CDDH(2019)29
21/11/2019

STEERING COMMITTEE FOR HUMAN RIGHTS /

COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME

(CDDH)

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Comments
on the draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order /

Commentaires
sur le projet de Rapport du CDDH sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international

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Introduction

1. In accordance with the terms of reference given by the Committee of Ministers to the CDDH regarding the work of the DH-SYSC for the 2018–2019 biennium, the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II) elaborated a Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, which it adopted at its 7th and last meeting (18–20 September 2019).[1] The DH-SYSC subsequently examined and adopted the Draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order at its 5th meeting (15–18 October 2019).[2]

2. The Draft CDDH Report is now submitted to the CDDH for consideration and possible adoption of the final Report at its 92nd meeting (26–29 November 2019).[3]

3. The participants in the CDDH meetings were invited to send comments, if any, on the Draft CDDH Report in the form of drafting proposals to the Secretariat by 18 November 2019.

4. The present document contains the compilation of these comments.

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Introduction

1. Conformément au mandat confié par le Comité des Ministres au CDDH concernant les travaux du DH-SYSC pour le biennium 2018–2019, le 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) a élaboré un 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, qu'il a adopté lors de sa 7e et dernière réunion (18–20 septembre 2019)[4]. Le DH-SYSC a ensuite examiné et adopté le Projet de Rapport du CDDH sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international lors de sa 5e réunion (15–18 octobre 2019)[5].

2. Le Projet de Rapport du CDDH est maintenant soumis au CDDH pour examen et adoption éventuelle du Rapport final lors de sa 92e réunion (26–29 novembre 2019)[6].

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1 See DH-SYSC-II(2019)R7, §§ 4-10.
2 See DH-SYSC(2019)R5, §§ 5-12.
3 It is recalled that at its 91th meeting (18–21 June 2019), the CDDH already provisionally adopted the following draft chapters of its future Report: chapter of Theme 1, subtheme i): Methodology of interpretation by the European Court of Human Rights and its approach to international law; chapter of Theme 1, subtheme iii): Interaction between the resolutions of the Security Council and the European Convention on Human Rights; chapter of Theme 1, subtheme iv): Interaction between international humanitarian law and the European Convention on Human Rights; and chapter of Theme 2: The challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties (see CDDH(2019)R91ab, § 2 (c) (i)).
4 Voir DH-SYSC-II(2019)R7, §§ 4-10.
5 Voir DH-SYSC(2019)R5, §§ 5-12.
6 Il est rappelé que, lors de sa 91e réunion (18–21 juin 2019), le CDDH a adopté à titre provisoire les projets de chapitres suivants de son futur Rapport : chapitre du Thème 1, sous-thème i) : Méthodologie d'interprétation de la Cour européenne des droits de l'homme et son approche du droit international ; chapitre du Thème 1, sous-thème iii) : Interaction entre les résolutions du Conseil de sécurité et la Convention européenne des droits de l'homme ; chapitre du Thème 1, sous-thème iv) : Interaction entre le droit international humanitaire et la Convention européenne des droits de l'homme ; et chapitre du Thème 2 : Défi de l'interaction entre la Convention

3. Les participants aux réunions du CDDH ont été invités à faire parvenir au Secrétariat leurs commentaires éventuels sur le Projet de Rapport du CDDH sous forme de propositions de rédaction au plus tard le 18 novembre 2019.

4. Le présent document contient la compilation de ces commentaires.

et d'autres instruments internationaux relatifs aux droits de l'homme auxquels les États membres du Conseil de l'Europe sont parties (voir CDDH(2019)R91ab, § 2 (c) (i)).

Member States / États membres

AZERBAIJAN / AZERBAÏDJAN

The comments and drafting proposals of the Republic of Azerbaijan concerning the wording of paragraphs 132-134 of the draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order.

1. The Republic of Azerbaijan does not share the assessment of the way the facts were presented in paragraph 132 regarding the *Al-Skeini* case, as well as, paragraphs 133 and 134 regarding the *Chiragov* case and the context in which this case was referred to in those paragraphs.

2. In paragraph 132, the Report states that given the broad formulation of the principles set out in *Al-Skeini* in respect of State agent authority and control "it could be difficult for the respondent State to foresee the exact scope of its obligations". This statement seems to suggest that the Report intends to significantly limit the scope of application of the Convention, in particular in the sphere of State agent authority and control. It should be noted that the UN treaty bodies, the Inter-American bodies and HRC in its General Comment No. 31 (see paragraph 126 of the Report) have adopted even a broader view of extraterritorial jurisdiction, consistently finding that such jurisdiction arises when a State has effective control over the enjoyment of a particular right by an individual. It is unclear why "it could be difficult for the respondent State to foresee the exact scope of its obligations". On contrary, narrowing "the State agent authority and control" test might permit States' agents to behave in a foreign country in a manner prohibited under human rights law at home. This can further create legal vacuums where no human rights law applies. Therefore, the delegation asks to add the aforementioned view of Azerbaijan in a footnote to paragraph 132.

3. As regards paragraph 133, it starts with the sentence "Several **other** judgments **further** developed the scope of the States' jurisdiction where they were found to have effective control of an area…[emphasis added]" and continues by referring to cases of *Ilascu*, *Catan* and *Chiragov*. The delegation considers that the words "other" and "further" appear to indicate that the cases referred to in paragraph 133 (in particular *Ilascu*, 2004 and *Catan*, 2012) are dated after the cases referred to in paragraph 132 (in particular *Hassan*, 2014 and *Jaloud*, 2014), while it is, in fact, the vice-versa. Using these words adds inessential emphasis to the sentence and is unnecessary in the context of the paragraph 133. Hence, for the sake of clarity the delegation proposes to remove the words "other" and "further" from the first sentence of paragraph 133.

4. After examining the cases of *Ilascu*, *Catan* and *Chiragov* paragraph 133 concludes with the following statement:

> *"Thus, the threshold for establishing jurisdiction in these cases seems to* ***reduce*** *the requirements of the effective control test. Furthermore, the broad formulation*

of the elements necessary for the Court to conclude that a State had jurisdiction, as shown above, ***could make it difficult for States to foresee*** *the exact scope of their obligations under the Convention [emphasis added]"*

5. Such assessment in the Report does not reflect the true interpretation given by the Court with regard to the decisive influence and effective control applied in *Chiragov* case. Regrettably, the Committee previously removed the reference to the finding of the Court in the present case about the high degree of integration between Armenia and the "NKR" from the paragraph for no apparent objective reason despite the objections raised by the delegation. The delegation states that this finding constitutes an important criterion which was used by the Court for the first time and led it to conclude that Armenia exercised effective control over the so-called "NKR" territory. The Republic of Azerbaijan considers that the reference was deliberately deleted, so as to make *Chiragov* appear to correlate with the conclusion formulated in the last two sentences of paragraph 133.

6. *Chiragov* is a classic case of an effective control of an area. Indeed, the Court has characterised this case as "its leading case on the matter" (see *Muradyan v Armenia*, no. 11275/07, § 126, 24 November 2016). The judgment was reaffirmed later in *Muradyan v Armenia,* no. 11275/07, ECHR 2016 and *Zalyan and Others v Armenia,* nos. 36894/04 and 3521/07. Both *Muradyan* and *Zalyan* confirmed that Armenia is under an obligation to secure in the occupied Nagorno-Karabakh region and surrounding territories of Azerbaijan the rights and freedoms set out in the Convention and is responsible under the Convention in respect of "the acts of its own soldiers or officials operating in Nagorno Karabakh" and "the acts of the local administration which survives by virtue of Armenian military and other support" (see *Muradyan*, at § 126).

7. While in *Chiragov* the Court did not examine the question of the attribution of the acts on account of which the applicants have been deprived of their possessions, it had established the existence of a high degree of integration between the "NKR" and Armenia. As Judge Motoc stated in her concurring opinion in *Chiragov* "[a] State may perhaps have been able to prove the involvement of the Armenian armed forces in the acts of the authorities of the "NKR", but for an individual wishing to assert their fundamental rights that would have been very difficult, if not impossible…The Court's logic is much easier to discern in the present case than in the earlier cases: even if it does not examine the question of attribution and does not seek to establish the actual participation of the Armenian forces in the acts that resulted in the applicants being deprived of their possessions, the exercise of jurisdiction by the defendant State has been convincingly established here".

8. In this respect, the present case looks to be the closer to the criterion of effective control, imposed by the ICJ. Even if the words "complete control" are not used by the Court, it does use "occupation" and "high degree of integration". As Judge Motoc put it quite strongly, *Chiragov* "represents one of the strongest returns to general international law".

9. In addition, we must also remain mindful of the Convention's special character as a human rights treaty, as confirmed by the Court's case law and rightly putted in paragraphs 136 and 154 of the present Report. As paragraph 154 goes, the Court's mandate "differs both from that of the ICJ and that of the ICTY, and the Court regularly stresses 'the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings'".

10. Furthermore, the Republic of Azerbaijan considers that the conclusion in paragraph 133, especially in the part where it is argued that the requirements of the effective control test have been reduced in *Ilascu*, *Catan* and *Chiragov,* is regrettable. In fact, *Ilascu*, *Catan* and *Chiragov,* as well as, preceding cases concerning the TRNC have been the dominant and leading cases concerning the test of effective control of an area. The Report itself does not indicate any other ECtHR cases concerning this test. In this circumstances, it is unclear how the requirements are reduced and what is actually the point from where it is reduced. There has been no case in the Court's jurisprudence so far, which applied stronger requirement for effective control test than one applied in *Ilascu*, *Catan*, *Chiragov* or cases concerning the TRNC. It cannot be argued that any stricter requirements exist in general international law. In any case, the Convention's special character as a human rights treaty should be taken into account.

11. The statement then continues by arguing in similar vein to paragraph 132 that the broad formulation "could make it difficult for States to foresee the exact scope of their obligations". The statement, however, does not provide any clarification how such "difficulty" arises. While finding jurisdiction using "the State agent authority and control" test might in certain circumstances be completely fact dependent and possibly entail uncertainties - in anyway the Republic of Azerbaijan does not agree that hypothetic uncertainties should be enough to conclude in favour of the narrowing of the application of this test - the effective control of an area test, especially an area within the European *espace juridique*, is usually, if not always, an established and a well-known fact. In *Chiragov*, for example, the Court referred to immense number of sources in finding the effective control, including relevant resolutions of the UN Security Council, UN General Assembly, PACE and European Parliament, all of which confirmed the fact of occupation.

12. Moreover, given that the above cases concerned areas within the European legal space, it is unclear how more stringent requirements would benefit foreseeability or legal certainty. At the same time, finding lack of effective control in such cases would inevitably result in creation of legal vacuums in the European *espace juridique* itself. Such scenario would even go beyond the *Bankovic* case with its strict approach.

13. In light of the above, the delegation proposes to remove the aforementioned conclusion from paragraph 133. The reference to *Chiragov* should also be removed as a whole from the said paragraph.

14. As to paragraph 134, the delegation proposes to delete the word "only" from the first sentence and add the words "and effective control" after the words "decisive influence", as the cases referred to are not only about decisive influence, but also about effective control. Furthermore, the Report states that a respondent State is obliged to secure Convention rights on the territory under its effective control and then continues that "[t]his category of cases [*Ilascu*, *Catan*, *Chiragov]* may cause difficulties for the States at the stage of the execution of judgments". The delegation is of the view that securing the Convention rights over an area of which a State exercises effective control is vital in avoiding a gap or vacuum in human rights' protection and the Court's approach on this matter has been relatively straightforward (see, for example, *Cyprus v. Turkey* [GC], no. 25781/94, § 78, 10 May 2001, *Guzelyurtlu and others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019, §§ 188, 190, 193-196).

15. Thus, the delegation proposes rephrasing the relevant sentence of paragraph 134 as follows: "While this is consistent with the desirability of the Court to avoid a gap or vacuum in

human rights' protection, this category of cases may cause difficulties for the States at the stage of the execution of judgments."

16. Taking into account the aforementioned, the Republic of Azerbaijan proposes the following amendments to the paragraphs 132-134 of the Report:

132. In further applications including the cases of *Hirsi Jamaa*, *Hassan* and *Jaloud*, the Court, while relying on the principles as summarised in *Al-Skeini*, found the facts of the case to fall under the exception of State agent authority and control, thus again enlarging the scope of application of the Convention to further situations arising outside the respondent States' territory. The broad formulation of the principles set out in *Al-Skeini*, in respect of State agent authority and control, means that it could be difficult for the respondent State to foresee the exact scope of its obligations under the Convention in respect of individual rights in a given situation. This is particularly so in the light of the development of the substantive rights under the Convention, which now also comprise positive and/or procedural obligations. [footnote: The Republic of Azerbaijan regrets such assessment of facts, in particular considering that the UN treaty bodies, the Inter-American bodies and the HRC in its General Comment No. 31 adopted even the broader view of extraterritorial jurisdiction (see paragraph 126 of the Report). The Republic of Azerbaijan considers that narrowing "the State agent authority and control" test might permit States' agents to behave in a foreign country in a manner prohibited under human rights law at home. Moreover, this can create legal vacuums where no human rights law applies.]

133. Several ~~other~~ judgments ~~further~~ developed 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 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 *Ilascu* the Court did not require effective control, considering "decisive influence" to be a sufficient requirement for establishing jurisdiction. In *Catan*, even though no direct involvement of the agents of the respondent State was established,[167] the Court nevertheless concluded 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". ~~In *Chiragov*, the Court found not only that the respondent State's military support continued to be decisive for the continued control over the territories in question, but that the "Republic of Nagorno-Karabakh" (the "NKR") survived "by virtue of the military, political, financial and other support" given to it by Armenia.~~[169]

No direct action by the 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. ~~Thus, the threshold for establishing jurisdiction in these cases seems to reduce the requirements of the effective control test. Furthermore, the broad formulation of the elements necessary for the Court to conclude that a State had jurisdiction, as shown above, could make it difficult for States to foresee the exact scope of their obligations under the Convention.~~[170]

134. In this category of cases, where a respondent State does not have direct territorial control, but ~~only~~ decisive influence and effective control over the

administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.[171] While this is consistent with the desirability of the Court to avoid a gap or vacuum in human rights' protection, this category of cases may cause difficulties for the States, at the stage of the execution of judgments. However, the unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention must be recalled. It has been decided that this aspect relating to the execution of judgments will not be addressed as it goes beyond the scope of the Report on the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the present report.

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

[…]

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

[…]

d. CHALLENGES AND POSSIBLE SOLUTIONS

[…]

81. The requirement in Article 31(3)(c) of the VCLT that other rules of international law are taken into account when interpreting a treaty, is an important factor in avoiding the risks of fragmentation of international law. As will become clear in the subsequent chapters, ***the Court does not always follow the general international law approach, while*** it is essential for States Parties that there is clarity and consistency in the Court's case-law when dealing with these issues.[7] ***Concerns have been raised by certain member States[8], by some members of the Court in separate opinions[9] and in academia[10] as to the question whether the Court always achieves an interpretation of the Convention which is in harmony with other provisions of international law. In its report on the longer-term future of the system of the ECHR the CDDH[11] noted that an interpretation of the Convention which is at odds with other instruments of public international law could have a detrimental effect on the authority of the Court's case law and the effectiveness of the Convention system as a whole.***

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[7] See also the CDDH Report on "The longer-term future of the system of the European Convention on Human Rights", cited above, § 186.

[8] ***The Russian Federation expressed deep concerns as to the quality of some Court judgments where "the Court departs from the existing system of international case law which, in turn, could lead to the fragmentation of public international law" (p. 99 of the Proceedings of the 2015 Brussels Conference).***

[9] ***See for example the separate opinion of Judge Spielmann, joined by Judge Raimondi, in the case of Jaloud v. the Netherlands (Grand Chamber judgment of 20 November 2014, App. No. 47708/ 08) in which certain parts of the judgment are described as "ambiguous, subsidiary and incomprehensible". See also the separate opinion of Judge Motoc in the same case: "[...] questions concerning the relationship between general international law and the human rights provided for in Article 1 have still to be clarified, as do the various conflicts of norms which may arise in the course of that Article's application". And Judge Kovler in the case of Catan and Others v. Moldova and Russia [GC], App. Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012.***

[10] ***See, for example James Crawford, "The structure of State responsibility under the European Convention of Human Rights" at the Conference The European Convention on Human Rights and General International Law, organised by the Court and the European Society of International Law (ESIL) on 5 June 2015. Mr Crawford identified various areas in which there is potential divergence from the rules on State responsibility. See also Sir Daniel Bethlehem, "When is an act of war lawful?" Report delivered at the seminar organised by the Court in honour of the Deputy Registrar of the European Court of Human Rights Michael O'Boyle, 13 February 2015.***

[11] ***Paragraph 186.***

82. The Court has referred to both the subsequent practice of the States Parties to the ECHR (Art 31(3)(b) VCLT) and other rules of international law (Art 31(3)(c) VCLT) as a means of tacit modernisation of the provisions of the ECHR by the States. Where the Court seeks to establish a "European consensus" in this respect, it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law. ***The Court's reference to the subsequent practice of not all but only a majority of the States Parties of the ECHR may potentially lead to an outcome that does not take into account these factors.***

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

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

[…]

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

[…]

ii. The case-law

[…]

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

108. Following its decision in the *Banković* case, the Court ~~further developed~~ ***moved in*** its case-law on extra-territorial jurisdiction ***to a more extensive interpretation of Article 1***; both the decision in *Banković* and the Court's subsequent case-law have been the subject of numerous comments and shall be further analysed below.[12]

[…]

- The case-law since *Al-Skeini*

[…]

122. In relation to the Court's category of extraterritorial application on the basis of "effective control of an area", there have been ~~developments~~ ***significant expansion*** as regards the factors the Court will consider, notably in the ***contradictory***[13] Court's judgment

[12] See the "Challenges and possible solutions" section, §§ 128 *et seq*.

[13] ***See also Partly dissenting opinion of Judge Kovler in Catan and Others v. the Republic of Moldova and Russia [GC]; B.Bowring, 'Case commentary: Catan v Moldova and Russia: geopolitics and the right***

in *Catan and Others v. the Republic of Moldova and Russia*[14][15] The case concerned the complaint lodged by children and parents belonging to the Moldovan community in Transdniestria about the effects of a language policy adopted by the separatist regime of the "Moldavian Republic of Transdniestria" ("MRT") prohibiting the use of the Latin alphabet in schools and the subsequent measures to implement that policy. The Court, in establishing that the applicants were within Russia's jurisdiction for the purposes of Article 1, looked beyond the question of the establishment of the "MRT" as a result of Russian military assistance (in 1991-1992) and the size of Russia's military deployment (in 2002-2004)[16] and had also regard to the fact that "the "MRT" only survived during the period in question (2002-2004) by virtue of Russia's economic support, *inter alia*"[17]. The Court concluded that Russia was continuing to provide military, economic and political support to the Transdniestrian separatists so that it was found to have exercised during the period in question effective control and decisive influence over the "MRT" administration.[18] According to the Court, the impugned facts therefore fell within the jurisdiction of Russia, although the Court accepted that there was no evidence of any direct involvement of Russian agents in the action taken against the applicants' schools.[19] The Court specified: […]

[…]

iii. Challenges and possible solutions

[…]

130. Some subsequent cases of the Court have ~~developed~~ ***broadened*** its application of the Convention extraterritorially as set out in *Banković*. In *Issa* the Court found that "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"[20] and thereby indicated that the Convention could be applied outside the Convention legal space. In *Pad* the Court found that the respondent State could potentially be held liable in a case involving the death of persons possibly brought about by shots from a military helicopter on foreign territory and thus possibly in a situation concerning air strikes which had not been found to make the victims thereof fall within the respondent State's jurisdiction in *Banković*~~.~~ ***and thus in a clear departure from the Banković decision and despite striking resemblance of factual circumstances.***

[…]

133. Several other judgments further developed 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 existence, within the territory of a Contracting State, of an

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to education, and why "no person" is in fact "a child". International Justice 1 (9), 2014, pp. 44-59; M. Milanović, 'Catan and Others'. European Journal of International Law: Talk!, 21 October 2012.

14 ~~The Russian delegation regrets that the Report does not recognize the obviously contradictory character of the judgment in the case *Catan and Others v. Moldova and Russia*, as well as the fact that the Court significantly expanded the factors inherent in the determination of the existence of "effective control", thus considerably lowering the threshold of responsibility (the full comment is reproduced in document DH-SYSC(2019)R5).~~

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

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

17 Ibid., § 120.

18 Ibid., § 122.

19 Ibid., § 114.

20 *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004.

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 *Ilascu* the Court did not require effective control, considering "decisive influence" to be a sufficient requirement for establishing jurisdiction. In *Catan*, even though no direct involvement of the agents of the respondent State was established,[21] the Court nevertheless concluded 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".[22]In *Chiragov*, the Court found not only that the respondent State's military support continued to be decisive for the continued control over the territories in question, but that the "Republic of Nagorno-Karabakh" (the "NKR") survived "by virtue of the military, political, financial and other support" given to it by Armenia.[23] No direct action by the 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. Thus, the threshold for establishing jurisdiction in these cases seems to reduce the requirements of the effective control test[24]. Furthermore, the broad formulation of the elements necessary for the Court to conclude that a State had jurisdiction, as shown above, could make it difficult for States to foresee the exact scope of their obligations under the Convention.[25]

134. In this category of cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.[26] ***As was agreed by the CDDH in its meeting of 27-30 November 2018***[27] ~~T~~this category of cases may cause difficulties for the States at the stage of the execution of judgments. However, the unconditional character of the obligation to execute the Court's judgments under Article 46 of the Convention must be recalled. It has ***also*** been decided ***by the CDDH*** that this aspect relating to the execution of judgments will not be addressed as it goes beyond the scope of the Report on the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the present report.[28]

[…]

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21 See paragraph 123 above.

22 *Catan and Others,* cited above, § 122.

23 *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 180, 185 and 186, 16 June 2015. See also paragraph 125 above.

24 ***See more M. Milanović, 'Catan and Others'. EJIL: Talk!, 21 October 2012; B.Bowring (2014), 'Case commentary: Catan v Moldova and Russia: geopolitics and the right to education, and why "no person" is in fact a child'. International Justice 1 (9), pp. 44-59.***

25 The Republic of Moldova does not share the assessment of the way the facts were presented in this paragraph regarding the *Ilascu* and *Catan* cases. The full comment is reproduced in document DH-SYSC(2019)R5.

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

27 ***Report of the 90th CDDH meeting (27–30 November 2018), CDDH(2018)R90, paragraph 19.***

28 ~~See the Report of the 90th CDDH meeting (27–30 November 2018), CDDH(2018)R90, § 19. One delegation considered that problems for the States at the stage of the execution of judgments in cases concerning the extraterritorial application of the Convention are within the scope and should have been addressed in the Report.~~ ***One delegation considered that problems for the States at the stage of the execution of judgments in cases concerning the extraterritorial application of the Convention are within the scope and should have been addressed in the Report***

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

[…]

iii. Challenges and possible solutions

[…]

185. ***Apparent inconsistencies in the Court's interpretation of "jurisdiction" 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.*** In view of the foregoing, and in order to ~~preserve the effectiveness of the Convention system against risks~~ ***avoid a risk*** of fragmentation of the ~~European and~~ international legal ~~space~~ ***order, as well as*** in the ~~field~~ ***interest*** of ~~human rights protection~~, ***preserving the authority of the Court's decisions*** ~~it is important that~~ ***would be desirable if*** the Court ~~gives detailed reasoning when applying the~~ ***more consistently applied relevant*** rules of general international law, ~~and in particular as to whether and how far it considers the~~ ***including those codified in*** ARSIWA ~~rules relevant and applicable~~ in cases concerning attribution of conduct to the respondent State before it.[29]

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

[…]

3. CHALLENGES AND POSSIBLE SOLUTIONS

[…]

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

[…]

ii. Analysis

326. As exemplified by the *Correia de Matos* case, the existence of parallel human rights protection mechanisms, normally a source of enrichment and enhancement of the universal protection of human rights, has also the potential of becoming a source of uncertainty for States parties on how to best fulfil their human rights commitments, not to mention for individuals as regards the exact scope of their rights, and a threat to the coherence of human rights law and the credibility of human rights institutions. ***As was stated by the CDDH in its report on the longer-term future of the ECHR, the existence of numerous***

~~[29] The Russian delegation regrets the lack of substantive recommendations corresponding to the challenges identified, and proposes to highlight the need that the Court, in the interest of preserving its authority, more consistently applied relevant rules of general international law, including those codified in the ARSIWA (the full comment is reproduced in document DH-SYSC(2019)R5).~~

European and international treaties relevant to the protection of human rights standards increases the risk of diverging interpretations of one and the same or interrelated (human rights) norm(s). This in turn may lead to conflicting obligations for States under various mechanisms of international law. It could undermine the credibility of the Convention mechanism if the Convention were to beinterpreted in a manner inconsistent with States' commitments under other treaties[30].

[…]

CONCLUSION

[…]

426. Legal certainty as regards the applicable rules concerning the interpretation of the ECHR, and its relationship with other rules of international law, for example ~~on State responsibility or~~ international humanitarian law, ***as well as clarity and consistency in the application by the Court of general rules of international law on state responsibility*** is of great importance for the States Parties. As the ECtHR itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.[31]

[…]

[30] ***Para 172.***

[31] ~~The Russian delegation regrets that the conclusions of the report do not properly reflect the challenges and solutions identified, and proposes to highlight that clarity and consistency in the application by the Court of general rules of international law on state responsibility is of great importance for the States Parties (the full comment is reproduced in document DH-SYSC(2019)R5).~~