ilaşcu* jurisprudence seems misplaced. In effect, the ECtHR has specifically clarified that the test for the existence of jurisprudence is a different one than the test for the establishment of responsibility[75]

Further, the norms of State Responsibility cannot be applied by the ECtHR as such, because the beneficiaries of the rights enshrined in the Convention are not other States, but individuals. Taking into account this feature of the legal framework that it has to apply, the Court is justified in devising its own tests to address issues related to jurisdiction (*this issue is addressed in more detail in Section 5 below*).

3. The Approach of ECtHR in Respect to Jurisdiction. The "Effective Control" Exception

The Court's approach on jurisdiction has been gradually developed over a string of cases (the leading ones being the *Loizidou, Banković* and *Ilaşcu* cases). In accordance with the case law, the jurisdictional competence of Member States to the Convention is in principle territorial, but, in a number of exceptional circumstances, it may operate extraterritorially. Of particular relevance here is the exception related to the situation when a State exercise "effective control" over a particular territory. This exception is perhaps best articulated in the findings of the Court in the *Al-Skeini* judgment, which deserves to be quoted at length:

> (γ) Effective control over an area
>
> 138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (Loizidou (preliminary objections), cited above, § 62; 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). 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

[74] *Ilaşcu and others v. the Republic of Moldova and Russia*, Judgment of 08 July 2004, para 311.
[75] Catan and others v. Moldova and Russsia, Judgement, para 115 (*quoted in extenso below, Section 4*).

> and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights
> (Cyprus v. Turkey, cited above, §§ 76-77).
>
> 139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see Loizidou (merits), cited above, §§ 16 and 56, and Ilaşcu and Others, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see Ilaşcu and Others, cited above, §§ 388-94)."[76]

The ECtHR has thus established that the exercise of effective control over a territory by a Member State triggers its responsibility to guarantee the application of the provisions of the Convention within that area, irrespective of whether the control is exercised directly or through an intermediate entity. . The ECTHR has further consistently held that whether a State exercises effective control may be proved by various indicators – primarily military occupation, but in subsidiary other acts proving extensive influence and control of the State over the subordinate administration. The allegations of the Co-Rapporteurs in respect of the use of a lower threshold are based on a misconception of the reasoning followed by the ECTHR, because "decisive influence" or "military, economic and political support" are not in themselves used as thresholds, but as means of proof; the test for jurisdiction itself is not any lower, but remains stringent.

4. The Use of Different Thresholds to Determine Jurisdiction and respectively State Responsibility

The Co-Rapporteurs argue that international law establishes a "direction and control" criterion as the test which must be met in order to establish whether acts of persons or entities are attributable to a State; they consider that the jurisprudence of the ECtHR departs from this rule.

The test of "direction and control" has arisen in the context of the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case (1986), where the International Court of Justice has found that the conduct of the *contras* rebels was not generally attributable to the United States of America, as their activities were not carried out under the „direction and control" of that State.

However, a survey of jurisprudence and legal doctrine leads to the conclusion that international law does not provide for an universal "direction and control" criterion; rather, distinct criteria were used by international courts in diverse factual contexts and in order to determine the existence of control for different purposes.

In particular, in the *Prosecutor v. Tadic* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia took the view that

[76] *Al Skeini v. the United Kingdom,* Judgment, para 138-139.

> "(…) international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a de facto organ of the State."[77]

It further found that

> „(…) the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[78]

Thus, the Appeals Chamber employed a distinct criterion from "direction and control", namely that of an "overall control" exercised by the Yugoslavian authorities over the Bosnian Serb forces, in order to determine that the conduct of these forces may be attributed to Yugoslavia, and that the armed conflict was ,consequently, an international one.

In an authoritative commentary to the *Articles on State Responsibility for International Wrongful Acts*, a leading author explained the reasoning of the Appeals Chamber as follows:

> „ (…) the legal issues and the factual situation in that case were different from those facing the International Court of Justice in *Military and Paramilitary Activities*. The Tribunal's mandate is directed to issues of individual responsibility, not State responsibility, and the question in this case in that case concerned not responsibility but the applicable rules of international humanitarian law. *In any event it is a matter of 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*" [79] (emphasis added).

Furthermore, in the *Bosnian Genocide* case, the International Court of Justice has, when assessing whether acts of genocide committed at Srebrenica could be attributed to Yugoslavia (a question that it responded in the negative), established that different tests may be used to establish the international character of a conflict and responsibility of States respectively. The ICJ stated that

> " It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict".[80]

The concept of "effective control", employed by the ECtHR, is also used in the context of other human rights conventions. In particular, in respect of the International Pact on Civil and Political Rights, the General Comment No. 31 [80] adopted by the Human Rights Committee on 29 March 2004, during its 18th Session, titled *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* states the following.

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[77] Case IT-94-1, *Prosecutor v. Tadic* (1999) para 137
[78] Ibid, para 145.
[79] James Crawford, "The International Law Commission's Articles on State Responsibility", Cambridge University Press, 2002, p112.
[80] *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgement, para 405

> "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the *power or effective control* of that State Party, even if not situated within the territory of the State Party"[81] (emphasis added).

It is quite clear from the foregoing that international law does not constrain the ECtHR to use a "direction and control" criterion in order to determine whether a State has jurisdiction in accordance with article 1 of the European Convention on Human Rights. Different tests may be developed to decide different points of law and issues that are conceptually different need not be measured by the same yardstick. For the purpose of determining that certain acts or omissions fall within the jurisdiction of a State party to the Convention, the ECtHR is justified in establishing a specific threshold, such as the criterion of "effective control".

In fact, the ECtHR has already had the opportunity to explicitly address the issue of the existence of different thresholds for the establishment of jurisdiction and responsibility respectively, in the context of assessing the arguments put forward by the Government of the Russian Federation in the *Catan* case (arguments which roughly parallel the conclusions reached by the co-Rapporteurs). The Court has found the following:

> 115. The Government of the Russian Federation contend that the Court could only find that Russia was in effective control if it found that the "Government" of the "MRT" could be regarded as an organ of the Russian State in accordance with the approach of the International Court of Justice in the Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro (see paragraph 76 above). The Court recalls that in the judgment relied upon by the Government of the Russian Federation, the International Court of Justice was concerned with determining when the conduct of a person or group of persons could be attributed to a State, so that the State could be held responsible under international law in respect of that conduct. In the instant case, however, the Court is concerned with a different question, namely whether facts complained of by an applicant fell within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. *As the summary of the Court's case-law set out above demonstrates, 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.*[82] (emphasis added).

5. The Application by the ECtHR of the Norms Pertaining to State Responsibility

The international law on State responsibility, as codified in the *Articles on State Responsibility for International Wrongful Acts*, is mainly concerned with a State's conduct towards other States or to the international community as a whole. In the international law doctrine it has been recognized that issues related to the responsibility of States for breaches of rights of individuals have a particular character:

> When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for a breach of an obligation under a treaty concerning the protection of human rights may exist towards all other party to the treaty, but *the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights*.[83] (emphasis added)

[81] Available at http://www.refworld.org/docid/478b26ae2.html
[82] Catan and others v. Moldova and Russsia, Judgement, para 115
[83] James Crawford, op. cit., p. 209

The ECtHR has already examined the manner in which it is required to take into account the rules on State responsibility when assessing issues of jurisdiction, in the *Bankovic* decision, stating that:

> "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 Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part." [84]

When assessing issues of State responsibility, the ECtHR has thus acted in accordance with its role as a human rights Court. The Court has not sought to develop a different set of rules on State responsibility to be used as *lex specialis* (as argued by the co-Rapporteurs). Rather, it has taken into account the relevant rules of international law, but applied them within the context of a system of human rights protection.

6. Conclusion

An overarching aspect which needs to be taken into account, when assessing the Court's case law and the way in which it has been interpreting various institutions of public international law, is the special character of the Convention as a regional human rights treaty for the enforcement of human rights and fundamental freedoms, which, unlike most traditional judicial bodies public international law, allows individuals from all member states to bring complaints against states concerning breaches of human rights.

Furthermore, the ECtHR has also expressed the need to avoid the formation of a vacuum in the system of human rights protection, even in territories that even though they belong to a Contracting Party, are effectively controlled by another Contracting Party[85]

> 136. The Court considers that this issue is to be viewed in the context of its general approach to the exercise of extraterritorial jurisdiction in unrecognised entities. In that context the Court has had regard to the special character of the Convention as an instrument of European public order for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, to "ensure the observance of the engagements undertaken by the High Contracting Parties". It has underlined the need to avoid a vacuum in the system of human rights protection and has thus pursued the aim of ensuring that Convention rights are protected throughout the territory of all Contracting Parties, even on territories effectively controlled by another Contracting Party, for instance through a subordinate local administration (see Cyprus v. Turkey, cited above, § 78).

In conclusion, Romania submits that the current jurisprudence of the ECtHR is consistent with the international law on State responsibility. The test of "effective control" developed in the jurisprudence is a threshold for establishing jurisdiction within the meaning of Article 1 of the Convention, an issue which is conceptually distinct from issues of responsibility of States and acknowledged as such by the ECtHR in its jurisprudence. This test is appropriate to determine whether alleged infringements of human rights fell within the jurisdiction of a State party to the Convention.

[84] *Banković and Others v. Belgium and Others,* Decision as to the admissibility of application no. 52207/99, 12 December 2001, para. 57.
[85] Mozer v. the Republic of Moldova and Russia, Judgment, para. 136.

On a more general note, an essential issue that needs to be clarified with regards to the draft report that shall emerge from the works of the DH-SYSC-II is the overall goal of the present endeavor. As such, one can consider that the future report would seek to analyze the case law of the ECtHR and identify and highlight, when appropriate, those interpretations and approaches that differ (at least in the opinion of the members of the drafting group) from the existing rules and interpretations in public international law. Alternatively, the future report could, in case it identifies substantial discrepancies between the Court's work and current rules of public international law, formulate recommendations and try to correct the Court's discrepancies, in view of bringing about a potential change in the ECtHR's jurisprudence.

Nevertheless, as it is mentioned in the 2015 Report on the Long Term Future of the system of the Convention, and as it has been highlighted in the report of the first meeting of the drafting group, on 20-22 September 2017, the goal of this report should not be to tell the ECtHR how it should act, but to provide an overview of its case law and of any possible points of divergence between it and the general rules of public international law, as well as to indicate some direction in which the methodology of the Court might be developed or specified with the aim to diminish the risk of fragmentation in the international legal order[86].

Consequently, the wording used several times in the draft report does not reflect the idea of the report, namely to provide an overview of the ECtHR's case law and its relation with public international law, as it appears to express judgments over the Court's judgments and their worth (such as at paras. 25 and 53 of the draft chapter of theme 1, sub-theme ii, where the word „controversial" is used to describe the Court's ruling in the case of *Catan and others* or the case of *El-Masri,* or para. 67, where it is alleged that the Court has sought to create its own *lex specialis* when dealing with state responsibility while at the same time claiming to follow the general rules of public international law).

It is important to note, as a possible solution to the threat of diverging interpretations, that the issues identified in the chapter of the draft report concerning the ECtHR's jurisdiction and the issue of state responsibility could be addressed by means of strengthening and expanding the dialogue between the Court and other international judicial bodies, a solution that has already been envisaged in the 2015 Report on the Long Term Future of the Convention System, which espoused the position, also shared by the CDDH, that judicial dialogue among international courts is of the utmost importance.

This type of dialogue can be carried out traditionally by means of reasoning in judicial decisions, and, in addition, can take place though regular encounters the Court and other international jurisdictions. It should be noted that such actions have already taken place and can be further expanded, both in terms of frequency and scope of jurisdictions with which the ECtHR can enter into dialogues (for example, we can so far note the periodic meetings between judges and exchanges of legal staff with the Inter-American Court of Human Rights and the visit of the International Court of Justice to the ECHR in June 2015).
With regards to the issue of judicial dialogue carried out by means of motivated decisions, one cannot stress enough the importance of offering high quality reasoning for its judgments,

[86] Para. 15 of the draft ;eeting report for the 2nd DH-SYSC-II meeting, 20 – 22 September 2017.

which is essential not only for serving as a good basis for the said dialogue but also for preserving the authority of the case law and for helping the execution of judgments, as stated in the 2015 Report on the Long Term Future of the system of the Convention.

Another aspect which needs to be accounted for when discussing possible proposals for dealing with the fragmentation in the international legal order and for enhancing the authority of the Convention system is the need for State Parties to pay attention to the manner in which they submit complaints concerning the respect of the human rights established by the Convention to various international jurisdictions other than the ECHR. By submitting such cases to other international bodies (for example those established under the auspices of the United Nations), the risk of generating different interpretations for similar situations pertaining to breaches of human rights increases significantly, thus leading to a fragmentation of the international legal order.

A possible means of addressing such a risk is for the State Parties involved in human rights related proceedings both before the ECHR and before other jurisdictions to present in front of the Court their positions concerning any potential diverging interpretations of international law between the ECHR and other jurisdictions, thus providing the Court in Strasbourg with a better image of international law and the manner in which various notions are interpreted by other jurisdictions. Such a conduct from the part of State Parties would also help the development of judicial dialogue, as described above.

Theme 1, subtheme iii)

1. General overview

Firstly, an important aspect that can be discerned from the analysis of the Court's case law relevant on the present topic is the importance of taking into account the specific circumstances of each case brought before it which concerns issues pertaining to UNSC resolutions. Such specific circumstances should be taken into account both with regards to the applicant's particular situation (such as it was highlighted in the case of *Nada v. Switzerland*) and in terms of the context in which a UNSC Resolution was adopted (in the case of *Berhami v. France and Norway*) and of its specific content and obligations it imposes on UN Member States, not least with regards to any potential infringement the UNSC Resolution may cause on human rights (such as in the *Al Jedda v. the UK case*).

As such, it is important to stress the importance of ECtHR judgments providing a careful appreciation of the legal underpinnings and of the context of the work of the Security Council in discharging of its primary responsibility for the maintenance of international peace and security. Such analysis should include the specific circumstances in which the UN has acted in each case when a UNSC Resolution makes the object of an ECtHR case, and an analysis of the obligations imposed on States by the said resolution.

In this context, it is always important and beneficial that, when the Court interprets and/or draws presumptions concerning UNSC Resolutions, it provides a detailed and thorough analysis of the arguments[87] that have led it to arrive at its conclusions, as it has been already mentioned above.

2. Possible responses and conclusions

One potential means of addressing potential risks in terms of or the creation of a conflict between States' obligations under the UN and the ECtHR respectively, or the potential risk of divergence between the Court's case law and that of other international judicial bodies, which is equally relevant for this topic as it is for the issues of state responsibility and jurisdiction, mentioned above, would be to resort to establishing a (judicial) dialogue[88] with relevant UN bodies, including the recently established UN Focal Point for assessing delisting requests or the competent UN Ombudsperson.

Furthermore, one could also look at the recent evolutions at UN level in the area of sanctions affecting individuals (e.g. travel bans and asset freezes), such as the creation of a Focal Point and of an Ombudsperson, as an illustration the growing importance of ensuring the respect of human rights at the UNSC level, mirroring the ECtHR's own view and concerns on the need for a review mechanism in the field of sanction affecting individuals.

[87] Judicial reasoning is an important aspect in carrying out judicial dialogue between the ECtHR and other international judicial bodies. Judicial dialogue is a solution already envisaged by the 2015 Report on the Long Term Future of the system of the Convention in order to ensure consistency between States' commitments under the Convention and under other treaties and international customary law (para. 189).
[88] Idem, para. 189.

OTHER COMMENTS / AUTRES COMMENTAIRES

Mr Anatoly KOVLER (Russian Federation), Contributor for subtheme iv) on the interaction between international humanitarian law and the European Convention on Human Rights /
M. Anatoly KOVLER (Fédération de Russie), Contributeur pour le sous-thème iv) sur l'interaction entre le droit international humanitaire et la Convention européenne des droits de l'homme

Theme 1, subtheme ii)

The draft on State responsibility and extraterritorial application of the Convention is written in a very clear manner. The case- law of the Court is largely represented. It permits to analyse the evolution of the Court's positions through the time.

There is a clear contradiction between the Court's assessment in Bancovic that the State's jurisdiction is "primarily territorial" and the constant case- law where the jurisdiction is often"primarily" extra- territorial (from Loizidou to Al- Skeini and after), when "an exception" becomes a rule ....

I can not but share the Authors' conclusions expressed on pages 18, 35-37 concerning an apparent inconsistencies in the ECtHR interpretation of "jurisdiction" and "State responsibility". The observations of judges Petiti ans other dissenting judges in Loizidou are still relevant.Thus is can be recommended to the Court to be more attentive towards the The International Law Commission's Draft articles on Responsibility of States for International Wrongful Acts adopted in 2001.

Thème 1, sous-thème iii)

L'interaction entre les résolutions du Conseil de Sécurité et la Convention européenne est un terrain peu exploité en comparaison avec la juridiction territoriale ou extra- territoriale des États parties de la Convention. Néanmoins les Auteurs ont réussi d'analyser au fond le problème en "exploitant" au maximum les arrêts et décisions de la Cour Européenne.

Les auteurs à juste titre ont dégagé dans la jurisprudence de la Cour une tendance à éviter toute incompatibilité entre les résolutions parfois rigoureuses du Conseil de Sécurité et le souci de protéger les droits de l'homme (l'affaire Nada en est un exemple éclatant).Vu la variété d' approches différentes de la Cour aux questions complexes qui s' y posent et le fait que les juges ont eux- mêmes joint des opinions individuelles et divergentes , les Auteurs ont maintes raisons de suggérer que "la Cour dans son ensemble doit encore s' accorder sur une théorie ou un raisonnement juridique pleinement satisfaisant pour ces interactions" (p.16, point 21)

Une autre suggestion mérite d'être pris en considération : la désignation d'un médiateur indépendant et impartial dans le cas des sanctions envers des individus qui sont l'objet de listage. (p.19-20)