DH-SYSC-II(2019)42rev

17/09/2019*

STEERING COMMITTEE FOR HUMAN RIGHTS /

COMITÉ 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 /

COMITÉ D'EXPERTS SUR LE SYSTÈME DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

(DH-SYSC)

———————

DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER /

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

(DH-SYSC-II)

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Comments on the Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, in view of the 7th DH-SYSC-II meeting /

Commentaires sur l'Avant-projet de Rapport du CDDH sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international, en vue de la 7e réunion du DH-SYSC-II

* This document, originally published on 29 August 2019, was revised to include comments by the Republic of Moldova. /
Ce document, initialement publié le 29 août 2019, a été révisé pour inclure les commentaires de la République de Moldova.

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Introduction

1. In accordance with the revised planning of the work of the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II),[1] the Secretariat compiled the chapters of the future *CDDH report on the place of the European Convention on Human Rights in the European and international legal order* into one preliminary draft Report with an executive summary, an introduction and a conclusion (document DH-SYSC-II(2019)41).

2. This preliminary draft Report was sent to the experts of the DH-SYSC-II in July 2019. They were invited to send their written comments on the text by 21 August 2019. In so far as the text has already been provisionally adopted by the Group and/or the CDDH, only written comments on the form of the text or regarding updates of the case-law were expected.[2] The present compilation contains these comments.

* * *

Introduction

1. Conformément au planning révisé des travaux 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)[3], le Secrétariat a compilé les chapitres du futur *Rapport du CDDH sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international* en un avant-projet de Rapport avec un résumé, une introduction et une conclusion (document DH-SYSC-II(2019)41).

2. Cet avant-projet de Rapport a été envoyé aux experts du DH-SYSC-II en juillet 2019. Ils ont été invités à envoyer leurs commentaires écrits sur le texte jusqu'au 21 août 2019. Pour ce qui est du texte provisoirement adopté par le Groupe et/ou le CDDH, seuls des commentaires écrits sur la forme ou concernant des mises à jour de la jurisprudence étaient attendus.[4] La présente compilation contient ces commentaires.

[1] See the Revised planning of the work of the DH-SYSC-II as adopted in the 6th DH-SYSC-II meeting, document DH-SYSC-II(2019)R6, §§ 9-10 and Appendix III.
[2] See document DH-SYSC-II(2019)R6, Appendix III, footnote 8.
[3] Voir le Planning révisé des travaux du DH-SYSC-II tel qu'adopté lors de la 6e réunion du DH-SYSC-II, document DH-SYSC-II(2019)R6, §§ 9-10 et Annexe III.
[4] Voir document DH-SYSC-II(2019)R6, Annexe III, note de bas de page 8.

Member States / États membres

CYPRUS / CHYPRE

Comment:

In relation to the Preliminary draft CDDH report as per your email below, I am wondering whether it is possible to insert to the report (under the title "state responsibility and extraterritorial application of the European Convention on Human Rights) reference to the recent Grand Chamber judgment of 29/01/19 in the case of *Guzelyurtlu and others v. Cyprus and Turkey* [GC] no. 36925/07. In terms of jurisdiction, the case raises complaints under the procedural limb of Article 2 where the death occurred under a different jurisdiction from that of the State in respect of which the procedural obligation is said to arise (para. 181 of the judgment) and builds upon the "special features" references in the case of *Rantsev v. Cyprus and Russia* no. 25965/04 (paras. 243-244). In essence, in terms of jurisdiction, the Grand Chamber held that -

> 188. [i]t appears that if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law, the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court.
>
> 190. Where no investigation or proceedings have been instituted in a Contracting State, according to its domestic law, in respect of a death which has occurred outside its jurisdiction, the Court will have to determine whether a jurisdictional link can, in any event, be established for the procedural obligation imposed by Article 2 to come into effect in respect of that State. Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, "special features" in a given case will justify departure from this approach.
>
> 195. […] Any other finding would result in a vacuum in the system of human-rights protection in the territory of Cyprus, which falls within the "legal space of the Convention", thereby running the risk of creating a safe haven in the "TRNC" for murderers fleeing the territory controlled by Cyprus and therefore impeding the application of criminal laws put in place […].

Reference to above judgment could possibly be inserted in footnote 71 of the draft report, as per attached.

Drafting proposal:

154. The Court subsequently reiterated these principles in the case of *Cyprus v. Turkey*, which concerned, *inter alia*, alleged violations of the rights of Greek-Cypriot

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missing persons and their relatives and of the home and property rights of displaced persons.[1] In finding that Turkey's jurisdiction extended to "securing the entire range of substantive rights set out in the Convention",[2] the Court had regard to "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings"[3]. It further noted that in view of Cyprus's inability to exercise its Convention obligations in northern Cyprus, any other finding as to "jurisdiction" would "result in a regrettable vacuum in the system of human-rights protection in the territory in question"[4].

[1] *Cyprus v. Turkey* [GC], no. 25781/94, § 76, 10 May 2001.
[2] Ibid., § 77.
[3] Ibid., § 78.
[4] Ibid., § 78. See also *Guzelyurtlu and others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019, §§ 188, 190, 193-196 concerning Turkey's procedural obligation arising out of Article 2 of the Convention for a murder which occurred in areas under the effective control of the Republic of Cyprus. Sufficient jurisdictional link for the purposes of Article 1 is established if "special features" in a given case will justify departure from the principle that the procedural obligation under Article 2 is triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death (§ 190), or if the investigative or judicial authorities of a State institute their own criminal investigation or proceedings concerning the death (§ 188).

FRANCE

[Note by the Secretariat: These comments were made to a previous version of the draft chapter of Theme 2. As the paragraph numbers have changed since then, we have changed them accordingly in the French comment.]

[…]

314. Un examen approfondi de l'ensemble de la jurisprudence et de la pratique de la Cour EDH et des organes de traités des Nations Unies serait impossible à entreprendre dans le contexte du présent rapport.[17] Des points de vue divergents ont été adoptés dans le passé sur des questions telles que l'avortement,[18] le droit de se représenter seul dans les procédures pénales,[19] le droit de vote des personnes sous tutelle,[20] ainsi que la responsabilité des États lors de la mise en œuvre des résolutions du Conseil de sécurité des Nations Unies.[1] Il existe néanmoins des domaines, examinés plus en détail ci-dessous, dans lesquels les tendances centrifuges semblent plus fortes et attirent parfois l'attention des médias et du grand public. Ceux-ci couvrent la liberté de manifester sa religion (i), le droit à la liberté et à la sécurité (ii) et le transfert de personnes vers un autre État (iii).

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[…]

363. L'article 39 entre en jeu lorsqu'il existe un risque imminent de préjudice grave et irréparable. En réalité, les mesures provisoires sont indiquées seulement dans un nombre limité de domaines, principalement l'expulsion et l'extradition, lorsqu'il est établi que le requérant s'exposerait autrement à un risque réel de préjudice grave et irréversible au regard des articles 2 et 3 de la Convention. Exceptionnellement, de telles mesures peuvent être indiquées en réponse à certains griefs relatifs à l'article 6 (droit à un procès équitable)[115] et à l'article 8 (droit au respect de la vie privée et familiale)[116], y compris les ordonnances d'expulsion[117], ou dans d'autres situations concernant différents articles de la Convention, telles que la détérioration de l'état de santé d'un requérant en détention[118] ou pour préserver ~~la destruction probable d'un élément essentiel à~~ un élément essentiel à l'examen de la ~~r~~requêtecommunications~~s~~[2].

Comment [MF1]: Reformulation qui parait nécessaire compte tenu de la mention de l'affaire Lambert dans la note de bas de page. Il faudrait également le faire dans la version anglaise

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[…]

[1] Voir (CCPR), *Sayadi et Vinck c. Belgique*, 1472/2006, 22 octobre 2008, § 7.2, affaire de gel des avoirs dans laquelle le Comité se différencie clairement de la doctrine de l'affaire *Bosphorus* (voir Thème I, sous-thème ii et thème 3). Il a également conclu que la Belgique était responsable des violations résultant de l'inscription des auteurs sur la liste des sanctions, même si elle n'était pas en mesure de les supprimer par la suite (paragraphes 10.1 à 11).

[2] Voir *Evans c. Royaume-Uni* (GC), n° 6339/05, 10 avril 2007, et la demande visant à empêcher la destruction d'embryons fécondés jusqu'à ce que la Cour soit en mesure d'examiner l'affaire. Voir aussi l'affaire exceptionnelle *Lambert et autres c. France* (GC), no. 46043/14, 5 juin 2015, : demande de surseoir à l'exécution d'une décision d'interrompre la nutrition et l'hydratation artificielles d'un patient ~~dans le coma~~en état végétatif chronique.

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365. Le Comité de la CAT reçoit également régulièrement des demandes de mesures provisoires, principalement dans des affaires de non-refoulement. Il en va de même, à une fréquence variable, des autres organes de traités des Nations Unies, en ce qui concerne le non-refoulement mais également d'autres situations.[126] Par exemple, dans l'affaire *X c. Argentine*, le Comité de la CDPH a demandé à l'État partie « *d'envisager de prendre des mesures pour procurer à l'auteur l'attention, les soins et la réadaptation dont il a besoin, compte tenu de son état de santé »,*[127] ou encore de « prendre les mesures nécessaires pour veiller à ce que l'alimentation et l'hydratation entérale d'un patient en état végétatif chronique ne soient pas suspendues pendant l'examen de la communication »[3]. Le même organe a demandé à l'État partie de suspendre l'expulsion des auteurs dans l'affaire *O.O.J. c. Suède*, à l'instar du Comité CRC dans l'affaire *I.A.M. c. Danemark*. [128] Dans *M.W. c. Danemark*, le Comité CEDAW a demandé à l'État partie de prendre des mesures pour permettre à l'auteur d'accéder à son fils.[129]

Comment [MF2]: Proposition d'actualisation

[3] 3 mai 2019, consorts Lambert c France n°59/2019

GREECE / GRECE

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1 Suggestion: to use the full name the first time, then go with the acronyms (VCLT, UN, EU etc.)
2 Maybe have the challenges and the solutions together, as in the other Chapters?

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

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

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

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

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

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

agreement between States Parties to the ECHR regarding the interpretation of certain provisions of the ECHR or in finding support for its intention to depart from its previous case-law. It is, however, not clear whether the ECtHR may consider the subsequent practice of only some, but not all of the States Parties sufficient to establish an agreement regarding the interpretation of a Convention provision.[3] Where the Court seeks to establish a "European consensus", it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law.

[…]

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

[…]

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

Comment [SK3]: There is a problem with the formulation of the sentence.

[…]

15. The interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. In view of the importance for the States of knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is of the essence in this particular field.[4]

Comment [SK4]: Is the footnote (already in para. 188) needed here?

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

[4] One delegation disagreed with the decision taken by the CDDH that problems for the States at the stage of the execution of judgments in cases concerning the extraterritorial application of the Convention shall not be addressed as they go beyond the scope of the Report on the interaction between the Convention and general

[…]

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

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

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

[…]

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

[…]

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international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the Report.

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

27. The ECtHR, for its part, had initially been reluctant to consider the provisions of **IHL** (see *Isayeva*).[5] It ~~had~~ has ~~then~~ subsequently acknowledged provisions of IHL as part of the legal context in which the ECHR applies (see ~~–~~ *Varnava*). In other cases, it examined whether IHL gave a conclusive answer to the question of the lawfulness of the national authorities' measures, but found that this was not the case (see ~~–~~*Sargsyan*). Finally, in *Hassan*, the ECtHR found that even in situations of international armed conflict, the ECHR continued to apply, albeit interpreted against the background of the provisions of IHL and thus sought an "accommodation" between two apparently conflicting legal provisions, based on Article 31 § 3 (c) of the VCLT. In situations in which the provisions of IHL are clear and well-established, this constitutes a possible approach to the reconciliation of the two bodies of law.

Comment [SK5]: Proposal to replace by: "has initially refrained from considering IHL in its case-law. It has since gradually readjusted its position and finally has found, in the case of Hassan, that the ECHR continues to apply even in situations of international armed conflict, albeit interpreted against the background of IHL. The Court has thus sought an "accommodation" between two apparently conflicting legal provisions, based on Article ..."

[…]

30. The second Part of the Report addresses ~~present section of the report shall address~~ the interaction between the ECHR and other international human rights instruments to which the Council of Europe member States are parties, in particular human rights instruments ~~only in so far as the latter instruments have been~~ adopted under the auspices of the United Nations: ~~. Today all forty-seven Council of Europe member States are simultaneously bound by the ECHR and~~ the International Covenant on Civil and Political Rights (ICCPR, 1966), ~~as well as~~ the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), ~~of 1966. Moreover, since then several more UN human rights instruments have been adopted:~~ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1966), the Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989) and its Optional Protocols, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006) and the Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006).

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

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

follow-up ~~to the "Views"~~ consists of the initiation of a dialogue between the relevant treaty body and the State concerned.

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

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

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

[…]

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

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

Comment [SK6]: Inclusion of that depends on what we'll do with para. 365.

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

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

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

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

[…]

42. The **ECtHR** developed the following **principles regarding the interaction** between the ECHR and the EU legal order. While the ECHR does not exclude the transfer of competences to international organisations, the member States' responsibility to secure the Convention rights continues even after such a transfer (see, *inter alia*, *Matthews*). The fact that national measures give effect to EU law does not remove them from the ambit of the ECHR (see, for instance, *Cantoni*).

However, if the international organisation to which the member State in question had transferred part of its sovereignty ~~provided~~ provides a protection of fundamental rights in a manner which could be considered at least equivalent to that for which the ECHR provides, a presumption arises that a State has~~d~~ not departed from the requirements of the ECHR when it did no more than implement its strict legal obligations flowing from its membership of the organisation in question. However, any such presumption could be rebutted if, in the circumstances of a particular case, it is~~was~~ considered that the protection of ECHR rights was manifestly deficient (see, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*). The ECtHR has clarified that the presumption, which led to it reducing the intensity of its supervisory role in the interests of international cooperation, ~~arose~~ arises only under two conditions, namely the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law (see *Michaud* and *Avotiņš*).

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

[…]

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

[…]

50. At the moment the interaction between the ECHR system and the EAEU is limited and does not appear to raise immediate challenges in terms of fragmentation of human rights law. However, ~~should the Court of the EAEU continue to refer to the case-law of the ECtHR, it is necessary to ensure that the references are made to the current case-law. The~~ the interaction between the ECHR and the EAEU could notably benefit from constructive **judicial dialogue** that would help the judges to

exchange information about the relevant developments in the two systems, as well as to ensure that both systems maintain proper cross-references.

Conclusion

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

[…]

INTRODUCTION

1. Background to the work

53. The reflections on the place of the European Convention on Human Rights (ECHR, the Convention) in the European and international legal order have been conducted in the context of the ~~so-called~~ Interlaken reform process towards long-term effectiveness of the Convention system.[6] The Interlaken Declaration, adopted at a first intergovernmental conference on the future of the European Court of Human Rights in Interlaken in 2010, sought to establish a roadmap for the reform process and notably invited the Committee of Ministers to decide, before the end of 2019, whether the measures adopted in the course of the reform process have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary.[7]

54. Since the Interlaken conference, the measures considered necessary to guarantee the long-term effectiveness of the Convention system have been further elaborated in the Declarations adopted at four further high-level conferences (in Izmir ~~(~~2011~~)~~[8], Brighton ~~(~~2012~~)~~[9], Brussels ~~(~~2015~~)~~[10] and Copenhagen ~~(~~2018~~)~~[11]). The Committee of Ministers instructed the Steering Committee for Human Rights (CDDH)

[6] See the Interlaken Declaration of 19 February 2010 of the High Level Conference on the Future of the European Court of Human Rights, PP 10.
[7] See the Interlaken Declaration, Implementation of the Action Plan, point 6.
[8] See the Izmir Declaration of 26/27 April 2011 of the High Level Conference on the Future of the European Court of Human Rights.
[9] See the Brighton Declaration of 19/20 April 2012 of the High Level Conference on the Future of the European Court of Human Rights.
[10] See the Brussels Declaration of 27 March 2015 of the High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility".
[11] See the Copenhagen Declaration of 12/13 April 2018 of the High-Level Conference on "Continued Reform of the European Court of Human Rights Convention System – Better balance, improved Protection".

throughout the reform process to provide analyses and proposals on different topics related to the effectiveness of the Convention system. It ~~had~~ notably asked the CDDH to present its opinions and proposals in response to a number of issues raised in the Brighton Declaration ~~on the future of the European Court of Human Rights (20 April 2012)~~.[12] The CDDH had thereupon elaborated[13] and adopted on 11 December 2015 its Report on "The longer-term future of the system of the European Convention on Human Rights".[14]

[…]

2. Terms of reference

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

[…]

3. Methodology and purpose of the report

60. The starting point of the intergovernmental work resulting in the present report was a brainstorming Seminar on the place of the European Convention on Human Rights in the European and international legal order that was held in Strasbourg, on 29–30 March 2017. It was co-organised by the Directorate General Human Rights and Rule of Law and the *PluriCourts* (Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, University of Oslo) academic network and brought together Judges of the International Court of Justice and the European Court of Human Rights, Government Agents before the latter Court as well as leading international legal scholars and practitioners. The results of the discussions during that seminar were subsequently taken into account in the works of the DH-SYSC-II.[16]

[…]

62. In accordance with the Group's decision,[17] drafts covering these themes were elaborated by Rapporteurs, with the help of Contributors. Mr Alexei ISPOLINOV

[12] See the Committee of Ministers' decision at its 122nd session, instructing the CDDH to submit a report in response to paragraphs 35c to 35f of the Brighton Declaration.
[13] The work on this report had been conducted during the biennium 2014–2015 by the Committee of Experts on the Reform of the Court (DH-GDR) and its Drafting Group "F" (GT-GDR-F).
[14] See the website of the CDDH for further information on the Report on "The longer-term future of the system of the European Convention on Human Rights".
[15] See DH-SYSC(2016)003.
[16] See DH-SYSC-II(2017)R1, § 3.
[17] Both the DH-SYSC (see DH-SYSC(2017)R3, §§ 16–17) and the CDDH (see CDDH(2017)R87, §§ 14–15) endorsed the DH-SYSC-II's working methods.

(Russian Federation) and Mr Chanaka WICKREMASINGHE (United Kingdom), Co-rapporteurs, elaborated a draft of theme 1. The Rapporteurs and the Group were assisted in their work by a written submission of Mr Marten ZWANENBURG (Netherlands), Contributor, on theme 1, subtheme ii) on State responsibility and extraterritorial application of the European Convention on Human Rights. Furthermore, Mr Anatoly KOVLER (Russian Federation) was ~~nominated~~ named Contributor for theme 1, subtheme iv) on the Interaction between international humanitarian law and the European Convention on Human Rights and submitted a text on this topic. A draft of theme 2 was submitted by Ms Sofia KASTRANTA (Greece), Rapporteur. The draft of theme 3 was elaborated by Ms Kristine LĪCIS (Latvia), Rapporteur.[18] The Group further decided to work consecutively on these three themes.[19]

63. Moreover, in order to assist it in its reflections on the different topics, the Group ~~had~~ invited *ad hoc* experts to its meetings to make short presentations on the different themes and to exchange views with the Group.[20] In the course of its work, the Group exchanged views with Professor Rick LAWSON (University of Leiden) on the specific topic of State responsibility and extraterritorial application of the European Convention on Human Rights (theme 1, sub-theme ii)) and with Professor Sébastien TOUZÉ (Paris II Panthéon-Assas University) on the topic of the interaction between international humanitarian law and the European Convention on Human Rights (theme 1, sub-theme iv)).[21] It further ~~heard~~ consulted Professor Photini PAZARTZIS (University of Athens, Vice-Chair of the UN Human Rights Committee) on the topic of theme 2[22] and Professor Olivier DE SCHUTTER (University of Louvain, Belgium) on theme 3[23].

[…]

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

Comment [SK7]: GENERAL COMMENT: the acronyms/abbreviations need to be explained the first time they are used and not later on (cf para. 252)

[…]

b. THE VIENNA CONVENTION ON THE LAW OF TREATIES

i. Vienna Convention on the Law of Treaties (VCLT)[24]

[…]

[18] See DH-SYSC-II(2017)R2, § 5.
[19] See DH-SYSC-II(2017)R1, § 12; and DH-SYSC-II(2017)R2, § 4.
[20] See DH-SYSC-II(2017)R1, § 10; DH-SYSC-II(2017)R2, § 10; and DH-SYSC-II(2018)R4, § 23.
[21] See DH-SYSC-II(2018)R3, §§ 8 and 17.
[22] See DH-SYSC-II(2018)R4, § 18.
[23] See DH-SYSC-II(2018)R5, § 15.
[24] Suggestion: to use the full name the first time, then go with the acronyms (VCLT, UN, EU etc.)

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

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

[…]

84. In its *Golder* judgment of 1975, the Court noted that:

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

Comment [SK8]: GENERAL COMMENT: we must either put the references in all judgments (full title, date etc) or have an annex with all judgments referred to in the text (all jurisdictions).

[…]

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

Comment [SK9]: GENERAL COMMENT: We should decide on an homogeneous way of referring to paragraphs (para. or §?)

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

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

[…]

89. In another judgment the Court relied on the "general spirit of the Convention" finding that any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society" (*Kjeldsen, Busk Madsen and Pedersen v. Denmark* judgment of 7 December 1976, §53).

[…]

95. **[former 29.]** It is important to note that the Court often referred to the subsequent practice of not all but only some of the States Parties of the ECHR, even on occasion considering contrary practice, of a relatively small number of States. [add references if this paragraph is to be retained][25]

[This paragraph has not yet provisionally adopted].

[…]

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

98. As the ILC explains in the Commentaries to its original draft of the VCLT, subsequent practice requires that the parties as a whole to a treaty, not just some of them, accept this interpretation in such a way as to evidence their agreement.[26]

[…]

101. **[former 35.]** [At the same time the WTO Appellate Body seems not ready to accept for the purpose of interpretation as a sufficient practice the conduct of even a significant majority of the parties of WTO where there is contrary practice by a small portion of WTO member States (EC—Computer Equipment, WT/DS62/AB/R, p.p. 92—93).[27]]

[This paragraph has not been provisionally adopted yet].

[25] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: This paragraph does not seem to be sufficiently substantiated in the text.

[26] See the Draft Articles on the Law of Treaties with commentaries adopted by the International Law Commission at its 18th session, in 1966, and submitted to the General Assembly, published in the Yearbook of the International Law Commission, 1966, Vol. II, pp. 221-222.

[27] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: paras. 92-93 of Report of the WTO Appellate Body in EC-Customs Classification of Certain Computer Equipment (W/DS62/AB/R) seem to be about *prior* practice, or rather the parties of the particular dispute (EC-USA) during the Uruguay Round tariff negotiations ("*The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties*").

Comment [SK10]: Jurisprudence is needed. One could maybe refer to Demir and Baykara v. Turkey (2008), where the Court held that "as to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognized" and that "the remaining exceptions can be justified only by particular circumstances" (paragraphs 52 and 151). If this is the meaning of paragraph 95 though, it must be redrafted ("vast majority" instead of "some"). Also the Court speaks of "the great majority" in Dungeon v. the UK or Christine Goodwin v. the UK

Comment [SK11]: Proposal to include, as update, reference to the draft conclusions of the ILC on the matter (with commentaries, Report of the ILC (seventieth session 2018), document A/73/10
See for example conclusion 10, para. 2: "The number of parties that must actively engage in subsequent practice in order to established an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more of the parties may constitute acceptance of the subsequent practice when the circumstances call for some action".

Comment [SK12]: Maybe replace by other references, such as *US-Gambling* where the Appellate Body repeated that establishing subsequent practice with the meaning of Article 313 § 3 (b) of the Vienna Convention involves two elements: "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision" (US-Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R, adopted 20 April 2005, paragraph 192
Also, in EC-Chicken Cuts (EC-Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, 27 Sept 2005), the Appellate Body disagreed that "lack of protest" against one Member's classification practice by other Members may by understood, on its own, as establishing agreement with that …

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

[…]

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

125. However, the Court is not alone in resorting to these innovative techniques of interpretation. The two interpretative methods may also be found in other international courts and tribunals' jurisprudence.[28] By way of example, the so-called evolutive or dynamic interpretation was similarly applied by the Inter-American Court of Human Rights.[29] Likewise, the doctrine of autonomous concept is commonly applied by the CJEU[30] or the Inter-American Court of Human Rights.[31]

Comment [SK13]: Possible update? This two words seem to clash with the ILC 2018 draft conclusions on subsequent agreement and practice (mentioned previously) especially conclusion 8 on evolutive interpretation and its commentary.

Comment [SK14]: The I-ACHR is mentioned twice.

[…]

148. The term "jurisdiction" is not elaborated further by the Convention. In the case of *Banković*, one of its important decisions on the topic, the Court ~~had~~ affirmed that State jurisdiction as referred to in Article 1 is "primarily territorial".[32] Yet the phrase "within their jurisdiction" rather than "within their territory" might imply that the ECHR Contracting Parties' obligations can extend beyond their territory.

[28] Even if the ICJ does not apply human rights treaties, it can be noted that it has occasional recourse to the evolutive interpretation approach, see, for instance, *Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, judgment of 16 December 2015.
[29] See, for example, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* of 23 August 2013, § 153; *Mapiripán Massacre v. Colombia*, 2005c, § 106 or in its advisory opinion on the interpretation of the American Declaration of the Rights and Duties of Man OC-10/89 of 14 July 1989, Series A No. 10, at § 37. See also LIXINSKI, Lucas. *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*. The European Journal of International Law, Vol. 21, no. 3, 2010.
[30] See, amongst many authorities, C-66/85 *Lawrie-Blum*, ECLI:EU:C:1986:284 as to the autonomous meaning of the notion of „worker" under the EU law.
[31] See *Mapiripán Massacre v. Colombia*, 2005c, § 187 or *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, § 146.
[32] *Banković and Others, cited above*, § 59..

[…]

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

161. […]

[…]

165. In its Al-Skeini judgment[33], another leading case,[34] the Grand Chamber elaborated further on the concept of extraterritorial jurisdiction under the Convention. The case concerned the applications of six Iraqi nationals brought in respect of actions of UK forces in Iraq in 2003, when the latter were seeking to establish security and support civil administration in and around Basra; the applicants' relatives were killed during the security operations in question.

Comment [SK15]: Problem with the footnotes.

[…]

229. **[former 93.]** It emerges from the analysis of the Court's case-law described above that the Court, in determining whether conduct is attributable to the respondent State, does not make clear whether, and in how far it applies the rules of attribution reflected in the ARSIWA.[35] While the Court repeatedly ~~referred to~~lists specific Articles of the ARSIWA in the "Relevant international law" section of its judgments, ~~when listing the relevant provisions of international law,~~ it does not explicitly ~~apply~~ refer to these rules when deciding at the merits stage whether an impugned act can be attributed to the respondent State.

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

230. **[former 94.]** This can be illustrated, for instance, by the Court's approach in *Al Nashiri v. Poland*: After having quoted the relevant articles ~~provisions~~ of the ARSIWA in the section on relevant international law (articles 7, 14, 15 and 16)[36] and after the applicant and the third-party interveners had argued that the Contracting Party's responsibility under the Convention for co-operation in renditions and secret detentions should be established in the light of international law of state responsibility, in particular the ~~in the light of Article 16 of the~~ ARSIWA,[37] the Court stated that it would "examine the complaints and the extent to which the events complained of are imputable to the Polish State in the light of the above principles of State responsibility under the Convention, as deriving from its case-law"[38] and does not make any further reference to the ARSIWA in its ensuing examination of the question of the respondent State's responsibility.

[33] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011.
[34] See for this assessment also *Marko Milanovic*, *Al-Skeini* and *Al-Jedda* in Strasbourg, European Journal of International Law, Vol. 23, no. 1, p. 121.
[35] See also Jane M. Rooney, "The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands", Neth Int Law Rev 2015, vol.62, p.p.407–428; Kristen Boon, Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines, Melbourne Journal of International Law, Vol. 15, No. 2, 2014.
[36] *Al Nashiri v. Poland*, no. 28761/11, § 207, 24 July 2014.
[37] Ibid., §§ 446-449.
[38] Ibid., § 459.

231. **[former 95.]** It therefore appears that the Court applies its own methods~~principles~~, having taken into account the relevant rules of international law and applying them, as it usually does, while remaining mindful of the Convention's special character as a human rights treaty.[39]

[…]

233. **[former 97.]** However, an analysis of the case of *Ilaşcu* suggested ~~disclosed~~ that the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was defined as "under the effective authority, or at the very least under the decisive influence", of the respondent State, and "surviv[ing] by virtue of the military, economic, financial and political support given to it" by the respondent State and that this threshold was lower than the degree of control which must be exercised in order for the conduct of a group of persons to be attributable to the State under Article 8 of the ARSIWA as interpreted by the ILC or under the case-law of the ICJ. However, it was equally noted that the ICTY, by reference, *inter alia*, to its different mandate, had equally considered a lower threshold to apply. It must be regretted though that the Court does not give more detailed reasons for the development of these criteria and their relationship with the rules of international law.

234. **[former 98.]** In another two cases analysed ~~described~~ above, *El-Masri* and *Al Nashiri v. Poland*, it is difficult to discern which rules exactly the Court applied in respect of State responsibility and, in particular, whether or not the Court's reasoning amounted to attributing to the respondent States the conduct of a third State.[40]

*

[…]

237. **[former 101.]** Finally, another point to be made ~~conclusion that can be drawn from~~ with respect to the case-law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. As shown above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in its judgment in the *Jaloud case.*[41] It has also held that the question of jurisdiction precedes that of attribution. However, ~~T~~the acknowledgement in principle that attribution and jurisdiction are distinct has not

[39] Compare *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 57, 12 December 2001.
[40] See for the difficulties in interpreting the Court's conclusions on the issues relating to State responsibility in *El-Masri* the speech of Helen Keller, The Court's Dilution of Hard International Law: Justified by Human Rights Values?, at the Seminar organised for the launching of the work of the DH-SYSC-II, co-organised by PluriCourts and the Council of Europe, Strasbourg, 29-30 March 2017; and the speech of Rick Lawson, State responsibility and extraterritorial application of the ECHR, at the DH-SYSC-II meeting on 3 April 2018, document DH-SYSC-II(2018)12.
[41] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., 20 November 2014.

always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other.

~~[to be moved to the section on state responsibility, around paragraph 101:]~~ ~~[Moreover, the threshold for assuming jurisdiction would be higher if the criteria of "effective control of an area" in that sense were applied.~~ The Court, referring to the difference between the rules governing jurisdiction and attribution of conduct to a State so that it may be held responsible under international law for that conduct, has explained in this respect that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law".[42] Nevertheless, it has been argued above~~is clear~~ that when ascertaining jurisdiction, the Court~~, although set in the framework of States' jurisdiction under general international law,~~ has developed some particular features which take account of the nature and scope of the Convention as a human rights treaty.~~,~~[43] As a consequence, ~~and that~~ the threshold thus developed in the Court's case law appears less high than that under the – albeit different – law of State responsibility.]

[…]

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

[…]

241. The Charter system envisages a sophisticated structure of organs, each with its own defined areas of activity and responsibilities, powers, procedures and working methods; ~~. And t~~he relationship~~s~~ between the organs and between the organisation and its member States is governed by a complex body of law and practice stemming from the Charter itself. The Charter is therefore the supreme law of the organisation, and given the universal vocation of the UN as the world's central political organisation charged with the maintenance of international peace and security, the Charter is of central significance in the international political and legal systems. In the context of this Report, there are two particularly striking features of the Charter, which are unprecedented in international law and demonstrate the commitment of the member States to ensuring the effectiveness of the UN system in its core role of maintaining international peace and security. The first is the authority

[42] See *Catan and Others,* cited above, § 115, ; *Mozer*, cited above, §§ 98 and 102,; and *Chiragov and Others, cited above,*§ 168.
[43] See also Robert Spano, Questions of States' jurisdiction: the trends in the case-law of the European Court of Human Rights in the light of international law, in: International and Comparative Law Research Center (ed.), Case-law of the European Court of Human Rights – Extraterritorial jurisdiction: Looking for solutions, 2018, pp. 43-47.

given to the Security Council, an organ of 15 member States which operates through a special system of majority voting, and has the power to take decisions which the whole of the membership have a legal obligation to implement (explored in the next section). The second feature is Article 103 of the Charter according to which in case of any conflict between obligations arising on the member States under the Charter and obligations arising under other international agreements, Charter obligations shall prevail.

[…]

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

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

Comment [SK16]: GENERAL COMMENT: compared to the other chapters, there is a lot of emphasis added in the quotations here.

[…]

245. Following the end of the Cold War, the Security Council has been able to make much more extensive use of its Chapter VII powers than previously. The Charter provides for the Council (a) to decide on measures not involving the use of force, such as economic sanctions[44], and (b) to use military force, albeit that, as a result of political and other factors, in its practice the Council has had to adapt the means by which these powers are exercised. Further, and in order to fulfil its responsibility for the maintenance of international peace and security, the Council has also shown considerable ingenuity in its use of its Chapter VII powers including in ways which are not expressly foreseen in the Charter. Thus, for example, the Council has used these powers to mandate peace operations, to administer territory, to establish international tribunals, to refer situations to the International Criminal Court, and to establish a Compensation Commission. Whilst aspects of the Council's practice have not been without critics (at least as often for what the Council has been unable to do, as for what it has in fact done), the Council remains the central institution of the international system for the maintenance of peace and a unique source of legitimacy.[45]

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

[45] 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

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

246. Article 41 of the Charter gives the Council a broad discretion to decide the measures short of the use of force that it considers necessary to give effect to its decisions. These can include, but are not limited to economic sanctions. There is now an extensive body of Council practice where sanctions have been imposed by the Council, which has been developed largely in the post-Cold War period. Sanctions represent an essential tool, which can be used by the Council in response to various threats to international peace and security, importantly as a credible alternative to forcible action. They have been used to support peace processes / peaceful transitions, to deter non-constitutional changes, to constrain terrorism, to protect human rights and to promote non-proliferation. There are currently 14 different UN sanctions regimes in existence.[46]

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

Comment [SK17]: A problem with the formulation?

[…]

252. The European Court of Human Rights ~~(the ECtHR / the Court)~~ rejected a preliminary objection by the Respondent State that the imposition of sanctions was

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 Einsied~~a~~el, D Malone, and B Stagno Ugarte (ed.s) *The UN Security Council in the 21st Century* (2016) pp 771-792; M. Mattheson *Council Unbound* (2006). Other works have focused primarily on the legal limitations of the Council's powers and how they can appropriately be given effect: see D Akande "The International Court of Justice and the Security Council: Is there room for Judicial Control of Decisions of Political Organs of the United Nations" (1997) 46 ICLQ 309-43; M Bedjaoui *The New World Order and the Security Council: testing the legality of its acts* (1994); B Fassbender "Quis judicabit? The Security Council, Its powers and Its Legal Control" 11 EJIL 219-20; V Gowlland-Debbas (ed) *United Nations Sanctions and International Law* (2001); D Sarooshi *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999); A Tzanakoupolous *Disobeying the Security Council* (2011); E de Wet *The Chapter VII Powers of the United Nations Security Council* (2004).

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

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

[…]

[…]

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

[…]

283. **[former 13.]** As~~t thea~~ starting point~~ of this evolution~~, an apparent reluctance on the part of the Court to consider the provisions of IHL has been observed~~ in some of its earlier case law~~.[47] For example in the case of *Isayeva v. Russia* (concerning deaths and injuries to internally displaced persons ~~IDPs~~ as a result of the military led response to Chechen separatist violence around Grozny) the Court determined the case on the basis of the ECHR alone, despite the applicants' submissions that the military action contravened IHL, and the Court's own reference to the situation as one of conflict.[48]

[This paragraph has not been provisionally adopted yet].

[…]

[47] See the Contributions of Professor A. Kovler (DH-SYSC-II (2018)10) and Professor S. Touzé (DH-SYSC-II(2018)13). See also G. Gaggioli and R. Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, (2007) Israel Yearbook of Human Rights, pp. 115-163.

[48] See *Isayeva v. Russia*, no. 57950/00, § 167 and §§ 180 and 184, 24 February 2005; and also *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, § 157 and § 181, 24 February 2005.

292. Lastly, note should be taken of the fact that the Court has on occasion been called upon to indirectly consider questions of IHL in the context of cases concerning the compatibility of a criminal conviction for war crimes and crimes against humanity – which can result from serious violations of international humanitarian law – with Article 7 ECHR and the principle of *nullum crimen sine lege*.[49]

c. CHALLENGES AND POSSIBLE SOLUTIONS

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

[…]

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

[…]

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

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

[…]

305. The compliance of States parties with these treaties is monitored by special bodies, composed of experts from all geographical areas. The experts are elected by the States Parties and shall be of recognised competence in the field of human rights, consideration being also given to legal experience.[50] Under the relevant instruments (the Conventions above or special Optional Protocols), [51] these monitoring bodies examine periodic reports submitted by the Contracting Parties and express their concerns and recommendations in the form of "concluding observations". Moreover, they adopt "General Comments" on matters they find of particular interest pertaining to the interpretation and the implementation of the respective convention. Some are also mandated to conduct confidential inquiries upon receipt of reliable information of systematic or serious violations. But most significantly, UN treaty bodies may receive and consider communications against contracting parties that have explicitly accepted their competence in this respect.[52] Such communications may be individual or, for most treaties, also inter-State; the present Chapter, however limits itself to communications submitted by individuals.

306. ~~However~~Nevertheless, it must be noted that the "Views" of the treaty bodies on individual communications contain recommendations to the States concerned and are not legally binding, as has been repeatedly underlined by CoE member States but also other States (also with respect to concluding observations on periodic reports). No equivalent of Article 46 ECHR is to be found in any of the relevant texts, Conventions or Optional Protocols. Follow-up to the "Views" of the UN treaty bodies consists of the initiation of a dialogue between the relevant treaty body and the State concerned, through the examination of periodic reports and special follow-up reports. This is not to argue that findings by the UN treaty bodies are not to be taken into consideration by States Parties. On the contrary, as indicated by the Human Rights Committee (CCPR) in its *General Comment no 33*, [53] its Views exhibit "*some important characteristics of a judicial decision*", including the impartiality and independence of its members, the "*determinative character*" of its findings on the question whether there has been a violation of the ICCPR, even the fact that failure by a State party to comply "*becomes a matter of public record",* through the publication of the Committee's decisions and the Annual Reports to the UN General Assembly, with obvious political repercussions for the State concerned. They should therefore be taken in good faith.[54] The same can be said of concluding observations on periodic reports and General Comments.[55] Nevertheless, the whole UN treaty body system relies on dialogue and the exchange of opinions on how legal

[50] See ICCPR, Articles 28 and 30. For a general presentation of the UN human rights treaty bodies see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice,* Cambridge University Press, 2013, xlvii, 730 p., at 181-218.
[51] In the case of the ICESCR, also ECOSOC Resolution 1985/17 of 28 May 1985.
[52] Almost all CoE Member States (44) have accepted the competence of the Human Rights Committee to receive individual communications and a significant majority has accepted the competence of the other treaty bodies, with the exception of the ICESCR (11) and the CED Committees (16). No CoE Member State has accepted the competence of the ICMW Committee, a mechanism which has not yet entered into force.
[53] (CCPR), *General Comment no 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 2008, CCPR/C/GC/33, §§ 11 and 17.
[54] See the 2014 Report of the Venice Commission on the implementation of international human rights treaties in domestic law and the role of courts, CDL-AD(2014)036, p. 31.
[55] In that respect, see the ICJ's finding in its *Ahmadou Sadio Diallo* Judgment of 30 November 2010 (*ICJ Reports 2010,* p. 639, at § 66), with respect to the Human Rights Committee's Views and its General Comment no 15.

obligations must be interpreted, and, although that does not diminish the significance of the UN treaty bodies' practice, it is therefore not comparable to the obligation to execute the Court's judgments. All these parameters should be kept in mind when discussing the coexistence of the ECHR with the UN human rights conventions and the possibility of conflicts between them.[56]

[…]

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

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

308. […]

[…]

329. As to the second condition, "*a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his/her condition, but also where the person needs control and supervision to prevent him/her from, for example, causing harm to him/herself or other persons*".[57] Additionally, in principle the detention of a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose.[58] The lawfulness of the detention also requires the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness.[59]

[…]

[56] Though not binding, Views of the treaty bodies may be influential. They may be taken into account by the ECtHR and the ICJ. See for example the ICJ's finding in its Ahmadou Sadio Diallo Judgment of 30 November 2010 (ICJ Reports 2010, p. 639, at § 66), with respect to the Human Rights Committee's Views and its General Comment no 15. See also the Advisory Opinion of the ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinial Territory", ICJ Reports 2004, p. 136, paras 109-110. Moreover, they could also be taken into account in rulings or decisions of the national courts. See, for example, the (unique, so far) case of *González Carreno v. Spain,* where the Spanish Supreme Court ruled the complainant should be compensated in compliance with the CEDAW Committee's views (no 47/2012, 16 July 2014) for the infringement of her rights under the CEDAW (Tribunal Supremo, sentencia núm. 1263/2018, 17 July 2018, particularly pages 23-28).

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

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

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

334. These diverging interpretations manifest themselves notably in the difficulties in drafting new standards on this matter within the Council of Europe.[60]

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

335. Another point of divergence concerns assurances provided for the non-use of torture, when there is a real risk thereto, in the context of procedures such as extradition or deportation, or even in cases of forcible, extra-judicial transfers (for example, cases of "extraordinary renditions").[61] Non-refoulement cases are quite central to the work of the ECtHR but also of the UN treaty bodies, considering that relevant claims are by far the most common ones raised before all the treaty bodies and constitute over 80 per cent of the CAT's caseload.[62]

Comment [SK18]: This footnote was missing.

336. Extradition or expulsion of an individual may give rise to an issue under Article 3 ECHR (prohibition of torture and of inhuman or degrading treatment of punishment) where substantial evidence has been presented that the individual involved, if extradited or deported, faces a real risk of being subjected to treatment contrary to Article 3. "Substantial evidence" includes all material available, including an assessment of the foreseeable consequences of sending the individual to a particular country, bearing in mind the general situation in the country in question but giving emphasis to the individual's personal circumstances at the time of the extradition or expulsion or at the time of the examination of the case by the Court, if the extradition or expulsion have not taken place yet.[63] In such a case, Article 3 implies an obligation not to extradite or deport, including in cases where the protection of national security is at play.[64] It should, however, be noted that, in general, the Court "has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention"[65] and that it acknowledges that it is not its task to substitute its own assessment to the one made by the authorities of the respondent State, even if it must satisfy itself that the latter was adequate and sufficiently supported by domestic materials and materials originating from other reliable and objective sources.[66]

[…]

341. In *Alzery v. Sweden* (removal ~~pursuant~~ following diplomatic assurances obtained from the Egyptian Government), the Human Rights Committee held that "the existence of diplomatic assurances, their content and the existence and

[60] See the drafting work on the Additional Protocol to the Convention on Human Rights and Biomedicine (Oviedo Convention), ~~see~~ https://www.coe.int/en/web/bioethics/psychiatry/about.
[61] A similar issue would be that of the assurances given on the non-use of the death penalty. See, for instance, the case of *Al Nashiri v. Poland,* already referred to under Theme 1 of this Report. Also *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018.
[62] Basak Cali and Steward Cunningham, "A few steps forward, a few steps sideways and a few steps backwards: The CAT's revised and updated GC on Non-Refoulement", *EJIL: Talk!,* 20 March 2018.
[63] See *Saadi v. Italy* [GC], no. 37201/06, §§ 128-133, 28 February 2008; *Kislov v. Russia,* no. 3598/10, - §89, 9 July 2019.
[64] See *Soering v. the United Kingdom*, § 88, no. 14038/88, 7 July 1989; *Saadi, cited above,* §§ 117, 125; *Chahal v. the United Kingdom,* no. 46827/99, § 80, 15 November 1996; *A.M. v. France*, no. 12148/18, §116, 29 April 2019
[65] *Harkins and Edwards v. the United Kingdom,* nos. 9146/07 and 32650/07, § 131, 17 January 2012.
[66] See *J.K. and Others v. Sweden,* § 84, no.59166/12, 23 August 2016.

implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists".[67]

[…]

348. Articles 34 and 35 ECHR set out the admissibility requirements with respect to individual applications. Those refer to (a) categories of applicants that may appear before the Court, (b) victim status, (c) procedural grounds for inadmissibility (anonymity, non-exhaustion of domestic remedies, applications submitted after the time-limit has expired, applications concerning the same matter as previous or parallel applications before other international organs, abuse of the right of application) and (d) inadmissibility based on the merits (applications incompatible with the provisions of the ECHR and its Protocols or manifestly ill-founded, applications that constitute an abuse of the right of individual application or where the applicant has not suffered a significant disadvantage). Questions of jurisdiction are also addressed.[68]

[…]

365. **[former 65.]** Likewise, the CRC (Committee on the Rights of the Child) and the CESCR (Committee on Economic, Social and Cultural Rights) often receive requests for the adoption of interim measures, which they automatically grant without a previous study of the substantive issues of the claim. In the first case, the requests normally refer to undocumented immigrants claiming to be unaccompanied minors and therefore requesting the special legal protection legally awarded to minors.[69] In the second case, the CESCR regularly receives requests for, – and automatically grants – interim measures in order to stay judicial evictions for humanitarian reasons (ill people or children living in the house which is the object of the eviction).[70] **[Comment by the CDDH: It is suggested that this statement is verified by the DH-SYSC-II and that, if possible, the percentage of requests for interim measures which are accepted is added.]**

[This paragraph has not been provisionally adopted yet].

Comment [SK19]: ?

366. Interim measures pronounced by treaty bodies are, like their findings, not legally binding. Nevertheless, the Human Rights Committee has expressed the view that "implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications […] Quite apart then from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its

[67] 1416/2005, Views of 10 November 2006. Nevertheless, "at the very minimum, the assurances procured should contain a monitoring mechanism and be safeguarded by practical arrangements as would provide for their effective implementation by the sending and the receiving States" (*Valetov v. Kazakhstan*, 2104/2011, 17 March 2014).

[68] See the Court's thorough *Practical Guide on Admissibility Criteria*, 4th ~~edition (2017)~~ updated on 30 April 2019.

[69] See, for instance, CRC, resolution G/SO CRC-IC ESP(26) - CE/AB/mbe 40/2018; and resolution G/SO CRC-IC ESP(31)- APP/AB/mbe 57/2018.

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

obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile […]".[71] It has also often been repeated, and finally consolidated in General Comment No. 33,[72] that "flouting of the Rule [92], especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol".[73] Similarly, the CAT Committee has argued that, by accepting its competence under Article 22 of the Convention against Torture, States parties have implicitly undertaken to cooperate with that Committee in good faith by providing it with the means to examine the complaints submitted to it; by failing to respect a request for interim measures, a tool that is "vital to the role entrusted to the Committee under that article", States parties "seriously fail" in their obligations.[74] However, several respondent States have expressed their firm opposition to such an interpretation of the Committees' competence to request interim measures and the nature of the latter.[75]

[…]

[71] See *Piandiong et al v. The Philippines,* 866/1999, 19 October 2000, §§ 5.1-5.2.
[72] *General Comment no 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights,* CCPR/C/GC/33 § 19.
[73] *Weiss v. Austria,* 1086/2002, 3 April 2003, § 8.3.
[74] (CAT) *Brada v. France*, 195/2002, 17 May 2005, §§ 6.1-6.2, The CAT Committee has also suggested that the binding nature of its interim measures is based on the fact that Article 18 of the Convention explicitly vests the Committee with the competence to adopt its own Rules of Procedure, which then constitute an integral part of the Convention, including Rule 114 on interim measures. (CAT), *R.S. et al v. Switzerland,* 482/2011, 21 November 2014, § 7.
[75] In *Weiss,* it was the Vienna Regional Court that refused to comply with the interim measures pronounced by the Human Rights Committee on the basis that Rule 92 (then 86) of the Committee's Rules of Procedure "*may neither invalidate judicial orders or restrict the jurisdiction of an independent domestic court*". Additionally, Austria argued before the Human Rights Committee that a request for interim measures could not override a contrary obligation of international law, in that case its obligations under the US-Austria extradition treaty. In *Brada,* France indicated that the Convention against Torture did not provide the CAT Committee with the competence to pronounce interim measures, therefore State parties are only required to examine such measures carefully and in good faith and endeavour to enforce them when possible. Therefore, the choice not to follow such measures does not constitute "a failure to respect obligations". In *Dar v the State*, a decision of 16 April 2008, the Norwegian Supreme Court found that requests for interim measures made by the CAT Committee were not binding under international law. The Supreme Court noted in this context that, distinct from the ICJ and the ECtHR whose decisions were binding under international law on the parties to the case, the Committee was a monitoring body that issued non-binding opinions in respect of individual communications. Therefore, Norway was not obliged under international law to comply with the Committee's request for interim measures to protect the applicant. However, due weight was to be given to such requests and they were generally complied with insofar as possible. With the same reasoning, Dutch lower courts (President of the lower court of The Hague (26 March 1999) and Amsterdam (17 January 2019) decided that the State was under no legal obligation to follow interim measures of the CAT or HRC. In the case of *Lambert v. France*, the Paris Court of Appeal did order the State to ensure respect of the CRPD's request of 3 May 2019 to stay a new decision to discontinue Vincent Lambert's artificial nutrition and hydration, an interim measure previously (30 April 2019) rejected by the ECtHR. Nevertheless, this decision was challenged by the French Government and overturned by the Cour de Cassation (see Plenary Judgment no 647 of 28 June 2019, pourvois nos 19-17.330 and 19-17.342). It should be noted that on 20 May 2019 the ECtHR had rejected a new request to -indicate to the French State the immediate application of the interim measures demanded by the CRPD (application no. 21675/19, see Press Release ECHR 180(2019)/20.5.2019). The Court pointed out that the applicants had submitted no new evidence such as to induce it to change its position already expressed by its refusal of 30 April 2019 to accord interim measures and by its Grand Chamber Judgment of 2015 finding that there would be no violation of Article 2 of the Convention in the event of the withdrawal of Vincent Lambert's artificial hydration and nutrition.

370. These evolutions in the jurisprudence are illustrative of the Court's fundamental belief that the Convention "*cannot be interpreted and applied in a vacuum*".[76] In line with Article 31 § 3 (c) of the Vienna Convention on the Law of the Treaties,[77] the Court seeks to interpret and apply the rights protected under the ECHR and its Protocols in a way that is in harmony not only with general international law, but in particular with the relevant universal human rights instruments. To that end, it uses the practice of the UN treaty bodies as a source of inspiration and argumentation in favour of its findings, in line with its "living instrument" doctrine.[78] The Court also refers to the case-law of other international jurisdictions such as the ICJ or the Inter-American Court of Human Rights (I-ACHR).[79]

[…]

388. At the same time, more consistent reference by the UN treaty bodies to regional courts, and ~~uninhibited inspiration from~~ in-depth discussion of the latters' jurisprudence would facilitate the development of consistent international human rights principles.[80] It is true that the ECHR and the Court's jurisprudence do not apply to the majority of States Parties to the UN conventions. Nevertheless, as it has been demonstrated above, both authors and respondent Governments of non-European States do not hesitate to refer to the Court's jurisprudence in their argumentation.
[Change on the basis of comments by the CDDH].

[…]

III. THE CHALLENGE OF THE INTERACTION BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE LEGAL ORDER OF THE EUROPEAN UNION AND OTHER REGIONAL ORGANISATIONS

[…]

406. As to the application of the EU law, the Treaties as primary law and regulations and decisions as secondary law are directly applicable, that is to say, they apply immediately as the norm in all EU member States and no other act~~s~~ by the~~of~~ member States are required. The directives, however, must be incorporated (transposed) into national law by the deadline set at the adoption of every directive. According to Article 288 TFEU, a directive is binding upon each member State to which it is addressed, as to the result to be achieved, while leaving national authorities the competence to choose the form and means to achieve this result.

[76] ECtHR, *Loizidou v. Turkey (merits)*, § 43, 18 December 1996..
[77] See Theme I, sub-theme (i) of the present Report. To harmonize cross-references within the text
[78] See Sicilianos, *op. cit.* pp. 225, 229.
[79] See paragraphs ~~110-112~~109-111 above.
[80] As advanced by Olivier de Frouville in his Individual Opinion (concurring) in *Seyma Turkan v. Turkey* (CCPR, 2274/13, 22 October 2018), " *the Committee should be mindful of ensuring consistency between its interpretations and those of other courts, including regional courts, and should diverge from them only after thorough reflection and for nullifying reasons, which should, ideally, be set forth in the reasoning"* (§11).

407. EU law is that of direct effect that enables individuals to invoke an EU law provisions directly before the national courts. member States. In the case of *Van Gend en Loos,*[81] the CJEU held that the Community constituted a new legal order of international law member States and that independently of the legislation of member States, Community law therefore not only imposed obligations on individuals but was also intended to confer upon them rights[82]. Direct effect can be vertical (an individual can invoke an EU law provision in relation to the member State) or horizontal (an individual can invoke an EU law provision in relation to another individual) under specific conditions. According to the jurisprudence, for a primary law (Treaty) provision to have direct effect, it must be precise, clear and unconditional and must not call for additional measures, either national or European. As to the secondary law, under Article 288 TFEU regulations always have direct effect. A directive also can have direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU member State has not transposed the directive by the deadline[83]. However, a directive can in principle only have direct vertical effect. Decisions may have direct vertical effect when they refer to an EU member State as the addressee[84].

Comment [SK20]: There is a problem with the formulation.

[…]

412. Neither of the Treaties establishing the then European Communities ~~(see paragraph 401 [formerly 5] above)~~ included any references to fundamental rights. The focus on economic matters was also reflected in the early case-law of the CJEU, for example, in cases like *Stork*, *Geitling* and *Sgarlata*[85] the CJEU refused to consider the application of human rights standards since they were not explicitly based on any Article of the Treaties[86]. However, from the early 1970s, in response to the concerns expressed by domestic constitutional courts that the supremacy of EU law might otherwise undermine the protection of fundamental rights under national constitutions[87], the CJEU has incorporated fundamental rights in its case-law. Thus in the *Nold* judgment of 14 May 1974, the CJEU held that "fundamental rights form an integral part of the general principles of law, the observance of which [the CJEU] ensures"[88]. As to the content of these rights, the CJEU stated as follows: "In safeguarding these rights, the [CJEU] is bound to draw inspiration from constitutional traditions common to the member States, and it cannot therefore uphold measures

[82] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, judgment of 5 February 1963, part II.B.
[83] Case 41-74 *Yvonne van Duyn v Home Office*, judgment of 4 December 1974.
[84] Case C-156/91 *Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg*, judgment of 10 November 1992.
[85] Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, judgment of 4 February 1959; joined cases 36, 37, 38 and 40/59 *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, judgment of 15 July 1960; Case 40/64, *Marcello Sgarlata and others v Commission of the EEC*, judgment of 1 April 1965.
[86] Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433.
[87] Olivier De Schutter, *Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019.
[88] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974.

which are incompatible with fundamental rights recognised and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law"[89].

[…]

414. At the level of the primary law, the reference to the ECHR was first included in the preamble of the Single European Act, where the EU member States expressed their determination "to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member States, in the [ECHR] and the European Social Charter, notably freedom, equality and social justice". This institutional link between the ECHR and the EU initially established by the CJEU in its case-law was later codified in the Maastricht Treaty ~~see paragraph 401 [formerly 6] above~~), where Article F (currently Article 6 TEU) stated that the EU "shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the member States, as general principles of Community law".

[…]

421. As regards the EU Charter of Fundamental Rights, Article 52 § 3 states, "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." In order to promote consistency, the drafters of the EU Charter of Fundamental Rights sought to ensure that the rights and freedoms of the Charter that "correspond" to rights and freedoms listed in the ECHR would be interpreted in accordance with the case-law of the ECtHR; for example, the Explanations appended to the EU Charter of Fundamental Rights [90] provide the list of such correspond~~a~~ences, distinguishing between those Articles of the Charter "where both the meaning and the scope are the same as the corresponding Articles of the ECHR", and the Articles "where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider"[91].

[…]

c. Analysis of the challenges

Comment [SK21]: Maybe the challenges and the possible solutions should be together, as in the other Chapters.

476. […]

[…]

[89] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974, para 13.
[90] OJ C 303, 14 December 2007, pages 17-35.
[91] Olivier De Schutter, *Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019.

CONCLUSION

483. As regards, in particular, the risk that two separate bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, ~~creating a dividing line in Europe,~~ it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

REPULIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA

[Note by the Secretariat: These comments were made in respect of the draft chapter on "State responsibility and extraterritorial application of the European Convention on Human Rights" (Theme 1 subtheme ii)) and refer to proposals previously made by other member States' delegations. The paragraphs referred to, as well as the comments made by the other member States, are set out in document DH-SYSC-II(2018)24rev (extracts) of 29 May 2019.

As the paragraph numbers have changed following the compilation of all draft chapters in the Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, we have added the current paragraph numbers for each of the Republic of Moldova's comments.]

187. [former 51.] Several important ~~decisions~~ judgements further defined the scope of the States' jurisdiction where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In several cases concerning the ~~creation~~ existence, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military presence in the area. In *Catan*, in particular, it emphasised that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".[1] Similarly, in *Chiragov*, the Court found not only the respondent State's military support continues to be decisive for the continued control over the territories in question, but in addition that the "Nagorno Karabakh Republic" – whose army and administration and those of Armenia had been found to be highly integrated – survived "by virtue of the military, political, financial and other support" given to it by Armenia.[2] No direct action by respondent State in relation to the impugned act was thus found to be necessary in this group of cases in order for the acts to come within the respondent States' jurisdiction.

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

Comment [DVA22]: Original version.

[1] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, ECHR 2012 (extracts).
[2] *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180, 185 and 186, ECHR 2015.

its judgment in the *Jaloud case*.[3] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. ~~For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other.~~

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

238bis. [former ~~101bis.~~] ~~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.~~

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

239. [former 102.] In view of the foregoing, and in order to avoid a risk of fragmentation of the international legal order, as well as in the interest of preserving the authority of the Court's decisions, it would be desirable if the Court ~~gave more explanations as to whether and in how far it considered the~~more consistently applied relevant rules of general international law, including those codified in ARSIWA ~~rules relevant and applicable~~, in cases concerning attribution of conduct to the respondent State before it.

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

Comment [m23]: RUSSIA / RUSSIE

Comment [SE24]: RUSSIA / RUSSIE (22/05/2019)

Comment [DVA25]: Original version.

Comment [l26]: RUSSIA / RUSSIE (22/05/2019)

Comment [DVA27]: Original version.

[3] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., ECHR 2014.

NETHERLANDS / PAYS-BAS

[Note by the Secretariat: These comments were made in respect of the draft chapter on "State responsibility and extraterritorial application of the European Convention on Human Rights" (Theme 1 subtheme ii)) and refer to proposals previously made by other member States' delegations. The paragraphs referred to, as well as the comments made by the other member States, are set out in document DH-SYSC-II(2018)24rev (extracts) of 29 May 2019.

As the paragraph numbers have changed following the compilation of all draft chapters in the Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, we have added the current paragraph numbers for each of the Netherlands' comments.]

§ 187 [former Para 51]: we agree with the French comment [SE4], but we do not have strong feelings.
§ 230 [former Para 93]: we agree with the French comment [SE8]
§ 232 [former Para 95]: we don't see the value of the addition of the French
§ 233 [former Para 96]: we don't want to loose ([SE17] France) or change (SE18 Georgia) this paragraph. We consider it to be very nuanced. The new place (para 101 bis) is fine
§ 234 [former Para 97]: we hesitate with respect to the alterations of France [SE21]. The former wording puts it more within the realm of the Court and seems more accurate.
§ 234 [former Para 97]: the Russian addition seems correct but we fail to see what the added value is.
§ 234 [former Para 97]: we wonder why we need to refer to the ICJ. What is the point we are trying to make?
§ 238 [former Para 101]: we would not support the comment of Georgia [SE36].
[French proposal for a new paragraph after current § 238] [former Para 101bis]: agree with the change of place of this para as suggested by france [SE40]. We don't like the suggestion of Russia [SE43]. The wording is somewhat harsh. We do not consider that it is the tone we would like to use in this report.
§ 239 [former Para 102]: we prefer our suggestion instead of the Russian one.

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

[…]

187. **[former 51.]** Several ~~important~~ subsequent decisions ~~further defined~~ expanded the scope of the States' jurisdiction even further, to cases where they were found to have effective control of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In several cases concerning the creation, within the territory of a Contracting State, of an entity which is not recognised by the international community as a sovereign State, with the support of the respondent State, the Court had not only had regard to the strength of the State's military presence in the area. In *Catan*, even though no direct involvement of the respondent was established~~,~~ ~~in particular, it emphasised~~ the Court nevertheless ~~that~~ attributed responsibility on the basis that the respondent State exercised "effective control and decisive influence" over the separatist administration, which was found to continue in existence "only because of Russian military, economic and political support".[1] In *Ilascu* the Court did not even require effective control, considering "decisive influence" to be a sufficient requirement for responsibility. Thus the threshold of State responsibility as viewed by the ECtHR was substantially decreased. Similarly, in *Chiragov*, the Court found not only the respondent State's military support continues to be decisive for the continued control over the territories in question, but in addition that the "Nagorno Karabakh Republic" – whose army and administration and those of Armenia had been found to be highly integrated – survived "by virtue of the military, political, financial and other support" given to it by Armenia.[2] No direct action by respondent State in relation to the impugned act was thus found to be necessary in this group of cases in order for the acts to come within the respondent States' jurisdiction.

[This paragraph has not yet been provisionally adopted].

[…]

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

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

[1] *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 122, ECHR 2012 (extracts).
[2] *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180, 185 and 186, ECHR 2015.

that the Court does not give more detailed reasons for the development of these criteria and their relationship with the rules of international law.

[…]

238. **[former 101.]** Finally, another conclusion that can be drawn from the case-law of the Court is that it does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. As show above, the Court has expressly acknowledged that there is a conceptual distinction between the two, for instance in its judgment in the *Jaloud case.*[3] It has also held that the question of jurisdiction precedes that of attribution. The acknowledgement in principle that attribution and jurisdiction are distinct has not always been clearly reflected in the Court's judgments. For instance, in *Ilaşcu*, it is not clear whether the Court made a clear distinction between the issue of attribution of conduct on the one hand, and the issue of whether Russia exercised jurisdiction in the sense of Article 1 ECHR over the applicant on the other. . **It has been argued that the Court conflated the two. The criteria used by the Court in this context, in particular those of "decisive influence" and "surviving by virtue of the military, economic, financial and political support" appear to depart from, and set a lower threshold than, the "direction or control" criterion used by the ARSIWA.**

238bis. 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.

[…]

239. **[former 102.].** In view of the foregoing, and in order to avoid a risk of fragmentation of the international legal order, **as well as in the interest of preserving the authority of the Court's decisions,** it would be desirable if the Court ~~**gave more explanations as to whether and in how far it considered the**~~**more consistently applied relevant rules of general international law, including those codified in** ARSIWA ~~**rules relevant and applicable,**~~ in cases concerning attribution of conduct to the respondent State before it**.**

[3] *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 112 ss. and 154 s., 20 November 2014.