JURISDICTION AND LIABILITY UNDER THE EUROPEAN CONVENTION OF CONTRACTING PARTIES PARTICIPATING IN MILITARY OPERATIONS ABROAD

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Abstract

The conduct of military forces is not limited to their territory. They are typically sent on missions that potentially affect civilians beyond the borders of the sending State. Under the European Convention, the linking factor bringing its protection into play is that of jurisdiction under Article 1 ECHR. What is the reach of the European Convention in the context of participation by Contracting Parties in military operations abroad?

The interpretation of the concept of jurisdiction has evolved from its territorial beginnings. After a detailed analysis of the case-law on the interpretation of jurisdiction, including the latest landmark cases of *Al-Jedda* and *Al-Skeini,* I conclude that the current case-law lacks coherence.

The search for a more coherent approach to determining questions of jurisdiction, in situations involving military conduct abroad has steered this thesis into considering the unsatisfactory interplay between humanitarian law and human rights law and the way in which the two systems apply to civilians caught in military operations. An analysis of the case-law under the European Convention in situations where Contracting Parties send troops as part of multi-national forces has indicated the benefits of considering dual or multiple attribution rather than a separation of jurisdiction.

I propose a more coherent approach to jurisdiction replacing the present uncertainty in the context of applicability of the European Convention to military operations abroad. I argue, in all situations, for a test requiring a direct and immediate link between the conduct of Contracting Parties and the violation of Convention rights as offering better protection of human rights for individuals trapped in conflicts. In this way the supervisory effect of the European Convention is enhanced.

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Abbreviations

ACHR	American Convention on Human Rights
COMKFOR	Commander of NATO Kosovo Force
Contracting Parties	Parties to the European Convention on Human Rights
CPA	Coalition Provisional Authority
DARIO	Draft Articles on the Responsibility of International Organizations
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
European Convention	European Convention on Human Rights
FRY	Federal Republic of Yugoslavia
HR	High Representative
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Court for the former Yugoslavia
IHT	Iraqi High Tribunal
ILA	International Law Association
ILC	International Law Commission
KCO	Kosovo Claims Office
KFOR	NATO Kosovo Force
MNB	Multinational Brigade
MNF	Multinational Force
MRT	Moldovan Republic of Transdniestria
NATO	North Atlantic Treaty Organization
PKK	Kurdistan Worker's Party
SOFA	Status of Forces Agreement
Strasbourg Court	European Court of Human Rights
TCN	Troops Contributing Nations
TCNCO	Troop Contributing Nation Claims Office
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIK	United Nations Interim Administration for Kosovo
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

Chapter One: Jurisdiction under Article 1 ECHR – A Troublesome Concept

1.1 Introduction

European States are getting more and more involved with countries beyond their immediate boundaries, and that move is reflected particularly in increasing military operations outside the Council of Europe territory. This extraterritorial move also means that many civilians all over the world are suffering[1] the consequences of European troops' conduct outside their national territory. Troops sent by Parties to the European Convention on Human Rights (Contracting Parties) operate on their own, in the context of multilateral forces or coalitions and sometimes under United Nations (UN) auspices. The reasons for their deployment are various from serving in humanitarian and peace supporting operations to the need to combat terrorism. Contracting Parties' forces performing under UN flag such as British troops in Iraq, forces helping to fight inside enemies in regions like Afghanistan or more cautious West military interventions avoiding 'boots on the ground' as in Libya, are the situations of extraterritorial liability this thesis is concerned with. Besides, new tendencies and technologies used in modern military conduct will affect the scope of this study. Thus, the question becomes: what human rights obligations and liability do Contracting Parties owe to victims of their troops' conduct?[2] Working out an answer for that question is the main purpose of this work.

[1] A Williams, 'Human Rights and Law: Between Sufferance and Insufferability' (2007) 123 LQR 132.

[2] 'In an era in which international military intervention may continue to occur for an unforeseeable amount of time, an examination of extraterritorial obligations to protect fundamental human rights in "lawless areas" of conflict is warranted'. T Abdel-Monem, 'How Far do the Lawless Areas of Europe Extend? Extraterritorial Application of the ECHR' (2005) 14 J Transnatl L & Poly 159.

Other factors will have to be considered in the background. On the one hand, the interaction between human rights law and humanitarian law since it is now recognized that human rights obligations apply not only in times of peace but in times of war.[3] On the other hand, general international law has moved from the idea that States treatment of their subject was not an 'international concern'.[4] Precisely, the introduction of human rights meant that the way States treated their subjects was regulated in international law,[5] and the power of States was limited.[6] Further than that, States are recognising now that they affect individuals' rights not only in their own territory but in other States' territory. Hence States can expect to be exposed to violations claims from individuals all over the world.[7] However, in order for States conduct to breach their human rights obligations outside their territorial boundaries, a jurisdictional link between the State/s and individuals affected by their conduct has to be established. Notwithstanding, jurisdiction clauses differ between human rights instruments. In fact, Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR)

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[3] N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 237; G Verdirame, 'Human Rights in wartime: a framework for analysis' (2008) 6 EHRLR 689.

[4] M Gibney, *International Human Rights Law: Returning to Universal Principles* (Rowman & Littlefied Publishers 2008) 1; J Dugard, 'The Future of International Law: A Human Rights Perspective, (Valedictory lecture, Leiden University, 20 April 2007) 4 <http://www.leidenuniv.nl/tekstboekjes/content_docs/afscheidsrede_dugard.pdf > accessed 20 November 2011.

[5] J Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) CHRGJ Working Paper 11.

[6] M Shaw, *International Law (6*th ed., CUP 2008) 268; A Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8 EJIL 583; S Schieder, 'Pragmatism as a Path towards a Discursive and Open Theory of International Law' (2000) 11 EJIL 663; S Skogly and M Gibney, 'Transnational Human Rights Obligations' (2002) 24 HRQ; M Koskenniemi, 'Introduction: Alf Ross and Life Beyond Realism' (2003) 14, 4 EJIL 654; G Simpson, 'Duelling Agendas: International Relations and International Law (Again)' (2005) 1 JILIR 62 (Duelling Agendas).

[7] S Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 EJIL 749.

includes in its jurisdictional clause the words: 'within its territory and subject to its jurisdiction'.[8] At first glance, the treaty gives a greater territorial emphasis than Article 1 (1) of the American Convention on Human Rights (ACHR)[9] or Article 1 of the European Convention on Human Rights (ECHR) that states: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. However, despite the territorial reference in the ICCPR's clause its case-law is rather less territorially focused than that of the European Convention on Human Rights (European Convention).[10]

Applicability of the human right treaties is conditioned by their jurisdictional clauses; hence this introduction will be devoted to elucidate the concept of jurisdiction.

This work will concentrate on the European Convention as it remains the most developed judicial system for the protection of human rights. [11] In addition, it produces

[8] Article 2 (1) of the ICCPR: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

[9] Article 1 (1) of the ACHR: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'.

[10] According to Gondek, the Human Rights Committee (HRC) and the International Court of Justice (ICJ) have not interpreted 'within its territory' as restricting the extraterritorial scope of the ICCPR. M Gondek , *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 369-371 (*The Reach of Human Rights*).

[11] 'Compulsory jurisdiction of human rights courts, in the strong sense as a condition of membership remains limited to the ECHR'. C Greenwood, 'Remarks' in Cerna C, Greenwood C, Hannum H and Farer T, 'Bombing for Peace: Collateral Damage and Human Rights' (2002) 96 ASIL PROC 95, 99 (Bombing for Peace); M Milanovic, 'State Responsibility for Genocide' (2006) 17 EJIL 564; A Orakhelashvili, 'The Idea of European International Law' (2006) 17 EJIL 315; B Cali, 'The Purposes of the European Human Rights System: One or Many?' (2008) 3 EHRLR 301.

the bigger case-load on extraterritorial jurisdiction too,[12] which is also frequently being referred to by other international courts.[13] This thesis will also focus mainly on the activities of Contracting Parties' military personnel as the one of the most common trait of extraterritorial conduct of European States abroad.[14] Although many military operations are presented by Contracting Parties as counterterrorism offensives, [15] this work is not trying to contribute any answers to the controversies surrounding the so call 'war on terror'.[16] This study will look at activities of the armed forces whether they are or not described as counter-terrorism,[17] and the facts of the cases will be considered only in the context of their extraterritoriality and the applicability of the human right treaty.

Since my research question is based on the concept of extraterritorial jurisdiction in the sphere of the European Convention, my method of study will be following the doctrinal

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[12] 'The prime concern for the ECtHR is the caseload, anticipated as an estimated 250,000 cases by 2010'. Lord Woolf, *Review of the Working Methods of the European Court of Human Rights (* December 2005) 7 <http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf> accessed 24 June 2011; by the 31st August 2011 the number of pending applications reached a total of 160,200 cases, European Court of Human Rights 'Analysis of Statistics' (January 2011) <http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF > accessed 20 October 2012.

[13] A Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 EJIL 29.

[14] P Rowe, *The Impact of Human Rights Law on Armed Forces* (CUP 2006) 1.

[15] *Issa and others v Turkey* App no 31821/96 (ECtHR, Admissibility Decision 16 November 2004).

[16] D Jinks, 'September 11 and the Laws of War' (2003) 28 Yale J Intl L 233; A Roberts, 'The Laws of War in the War on Terror' (2003) 23 Isr YB Hum Rts 196; B Saul, 'Attempts to Define "Terrorism" in International Law' (2005) 52 NILR 57; M Sassoli ,'Terrorism and War' (2006) JICJ 2.

[17] 'Kenya, the UK, Indonesia and Spain have been attacked by Al-Qaeda. They have all responded, but not with a military counter-attack. They have turned to their law enforcement agencies. None of these countries declared they were in a war'. M E O'Connell, 'When Is a War Not a War? The Myth of the Global War on Terror' (2005-2006) 12 ILSA J Intl & Comp L 4.

approach. The natural starting point is the interpretation of Article 1 ECHR which will be further explored in this chapter, and the analysis of case law of the European Court of Human Rights (Strasbourg Court) and literature on the subject. Comparisons with other human rights treaties are made where relevant.

This chapter sets the building blocks for the inquiry into a wider scope for Article1 ECHR, one that will be more inclusive of individuals affected by Contracting Parties' troops conduct abroad and more able to stand its ground against political and military constraints offered by the international community.[18]

1.2 The Research Questions

This study pursues to answer the following questions:

1. To what extent is the Strasbourg Court willing to consider the liability of Contracting Parties for their conduct in the context of military operations abroad?

2. Is the current interpretation of jurisdiction, as the criterion determining the existence and extension of the liability of Contracting Parties, adequate to meet the challenges of current extraterritorial military undertakings?

[18] H J Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals.*(3rd ed, OUP 2008) 951; M Reisman,'Designing and Managing the Future of the State' (1997) 3 EJIL 409, 412; S Sur, 'The State Between Fragmentation and Globalization' (1997) 3 EJIL 421; O De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2005) CHRGJ Working Paper 9, 3.

3. How can the European Convention evolve towards a principle of jurisdiction that is contemporary, practical and effective? How will any new jurisdictional standard impact on the extraterritorial obligations of Contracting Parties that send troops outside their boundaries?

The topic of jurisdiction has been the subject of an extensive literature, but the recent landmark cases of *Al-Skeini*[19] and *Al-Jedda,* [20] might be regarded as establishing a more comprehensive approach to the protections afforded by the European Convention. However in order to build a response, some of the concepts and terminology used need clarification.

1.3 Issues of Interpretation and Concepts

One of the challenges to face when approaching questions about liability of Contracting Parties conduct abroad is that of knowing when the alleged victims are within their jurisdiction. Hence, there is a need to set the meaning of jurisdiction, a concept that has invited many theoretical misperceptions,[21] and look at its interpretation. Additionally, this section will look at another concept much used in the context of extraterritorial jurisdiction which is *espace juridique*.[22] Lastly, whereas we are concentrating on Article 1 ECHR, there is a need to mention another European Convention Article

[19] *Al-Skeini and others v the UK* App no 55721/07 (GC, 7 July 2011).

[20] *Al-Jedda v the UK* App no 27021/08 (GC, 7 July 2011).

[21] M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 418 (From Compromise to Principle).

[22] '… [T]he notion of [*espace juridique]* is unknown in other human rights systems'. M Gondek , *The Reach of Human Rights* (n 10) 178.

relating to the extraterritorial reach of Contracting Parties' obligations, Article 56 ECHR, the so called colonial clause.

1.3.1 *Jurisdiction: From General International Law to Human Rights*

In order to come within the scope of human rights instruments it is necessary to establish a jurisdictional link, namely 'control', 'authority' or 'jurisdiction' between the State/s and individuals affected by their conduct. Hence, we need to define clearly the idea of 'jurisdiction' to make it easier for States and individuals to know when human right obligations are triggered. [23] It is essential to distinguish the concept of jurisdiction in human rights treaties, particularly the European Convention, and in general international law.[24] According to Wilde 'one cannot find the meaning of "jurisdiction" in human rights law from a different concept with the same name in another area of international law'.[25] However in the highly criticized *Bankovic* case, both concepts seemed melted into one:

> As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such

[23] S Skogly, *Beyond National Borders: State's Human Rights Obligations in International Cooperation.* (Intersentia 2006) 165; S Kavaldjieva 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?' (2006) 37 Geo J IntL L 507, 511.

[24] 'Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principle of state sovereignty, equality of states and non-interference in domestic affairs'. Shaw (n 6) 645.

[25] R Wilde, 'Triggering State Obligations Extraterritorially: the Spatial Test in Certain Human Rights Treaties' (2007) 40 Isr L Rev 503.

> jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States …[26]

Conversely, the concepts appeared differentiated in the *Loizidou* case, in which Turkey did not claim to have jurisdiction in the classical sense, but it had actual power to affect the lives of the residents of the territory that it occupied, whether its presence on northern Cyprus was legal or not.[27] In general, the purpose of the doctrine of jurisdiction in international law is to establish whether a claim by a State to regulate some conduct is lawful or unlawful.[28] In contrast, jurisdiction in human rights is a question of *fact*[29]and actual power that a State exercises over a territory and its people,[30] a control that will determine if the human right treaty is applicable. Hence in the context of the European Convention, the concept of extraterritorial jurisdiction is a notion less inclined to consider the legalities or sovereignty of Contracting Parties

[26] *Bankovic and Others v. Belgium and 16 Other Contracting States* App no 52207/99 (GC, Admissibility Decision, 12 December 2001), para 59.

[27] ' … [T]he Court need not pronounce itself … [about] the alleged lawfulness or unlawfulness under international law of Turkey's military intervention in the island…'. *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996), paras 52, 56 (*Loizidou* Merits).

[28] M Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 81.

[29] 'When applying the Convention the actual factual circumstances are the decisive element.' (Dissenting opinion of Judge Golcuklu) in *Loizidou* Merits (n 27), para 3 p 39 .

[30] 'The test should always be whether the person who claims to be within the jurisdiction of a contracting party to the convention in respect of a particular act, can show that the act in question was the result of the exercise of authority by the state concerned.'. L Loucaides 'Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the *Bankovic* Case' (2006) 4 EHRLR 391, 402.

conduct than the concept of jurisdiction does in general international law. [31] Wilde declares that, 'The State could be exercising extraterritorial jurisdiction without a valid international legal basis for doing so, and its human rights obligations would not be inapplicable simply by virtue of … illegality'.[32] Contracting Parties need to realize that jurisdiction over alleged victims is more connected with their human rights obligations than with a notion that reflect sovereignty over territory or people. In fact, Contracting Parties without jurisdiction, from an international law point of view, are arresting individuals abroad and attaching obligations to themselves for violations of human rights.[33] While it is contended here that the function of jurisdiction in the European Convention is different from the role the word holds in general international law, it does not mean that the term jurisdiction as understood in the realm of human rights, holds a meaning exclusive to human rights treaties.[34]

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[31]'Article 1 of ECHR is not concerned with the question of whether a state when acting extraterritorially is lawfully entitled to do so with respect to another state …' A Ruth and M Trilsh, 'Bankovic v Belgium' (2003) 97 AJIL 168; A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights (2003) 14 EJIL 530 (Restrictive Interpretation); According to Cassese the HRC has constantly assumed that human right protected in the ICCPR must be respected by all Contracting Parties and extended to all individuals under their authority or control; independently of if these individuals are under their sovereignty or not. A Cassese, 'Are International Human Rights Treaties and Customary Rules on Torture Binding Upon US Troops in Iraq?' (2004) 2 JICJ 874.

[32] Wilde (n 25) 526.

[33] States can act illegally even in their own territory, eg no State has any legal competence to exercise enforced disappearances on their territory. Milanovic, 'From Compromise to Principle' (n 18) 425.

[34] M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 53 (*Extraterritorial Application).*

1.3.2 *Jurisdiction and State Responsibility*

The concept of jurisdiction in human rights law determines if a State has human rights obligations towards an individual. However the fact that a person is within the jurisdiction of a State[35]does not mean that the State is liable for the conduct that violated that person's human rights, at least not straight away. Hence, there is a need to differentiate the concept of jurisdiction in human rights from the notion of State responsibility. In fact, human rights treaties do not have to adopt the rules of State responsibility to find out if a person is within the jurisdiction of a State. The purpose of jurisdiction is to find out the applicability of the human right treaty and not to attribute to a State a particular conduct.[36] According to McCorquodale, the general international law of State responsibility is a 'law by states for states, about when states are legally responsible to other states'.[37] Thus, it is not unexpected that human rights law had no impact on the matter of State responsibility in general international law.[38]

For instance in the *Nicaragua case*,[39] considered the leading case on State responsibility, the aim was to find out whether non-State actors were under the control

[35] The concept refers in this instance to a State's jurisdiction not a Court's jurisdiction. The Strasbourg Court will establish if the applicants are within the jurisdiction of the respondent Contracting Party. Milanovic, *Extraterritorial Application* (n 34) 19.

[36] Gondek (n 10) 165.

[37] R McCorquodale, 'Impact on State Responsibility' in M T Kamminga and M Scheinin *The Impact of Human Rights Law on General International Law* (OUP 2009) 236.

[38] '… [H]ow far removed the Law on State Responsibility is from assigning responsibility for engaging in practices that are destructive of human rights protection – at least as this relates to individuals living in foreign lands'. Gibney (n 4) 37.

[39] *Military and Paramilitary Activities in and Against Nicaragua* (Judgement of 27 June 1986) 1986 ICJ Report 14 (*Nicaragua* case).

of a State, so their conduct could be attributed to that particular State. [40] In brief, the United States (US) government opposed the communist government of Nicaragua, the Sandinistas, and in its zeal to remove them from power they supported a counter-revolutionary group, the contras. The Nicaraguan State pleaded to the ICJ to find the US responsible for the human rights violations carried out by the contras in Nicaragua.[41] The ICJ found the 'evidence insufficient to demonstrate complete dependence (of the contras) on the US aid.'[42] The ICJ did not have proof that each single act of indiscriminate killing of civilians, rapes or tortures performed by the contras, was 'directed or enforced' by the US.[43]

Then 20 years later, in the *Genocide* case,[44] the ICJ repeated the same stringent need of complete control from a State over a non-State actor abroad, in order to attribute any responsibility to the former. Nevertheless, in the *Tadic* case,[45] instead of using rules of State responsibility, the International Criminal Court for the former Yugoslavia (ICTY) used the guidelines to establish jurisdiction under a Contracting Party of the European Convention. The *Tadic* case is concerned with individual criminal responsibility in international law; thus the focus is not on individual's rights, but on the individual's

[40] D Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 Melbourne J Intl L 1.

[41] Gibney (n 4) 20.

[42] *Nicaragua* case (n 39), para 110.

[43] Ibid, para 115.

[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Judgement of 26 February 2007) 2007 ICJ Report 13, para 398 (*Genocide* case).

[45] In *Tadic*, the Appeals Chamber found the Nicaragua test unconvincing, '… A State is responsible for acts by individuals who make up an organised group under its overall control irrespective of whether or not it issued specific instructions'. *The Prosecutor v Dusko Tadic – Case No. IT-94-1-A* . (Judgement of 15 July 1999).

obligations.[46] In the *Tadic case*, the ICTY had to establish if the armed conflict in Bosnia was internal or international, since Dusto Tadic would not be criminally liable for grave breaches of the Fourth Geneva Convention if it was an internal conflict. However, to determine if it was an international conflict, they needed to establish that the Bosnian Serb units were acting on behalf of the Federal Republic of Serbia. [47] The *Tadic case* used the *Loizidou'*s test of 'overall control' used by the Strasbourg Court to determine jurisdiction of a Contracting Party in cases of military involvement.[48] In fact, using this test made it easier in the *Tadic case* to attribute Serbia with the conduct of the Bosnian Serb troops; since the overall control test did not require the strict evidence of direction or participation by the State demanded in cases like the *Nicaragua* one. Nonetheless, the *Genocide* case refused to accept the 'overall control' test as applicable to State responsibility,[49] because it 'stretches too far' the link between the States' agencies activities and the States' international responsibility.[50]

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[46] Shaw (n 6) 397.

[47] R Goldstone and R Hamilton, 'Case Comment. Bosnia v Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 LJIL 95.

[48] Cassese argues that the 'overall control test' could be valuable in the evaluation of State responsibility while States or international organizations are using armed groups and army units. The three groups Cassese points out are, firstly, military or paramilitary groups supported by States fighting abroad against other States or at home against rebel groups; secondly, terrorist groups assisted by States; and lastly, use of national military forces by international organizations for peacekeeping or other military operations. A Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 EJIL 657, 665-667 (The Nicaragua and Tadic Tests Revisited).

[49] '… [T]he difference in approach is due to a difference in the starting point. While the ICTY takes the individual victim as its point of departure, the World Court has the interests of states uppermost in its mind.' In *Report of the 73rd Conference of the International Law Association* (2008), (Committee on International Human Rights law and practice) (Report adopted at the 2008 ILA Conference in Rio de Janeiro) 14 < http://www.ila-hq.org/en/committees/draft_committee_reports_rio_2008.cfm>accessed on 1 August 2010 (The Rio Report).

[50] State attribution in the genocide judgement explicitly abandons the overall control test when it declares that, 'It must however be shown that this "effective control" was exercised … in respect of each

While the concept of jurisdiction established in Article 1 ECHR and State responsibility are different, they are undoubtedly connected. On the one hand, a Contracting Party cannot be liable unless the Strasbourg Court has established, *a priori,* that the alleged victim is within the jurisdiction of that Contracting Party. Jurisdiction is a necessary step before considering liability.[51] On the other hand, both concepts of jurisdiction and State responsibility require the exercise of some sort of control by the Contracting Party to exist.[52] It may be that this interconnection between the concepts of jurisdiction, as included in Article 1 ECHR, and State responsibility is facilitating the confusion. As Cassese has noted:

> The Court … had to establish whether alleged violations of the European Convention had been committed by states having 'jurisdiction' over the alleged victims, pursuant to Art.1 of the Convention. To this effect … the [Strasbourg Court] had established which state exercised such jurisdiction … to determine to which state or entity the violations were to be attributed.[53]

Cassese's statement is correct in principle, but jurisdiction is not seen to be simultaneous with liability. Hence his comment will not include cases in which a

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operation in which the alleged violation occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violation'. *Genocide* case (n 44), para 400.

[51] M O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic' in Coomans and Kamminga (n 28) 125, 131.

[52] While both tests ask for control, the type of control required is different. Gondek (n 10) 163.

[53] Cassese, 'The Nicaragua and Tadic Tests Revisited' (n 48) footnote 17; Cerone follows Cassese in thinking that the 'effective overall control' is not more than another test of attribution to State responsibility. J Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context' (2007) 40 Isr L Rev 412, 428 (Jurisdiction and Power).

Contracting Party that had jurisdiction over the applicants is not found to be liable for the alleged violation. Thus, the conduct could not be attributed to that particular Contracting State. In other words establishing that a person is within the jurisdiction of a Contracting Party does not make that Contracting Party liable for the alleged violation. Consequently, one cannot agree either with the idea that jurisdiction in Article 1 ECHR requires less control than in State responsibility in order to find the Contracting Party liable.[54] In reality, the Strasbourg Court might have contributed to this misperception in the *Loizidou* case, where jurisdiction and imputability were fused establishing that,[55] 'principles of the Convention system and the international law of State responsibility thus converge to produce a regime under which Turkey is responsible for controlling events in northern Cyprus.'[56]

Milanovic suggests that the Strasbourg Court used the jurisdictional test of 'effective overall control' as a test of attribution in *Loizidou*, because everything that happened in northern Cyprus was attributed to Turkey:[57]

> … It is obvious from the large number of troops engaged in active duties in northern Cyprus … that her [Turkey's] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the Turkish Republic of

[54] cf '…[H]uman rights treaty monitoring bodies [can] themselves require a lower level of control by a state over a non-state actor [to attribute state responsibility] than that found in general international law.' McCorquodale, 'Impact on State Responsibility' in Kamminga and Scheinin (n 28) 245.

[55] Gondek (n 10) 162.

[56] *Loizidou v Turkey* App no 15318/89 (Preliminary Objections, 23 March 1995), para 57 (*Loizidou* Preliminary Objections).

[57] Milanovic, *Extraterritorial Application* (n 34) 41.

> Northern Cyprus (TRNC) … Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus … [The] Court need not pronounce itself on the arguments which have been adduced by those appearing before it concerning the alleged lawfulness or unlawfulness under international law of Turkey's military intervention in the island in 1974 since, as noted above, the establishment of State responsibility under the Convention does not require such an enquiry.[58]

Milanovic contends that 'overall control' should not be an attribution test.[59] Jurisdiction as established in Article 1 ECHR is a test to determine if victims of human rights violations are under the power of a Contracting Party, through its agents. [60] The test used by the Strasbourg Court to determine jurisdiction of a Contracting Party is not directed to catch perpetrators and to attribute their conduct to their controlling State.

1.3.3 *Jurisdiction interpreted by the European Convention*

The Vienna Convention on the Law of Treaties (VCLT) set for the first time treaty-based rules for treaty making and interpretation. These are rules to be applied to all international treaties including human rights treaties. Not surprisingly, the Strasbourg

[58] *Loizidou* Merits (n 27), para 56.

[59] Milanovic, 'From Compromise to Principle' (n 21) 440.

[60] 'The scope of the convention is decided by Art 1 ECHR the victim must be between the jurisdiction of the respondent states, not the agent who commit the violation' Greenwood, 'Bombing for Peace' (n 11) 103; M Milanovic ,'State Responsibility for Genocide: a Follow-Up' (2007) 18 EJIL 694.

Court stated in the *Golder* case[61] that it should be guided in its interpretation by the VCLT. [62] This guidance is echoed in further cases under the European Convention case law.[63] However apart from the general accepted principles of interpretation of treaties, some commentators have observed that the Strasbourg Court has developed its 'own approaches'.[64] Apart from following its objective and purpose as required by the VCLT, the Strasbourg Court adopts an 'evolutive' interpretation of the European Convention, considering it a living instrument.[65] According to Christoffersen that special doctrine of the European Convention has not affected any general international interpretation doctrine. [66] Furthermore, generally there is support for a conciliatory

[61] 'The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties'. *Golder v United Kingdom* App No 4451/70 (ECtHR, 21 February 1975), para 29.

[62] Despite the VCLT not being in force at the time of the *Golder* case being considered, the Strasbourg Court used the VCLT. *Golder* (n 61), para 29.

[63] 'Under the VCLT, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn… The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the … Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties … Recourse may also be had to supplementary means of interpretation, including the preparatory works to the Convention …'. *Saadi v United Kingdom* App.No 13229/03(ECt HR, 29 January 2008), para 62; ' It is recalled that the Convention must be interpreted in the light of the rules of interpretation set out in the [VCLT] ...'. *Loizidou* Merits (n 27), para 43 ; *Johnston and others v Ireland* App 9697/82 (ECtHR, 18 December of 1986), para 51.

[64] D Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations' (2007) 87 Buff Hum Rts L Rev 113.

[65] R White and C Ovey, *The European Convention on Human Rights* (OUP 2010) 64.

[66] According to Christoffersen the 'speciality' doctrine is based on four different interpretative principles. Firstly, the principle of effectiveness, ie rights should not be illusory but practical an effective. Secondly, he European Convention is considered a law-making treaty. Thirdly, the objective nature of States' obligations, obligations are absolute, independent of State consent .Lastly, the doctrine of dynamic interpretation or 'living instrument'. J Christoffersen, 'Impact on General Principles of Treaty Interpretation' in Kamminga and Scheinin (n 37) 45-46.

position between the VCLT and the so-called 'special' features of human rights treaties.[67]

In this work, the relevant provision to interpret the meaning of jurisdiction and its scope is Article 1 ECHR. [68] Following Article 1 ECHR, the reach of the European Convention is limited by the requirement of the applicant being 'within' the jurisdiction of a Contracting Party. Adhering to the rules of the VCLT and its Article 31.1, the interpretations of Article 1 ECHR will have to concentrate on the 'ordinary meaning' to the terms on the treaty and its 'object and purpose'. The Strasbourg Court has opted for a meaning of jurisdiction that is 'primarily territorial' and reflects the term's meaning in public international law, like on the *Bankovic* case.[69] Yet, on other occasions the Strasbourg Court has opted for a test of jurisdiction that was not based on control over territory. A meaning we find more in tune with following the 'object and purpose' of the European Convention.[70] Jurisdiction basically establishes the people covered by the European Convention, and it should not be read as a tool to limit human right

[67] M Sheinin, 'Impact on the Law of Treaties' in Kamminga and Scheinin (n 37) 23.

[68] ' …[T]he scope of Article 1 … is determinative of the very scope of the Contracting Parties' … and, as such, of the scope and reach of the entire Convention system of human rights' protection … '. *Bankovic* (n 26), para 65; there really is not reference in the VCLT about extraterritoriality, Article 29 VCLT entitled '*Territorial scope of treaties'* establishes that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'. According to Gondek the latter statement does not to exclude the possibility of extraterritorial application. Gondek (n 10) 11.

[69] *Bankovic* (n 26), paras 56-58; 'The established case-law in this area indicates that the concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law … From the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial …'. *Issa (*n 15), para 67;

[70] '…Accountability in such situations (State operating through its agents in the territory of another State) stems from the fact 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'. *Issa* (n 15), para 71.

protection.[71] It was in the *Loizidou* case where it was established that extraterritorial application should flow from the objectives of the European Convention and its obligations.[72] Hence, the case-law of the Strasbourg Court needed to follow an interpretation of the European Convention's obligations that would not be seen as restricted,[73] not even territorially:

> … If, as contended by the respondent Government … territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order …[74]

These statements by the Strasbourg Court were made in a case concerning Turkey's declarations under Articles 25 and 46 ECHR, seeking territorial limitations on its obligations outside its territory, since the facts of the case happened in northern Cyprus. The Strasbourg Court dismissed Turkey's plea aiming at avoiding European

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[71] Gondek (n 10) 40.

[72] Orakhelashvili, 'Restrictive Interpretation' (n 31) 533.

[73] 'Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties …'. *Wemhoff v Germany* App 2122/ 64 (ECtHR, 27 June 1968), para 8.

[74] *Loizidou* Preliminary Objections (n 56), para 75.

Convention obligations outside its territory and ignored Turkey's reservations in favor of upholding the European Convention's objective and its effectiveness. Wildhaber praised the Strasbourg Court's approach in this case as showing the European Convention 'going beyond the consent-and-sovereignty-oriented rules of general international law'.[75] Nonetheless, according to Article 31.1 VCLT, Article 1 ECHR and its scope need to refer to the object and purpose of the European Convention, which is the protection of human rights.[76]

Article 31 3 (b) VCLT states that interpretation should take into consideration the 'practice in the application of the treaty'; in the context of the European Convention, the Strasbourg Court practice is the one that shows agreement between Contracting Parties,[77] and also has the power to enforce and oversee the application of the European Convention.[78] Hence, it was up to the Strasbourg Court to decide in the polemic *Bankovic* case that the Contracting Parties' practice was indicative of absence of extraterritorial obligations in military operations abroad. The latter conclusion was reached because the Contracting Parties did not use Article 15 ECHR, a clause that allows derogations from human rights obligations.[79]

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[75] L Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 ICLQ 217, 229.

[76] Art 31. 3 (a) VCLT refers to agreements between the parties about the interpretation of the treaty, since no such agreements exist in the European Convention they are not relevant. Not much relevance is been given either, in this context, to Art. 31 .4 VCLT: 'A special meaning shall be given to a term if it is established that the parties so intended'. Gondek (n 10) 41.

[77] Gondek (10) 43; Orakhelashvili, 'Restrictive Interpretation' (n 30) 542-3.

[78] Orakhelashvili, 'Restrictive Interpretation' (n 30) 541.

[79] 'Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (*inter alia*, in the Gulf, in Bosnia and Herzegovina and in the former Yugoslavia), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation

Article 31.3 (c) VCLT refers to interpretation taking into account 'relevant rules of international law applicable'. According to Tzevelekos this rule has been used to limit jurisdiction of the European Convention in some instances, by avoiding looking into some cases that could have political and security consequences.[80] On the other hand, the Strasbourg Court did not follow general international law when it contended in *Bankovic,* that the HRC and its case-law on extraterritorial applications does not displace territorial jurisdiction in the ICCPR.[81]

Article 32 VCLT concerns 'supplementary means of interpretation' and it is clear it has only secondary value to help with interpretation. [82]

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pursuant to Article 15 of the Convention …'.*Bankovic* (n 26), para 62; cf, for some commentators the reason of not derogating is down to Contracting Parties not wanting to alert the rest of the world about the possibility of their conduct violating human rights extraterritorially. E Roxstrom, M Gibney and T Einarsen, 'The NATO Bombing Case (*Bankovic and others v. Belgium and others)* and the Limits of Western Human Rights Protection' (2005) 23 B U Intl L J 55, 118.

[80] V P Tzevelekos, 'The Use of Article 31 (3) (c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systematic Integration.' (2010) 31 Mich J Intl L 621, 687.

[81] '… [It is] difficult to suggest that recognition by the HRC of certain instances of extra-territorial jurisdiction … displaces in any way the territorial jurisdiction expressly conferred by that Article of the ICCPR … or explains the precise meaning of "jurisdiction" in Article 1 of its Optional Protocol 1966…'. *Bankovic* (n 26), para 78; Tzevelekos (n 80) 687.

[82] 'In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasize that it is not interpreting Article 1 "solely**"** in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning …'. *Bankovic* (n 26), para 65; the Strasbourg Court did not consider the *travaux preparatoires* of primary influence or 'decisive' in the interpretation of Art. 1 ECHR: 'That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law... It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago'. *Loizidou* Preliminary Objections (n 56) para 71; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 63; Gondek (n 19) 34; U Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation. (2007) 54 NILR 133.

In sum, it is up to the Strasbourg Court to decide how it wants to apply the VCLT and its 'own approaches' to interpretation. In some cases,[83] it looked as if the Strasbourg Court walked away from highly politicized cases in which military operations were involved.[84] However there are signs that some dynamic interpretation of jurisdiction is starting to evolve in the context of military conduct of Contracting Parties abroad.[85] The Strasbourg Court is deciding how special or integrated it wants to be seen.[86] The Strasbourg Court can follow its purpose and objective, even outside the *espace juridique*, without resulting in confrontation or fragmentation within general international law. The Strasbourg Court's dynamic approach to extraterritorial jurisdiction and its interpretation will only enrich and help the evolution of international law, of which it forms part.[87] There is no reason why the Strasbourg Court when in

[83] *Bankovic* (n 26); *Behrami v France* App no 71412/01 and *Saramati v France, Germany and Norway* App no 78166/01 (GC, Admissibility Decision, 2 May 2007).

[84] According to Tzevelekos the Strasbourg Court willingly followed trends within the international order especially those set by the UN and the North Atlantic Treaty Organization (NATO) systems and was careful not to interfere with their international mission. The reason for that was that the Strasbourg Court considered it needed to resort to international law for questions it considered outside the European Convention's subject matter such as international security. Tzevelekos (n 80) 674-680.

[85] *Al-Skeini* (n 19); *Al-Jedda* (n 20).

[86] '… [C]ompliance with other international obligations does not justify restricting the Convention safeguards …' *Capital Bank v. Bulgaria* App 49429/99 (ECtHR, 24 November 2005), para 111; 'The Court has also long recognised the growing importance of international cooperation …' *Case of Bosphorus Hava Yollari Turizm Ve Tiracet Anonim Sirketi v. Ireland* App 45036/98 (GC, 30 June 2005) , para 150; '…[I]nterest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights'. *Bosphorus* (n 86), para 156, '… [T]he VCLT through its licence to use in interpretation "any relevant rules of international law applicable"… used this provision [Article 31 (3) (c) VCLT] as the "master key" to the house of international law'. Tzevelekos (n 80) 688; C A McLachlan, 'The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention' (2005) 54 ICLQ 279.

[87] Special regimes such as the Convention are not self-contained or can survive totally disconnected from the international legal order. According to Koskenniemi, 'Many of the new treaty-regimes in the fields of trade, environmental protection or human rights did have special rules for rule-creation, rule-application and change. This is what made them special after all. But when the rules run out, or regimes fail, then the institutions always refer back to the general law that appears to constitute the frame within which they exist'. M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007)

contact and conflict with other norms of general international law, cannot use its own approaches and follow its aim, just as the VCLT sanctions. The implications are not a European Convention that will apply, protect and supervise human rights all over the world;[88] but one that is bold enough to recognize its duty to oversee the conduct of its own Contracting Parties. This is especially when they violate their obligations outside their national territory or the *espace juridique.* The Strasbourg Court has the power through its interpretation to follow the European Convention's objective and purpose in a dynamic and effective way, [89] particularly in the context of Contracting Parties' military operations abroad. While military operations abroad are not as frequent as diplomatic and consular activities by Contracting Parties, it is in the context of extraterritorial military conduct that alleged human rights victims are at their most vulnerable.

1.3.4 *The Espace Juridique and the European Convention*

The expression *espace juridique* refers to the Council of Europe's regional area, covering all the territories of the Contracting Parties. In the *Bankovic* case the Strasbourg Court, as a Grand Chamber, presented a concept of jurisdiction 'restricted' to the *espace juridique* of the European Convention:[90]

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70 MLR 1, 17 (The Fate of PIL); See also B Simma, 'Self-Contained Regimes' (1985) 16 NYIL 111, 135.

[88] Orakhelashvili, 'Restrictive Interpretation ' (n 31) 551.

[89] Letsas argues that effectiveness and dynamic interpretation are part of the same concept. Letsas (n 82) 79.

[90] Kavaldjieva (n 23) 522; Orakhelashvili, 'Restrictive Interpretation' (n 31) 530.

> The Convention is a multi-lateral treaty operating … in an essentially regional context and notably in the legal space of the Contracting States … the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.[91]

However, the fact that the European Convention is a regional human rights treaty does not entail that Contracting Parties' obligations are limited, either to their national boundaries or to the borders of the *espace juridique*.[92] As Cerone notes, '[the] regional nature of the treaty speaks not to the scope of beneficiaries, but to the willingness of states within the region to agree to a particular treaty regime and system of collective enforcement'.[93] The Strasbourg Court in the *Issa* case [94] ascribed jurisdiction to Turkey despite the fact that the alleged conduct of its troops occurred outside the *espace juridique*; the Strasbourg Court declared that '… it would follow logically that they were within the jurisdiction of Turkey [and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States …]'.[95] Moreover in the very recent *Al-Skeini* case, it has been declared that jurisdiction under Article 1 ECHR '… exists outside the territory covered by the Council of Europe Member States'. [96]

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[91] *Bankovic* (n 26), para 80.

[92] Loucaides (n 30) 398.

[93] Cerone, 'Jurisdiction and Power' (n 50) 428 note 110.

[94] *Issa* (n 15).

[95] Ibid, para 74.

[96] 'The Court has not in its case-law applied any such restriction … [of limiting jurisdiction to the *espace juridique] Al-Skeini* (n 19), para 142.

1.3.5 *The 'Colonial Clause' and Territory*

This work concerns the extraterritorial scope of the European Convention; in this context a mention of Article 56 is warranted. The latter Article, also known as the 'colonial clause', allows Contracting Parties to extend the European Convention to 'all or any of the territories of whose international relations it is responsible'.[97] The question is, Could Article 1 ECHR and Article 56 ECHR be compatible? If under the 'colonial clause', there was a declaration needed to spread protection of the European Convention to Contracting Parties' colonies, how could it be acceptable that the same protection could expand to any territory, even outside the *espace juridique*, based on Article 1 ECHR? In other words, the 'colonial clause' could be used against extraterritorial extension of Contracting Parties' human rights obligations. That argument was in fact used in the *Bankovic* case by the Strasbourg Court [98] and in *Al-Skeini* by the respondent Contracting Party:

> According to the Government, the Court's case-law on Article 56 of the Convention further indicated that a State would not be held to exercise Article 1 jurisdiction over an overseas territory merely by virtue of exercising effective control there … If the effective control of territory exception were held to apply outside the territories of the Contracting States, this would lead to the conclusion that a State was free to choose whether or not to extend the Convention and its Protocols to a non-metropolitan

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[97] D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights (*2nd edn, OUP 2009) 790.

[98] '… [T]he Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States …' *Bankovic* (n 26), para 80.

> territory outside the Convention "*espace juridique*" over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised effective control as a result of military action only temporarily, for example only until peace and security could be restored.[99]

It is accepted that Article 56 ECHR is the product of a long gone historical state of affairs of small relevance today, [100] 'the apparent subtext was [that] the colonies were in the process of becoming civilized … but had not yet reached the same level of sophistication as the population of the mother states'. [101]

According to Miltner, Article 56 ECHR and Article 1 ECHR are irreconcilable, the former is set in another time, and the latter is expanding and adjusting to accommodate its obligations to changing times.[102] In sum, Contracting Parties can limit their European Convention liability in their dependent territories but not in any other territories. Hence, Contracting Parties can intentionally keep their dependencies out of

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[99] *Al-Skeini* (n 19), para 111.

[100] '…[A]fter decolonization and the evolution of international law the validity of such and argument [Article 56 ECHR] is not very convincing …'. Gondek (n 10) 15; White and Ovey (n 65) 98.

[101] 'The purpose of Article 63 [now 56] is not only the territorial extension of the Convention but its adaptation to the measure of self-government … [by] … non-metropolitan territories and to the cultural and social differences in such territories…' Roxstrom, Gibney and Einarsen (n 79) 95; for Roxstrom, Gibney and Einarsen the 'colonial clause' was less detrimental than the actual restriction on extraterritorial obligations of the European Convention, which offered 'a view of human rights that not even the colonial powers would openly subscribe to when the convention was drafted – that the universal human rights of non-Europeans are not necessarily the same as those of Europeans.' Roxstrom, Gibney and Einarsen, (n 79) 98.

[102] B. Miltner, 'Revisiting Extraterritoriality: the ECHR and its Lessons' (January 2011) <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=barbara_miltner> accessed on 25 September 2011.

the scope of Article 1 ECHR,[103] the wording of the latter Article does not introduce any territorial limitation to the Convention.[104] In fact, the *Al-Skeini* case has left no doubt that the 'colonial clause' cannot be used to interpret Article 1 ECHR restrictively:

> The 'effective control' principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible … The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the 'effective control' principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible …[105]

1.4 Responding to the Research Questions

Following this introductory section, there are four more chapters and a conclusion. Chapter two focuses upon the interplay between humanitarian law and human rights law and the way in which the two systems apply to civilians caught in military operations. If the application of humanitarian law is sometimes unclear and human rights law is unwilling to extend extraterritorially, how are individuals affected by the

[103] Ibid 40.

[104] '… [T]he Court recalls that … the concept of 'jurisdiction' under this provision [Article 1 ECHR] is not restricted to the national territory of the High Contracting Parties.' *Loizidou* Preliminary Objections (n 56), para 62.

[105] *Al-Skeini* (n 19), para 140.

conduct of Contracting Parties' troops safeguarded? How does this match with the notion that human rights apply in armed conflicts? These are some of the questions explored in this chapter. The last section of chapter two concentrates on the role of the European Convention when faced with civilians' claims against extraterritorial military operations, which can also be addressed within the framework of humanitarian law.

Chapter three examines the recognized models of extraterritorial jurisdiction in the European Convention. This chapter investigates the developing case-law of the Strasbourg Court, which has addressed new claims for the application of the European Convention to complex situations extraterritorrially.[106]

Chapter four focuses on situations where jurisdiction is claimed in the context of multi-national forces engaged in international operations, particularly those under UN auspices. The latter enquiry will lead to questions regarding the interaction between the European Convention and international organizations. In addition, this chapter highlights the benefits for the Strasbourg Court of considering dual or multiple attribution rather than a separation of jurisdiction.

Chapter five explores the protection the European Convention offers today, in general, to victims of Contracting Parties' military behavior and ways to improve that protection through a new jurisdictional test. The Strasbourg Court is now using as its preferred test for recognizing jurisdiction, of troops abroad, the 'authority and control' test instead of the territorial 'effective control' test. Using the 'authority and control' test helps jurisdiction expand and with it the liability of Contracting Parties. However, it will be argued this test, as devised in the European Convention's jurisprudence, is not inclusive

[106] This thesis took into account all cases, to best of my knowledge, decided until 1st July 2012.

enough to encompass certain conduct in the context of modern military operations abroad.

The concluding chapter draws the arguments together in order to reflect on a touchstone test, which will facilitate answers to the questions of liability of Contracting Parties' troops abroad. The answer I propose lies with the further development of the authority and control test based on the direct and immediate link between the Contracting Parties' conduct and the alleged human rights violation. This test offers freedom from territorial control restrictions and is not limited by the need for physical personal control over the victims. Furthermore, this test for jurisdiction does not impose unrealistic human rights obligations to Contracting Parties operating abroad. In the course of this work, after examining jurisdiction as the determining factor for the existence and level of liability of Contracting Parties, there is a call for adjusting and adapting the concept to modern needs. Yet, this work is not on the whole a demand for radical changes on the jurisprudence of the Strasbourg Court. The direct and immediate link test has already been used in Strasbourg as the basis for extraterritorial jurisdiction.

1.5 Conclusion

The interpretation and clarification of the term jurisdiction holds the key to the application of the European Convention scope extraterritorially. On the one hand, there is a need to recognize some 'autonomous' characteristics of the concept of jurisdiction in international human rights. On the other hand, the test to establish jurisdiction in the context of international human rights protection must detach itself from the traditional territorially-based test of jurisdiction in international law. The Strasbourg Court needs

to account for the reality of a globalized world,[107] and the fact that extraterritorial violations of human rights are going to increase. Contracting Parties' operations abroad are expanding, particularly those of a military character, challenging any restrictive view of jurisdiction.[108] It is unacceptable to justify a different protection to individuals inside or outside the Contracting Parties' territory.[109] Moreover, that conduct runs contrary to the recognised principles of universality of human rights and non-discrimination.[110] The Strasbourg Court cannot agree to a situation in which individuals affected by Contracting Parties' conduct abroad are deprived of the protection owed to them by the European Convention. If the European Convention is seen as not supervising efficiently Contracting Parties in foreign countries,[111] it will lose credibility as the 'the tangible symbol of the effective pre-eminence … of human rights.'[112] The European Convention needs to stay true to being a living instrument and its promise of an effective and practical protection of individuals' human rights.

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[107] M Koskenniemi, 'The Fate of PIL' (n 87) 1.

[108] '… [T]he Court should find jurisdiction over all actions in which states subject to the Court's jurisdiction are arguably complicit.' Farer, 'Bombing for Peace' (n 11) 106.

[109] 'The least one may expect from states who intervene abroad in the name of the great ideals of freedom, democracy and the rule of law, is that they continue to abide by the same universal human rights standards whether they act at home or abroad.' Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans & Kamminga (n 28); Williams (n 1) 143; 'Are human rights just "unenforceable aspirations"?'. Simpson, 'Duelling Agendas' (n 6) 61; M Hapold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3 HRLR 77, 88.

[110] Skogly (n 23) 112.

[111] M Koskenniemi "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law' (2002) 65 MLR 159; T Thienel 'Cooperation in Iraq and the ECHR: An Awful Epilogue' (Invisible College, 21 January 2009) <http://invisiblecollege.weblog.leidenuniv.nl/2009/01/21> accessed 22 September 2009

[112] L Wildhaber, 'The European Court of Human Rights is more than just an European institution, it is a symbol' (Third Summit of the Council of Europe, Warsaw, 16-17 may 2005) <http://www.coe.int/t/dcr/summit/20050516_speech_wildhaber_en.asp > accessed 9 January 2010

Particularly, when civilians are caught in military operations in which Contracting Parties' troops are participating.

Chapter Two: Human Rights and Troops beyond the National Boundaries

2.1 Introduction

The European Convention applies to Contracting Parties' military operations outside their territory. However, traditionally humanitarian law has been considered the primary protector of civilians caught in conflict. For this reason, this chapter examines the applicability of humanitarian law to the situations which raise questions of extraterritorial liability. How can the application of human rights extraterritorially be affected by the existence of an armed conflict and the application of humanitarian law? In principle, the relationship between humanitarian law and human rights law would not be of interest, if human rights law is not considered as applicable extraterritorially.[1] Notwithstanding, the support for extraterritorial application of human rights in armed conflicts is gaining recognition in domestic and international jurisprudence.[2] And there is a common understanding that human rights apply in armed conflicts[3] occurring

[1] This is the position of the US and Israel, both deny any applicability of human rights to armed conflicts anywhere. F J Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 IRRC 549, 550.

[2] *Armando Alejandre Jr. and others v. Republic of Cuba and the Cuban Air Force(Brothers to the Rescue)* Case No. 11.589, Rep No. 86/99, 29 September 1999 Annual Report of the IACHR 1999; *Coard and others v United States*, Case 10.951, Rep No. 109/99, Annual Report of the IACHR 1999; Human Rights Committee, General Comment No.31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) (HRC Comment 31) para 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Reports 2004. (*Wall* Advisory Opinion*)*; the *Wall Advisory Opinion* followed HRC comment 31 only 3 month later; *Issa and others v Turkey* App no 31821/96 (ECtHR, Admissibility Decision, 16 November 2004).

[3] The terms war and armed conflict are used interchangeably in this chapter. Notwithstanding that the Use of Force Committee of the International Law Association (ILA) in its *Final Report on the Meaning of Armed Conflict in International Law*, states: ' At the outset of its work, the Committee found that the term "war", while still used, has, in general, been replaced in international law by the broader concept of "armed conflict" (ILA The Hague Conference, 2010)<http://www.ila-hq.org/en/committees/index.cfm/cid/1022> accessed 30th December 2011(Armed Conflict Report).

everywhere.[4] Yet by nature humanitarian law follows troops extraterritorially when human rights obligations do not seem to travel that easily with those troops. Maybe that is why the problems of convergence of both disciplines seem to occur really when States' troops are located in foreign lands. Meanwhile, European armed forces are intervening all over the world using their soldiers and equipment, and questions are growing about their liability for the welfare of the civilians affected by their conduct abroad.[5] If the application of humanitarian law is sometimes uncertain and human rights law is limited extraterritorially, how are victims of human rights violations committed by foreign troops protected? How does this match with the idea that protection of human rights does not cease in armed conflicts? Situations in which victims are not protected by either of the disciplines are 'unconscionable and should be rejected'.[6] It may be through the Strasbourg Court's interpretation of jurisdiction that any gap in protection opened between both disciplines can get narrower. Particularly in modern warfare, where humanitarian law is struggling to fit in its traditional framework new tendencies in the use of force developed by States. There is the belief that applying human rights in the context of conflicts, will mean better treatment of civilians and

[4] In general, human rights instruments are assumed to be relevant to all human beings everywhere and at all times, whether in war or in peace. EC Gillard 'International Humanitarian law and extraterritorial state conduct' in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) (Humanitarian law); C Cerna, 'Introductory Remarks' in Cerna C, Greenwood C, Hannum H and Farer T, 'Bombing for Peace: Collateral Damage and Human Rights' (2002) 96 ASIL PROC 95 (Bombing for Peace).

[5] Many questions remain about the proportionality of the measures to protect civilians and if those include arming the opposition groups and forcing a regime change. C Henderson, 'International Measures for the Protection of Civilians in Libya and Cote d'Ivoire' (2011) 60 ICLQ 767.

[6] D Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence? (2005) 16 EJIL 185.

increased accountability for States sending troops abroad.[7] This chapter will focus on the application of humanitarian law and its interplay with human rights in conflict situations.

2.2 Human Rights Treaties Application to Military Operations Abroad

After the Second World War and the horrors witnessed in the course of it, there was a need for a system to protect human beings and prevent the repetition of such atrocities.[8] The adoption of the UN Charter and other international and regional human rights mechanisms came as a result of that need. Those instruments introduced a pioneering idea: individuals were considered subjects of international law.[9] Hereafter, human beings had rights, which States are obliged to respect and protect.[10]

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[7] C Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Isr L Rev 310; '… [T]he impossibility of respecting human rights in wartime should not cause us to give up on the tasks of monitoring compliance with them, bringing cases to … international courts … making human rights-based argument for the victims of armed conflict … for they may make a practical difference by providing remedies for example…' G Verdirame, 'Human Rights in Wartime: A Framework for Analysis' (2008) 6 EHRLR 689, 704; cf, according to Modirzadeh, the current debates of application of human rights extraterritorially in the context of military conflict is avoiding crucial questions about the real impact human rights can have if applied in times of conflict. N Modirzadeh, 'The Dark Sides of Convergence: A Pro-cCvilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict (2010) 86 U.S. *Naval War College International Law Studies (Blue Book) Series* 349.

[8] M Shaw, *International Law* (6th edn, CUP 2008) 271.

[9] 'World order has been analysed for centuries, with notable exceptions, as if human suffering was irrelevant, and that the only fate that mattered was either the destiny of a particular nation or state or the more general rise and fall of great powers' R Falk 'The Challenge of Genocide and Genocidal Politics in an Era of Globalization' in T Dunne and NJ Wheeler, *Human Rights in Global Politics* (CUP 1999) 177.

[10] S Skogly, *Beyond National Borders: State's Human Rights Obligations in International Cooperation* (Intersentia 2006) 3; JA Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8 EJIL 583; S Schieder, 'Pragmatism as a Path towards a Discursive and Open theory of International Law' (2000) 11 EJIL 663; S Skogly and M Gibney, 'Transnational Human Rights Obligations' (2002) 24 HRQ 781; M Koskenniemi, 'Introduction: Alf Ross and Life Beyond Realism' (2003) 14 EJIL 65; G Simpson, 'Duelling Agendas: International Relations and International Law (Again)' (2005) 1 JILIR 62; J Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) CHRGJ Working Paper 11.

The placement of human rights in the general international law field faces the hurdles of reconciling 'human rights of individuals in a legal system that traditionally regulated the conduct between and among states'.[11] However, it is the extraterritorial dimension of human rights this section is concentrating on. The general concern is that States tendency to assume their commitments towards human rights stop at their boundaries, results in limited human rights obligations and State liability towards individuals outside their territory. In principle, human rights are universal and owned to all. Hence, it is foreseeable that States will be subjected to human rights violations claims from people everywhere,[12] not just claims limited to the State's subjects or territory. In reality, States still resist the condemnation of violations committed by a foreign State on another's State territory,[13] while at the same time denouncing with ease violations committed within the boundaries of any given State.[14] Thus, the move towards States' accountability for human rights violations, against subjects of other States, seems to be

[11] Skogly (n 10) 9; M Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 EJIL 572; MW Reisman 'Designing and Managing the Future of the State' (1997) 3 EJIL 412; J Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 EJIL 241; SA Roberts, 'After Government? On Representing Law Without State' (2005) 68 MLR 1; a reconciling approach between human rights law and international law is the approach more in agreement with international practice. MT Kamminga 'Final Report on the Impact of International Human Rights Law on General International Law' in MT Kamminga and M Sheinin (eds) *The Impact of Human Rights Law on General International Law* (OUP 2009) 1; the *Report of the 73rd Conference of the International Law Association* by the Committee on International Human Rights law and practice, (ILA, Rio de Janeiro, 2008) <http://www.ila-hq.org/en/committees/draft_committee_reports_rio_2008.cfm> accessed 1 August 2009 (Rio Report).

[12] S Gardbaum , 'Human Rights as International Constitutional Rights' (2008) 19 EJIL 749.

[13] T Thienel 'Cooperation in Iraq and the ECHR: An Awful Epilogue (Invisible College Blog, 21 January 2009) <http://invisiblecollege.weblog.leidenuniv.nl/2009/01/21> accessed 20 May 2010.

[14] M Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' in Coomans and Kamminga (n 4) 239.

vague and unclear.[15] This will be particularly so in the case of armed forces of States conducting themselves outside their national territory.

2.2.1 *The Scope of Human Rights in a Conflict Situation*

According to a commentator, nowadays the question is not 'if' human rights apply in armed conflict anymore, but 'how' and 'when' they apply.[16] Exploring these queries is relevant since the object of this study is to examine when human rights obligations are applicable to Contracting Parties' forces conduct extraterritorially. There are two main problems on the application of human rights to military operations abroad. Firstly, the restricted application of human rights law outside States' national boundaries. Secondly, the refusal by States to accept, that their military forces can violate human rights, through their conduct in foreign countries.

Looking into the first obstacle, the limited extraterritorial application of human rights law[17] is probably rooted in the traditional view, which is that human rights belong within the State's territory. In contrast, the extraterritorial application of humanitarian law is readily accepted[18] since it was created to deal with international armed conflicts.

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[15] M Gibney, K Tomasevski and J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harv Hum Rts J 267; A Cassese, 'Are International Human Rights Treaties and Customary rules on Torture Binding Upon US Troops in Iraq?' (2004) JICJ 872.

[16] N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 IRRC 737, 738 (Challenges Applying Human Rights).

[17] According to Dennis the disadvantage of extraterritorial applicability of human rights is its disagreement with humanitarian law. MJ Dennis, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around? (2005-2006) 12 ILSA J Intl & Comp L 459 (Fuzzy Thinking All Around).

[18] '…[H]umanitarian law does not use territory as a requirement for its application. The existence of the armed conflict is the most important condition for its applicability…'. M Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 66.

Furthermore, this latter discipline accepts that States attach to their armies extraterritorial obligations for their conduct in foreign land. In human rights law, the applicability is not down to the existence of an armed conflict but of the State exercising jurisdiction over the alleged victims, either through territorial control or through control of its States' agents. The question is when exactly do armed forces bring people under the jurisdiction of their sending State? There is no straight forward answer because, jurisdiction is paired with control and it is difficult to gauge control in battlefields and hostile situations. In general, it is accepted that control is exercised when the victims are being removed physically by the forces[19] or when they are placed in a quasi-territorial locations run by the State's service personnel.[20] In a recent report commissioned by the UN High Commissioner on Protection of Civilians in Armed Conflicts, the issue of extraterritorial applicability of human rights treaties was considered. The report reaffirms that the application of human rights is not limited to the territory of the State.[21]

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[19] '… [T]roops have jurisdiction over people once removed from the battlefield …'. Lubell, 'Challenges Applying Human Rights' (n 16) 741.

[20] Lubell, 'Challenges Applying Human Rights' (n 16) 741; cf 'International human rights treaties apply in the context of armed conflict only with respect to acts of a state's armed forces executed within its own territory'. MJ Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr L Rev 453.

[21] The report concentrated on Contracting States of the ICCPR that undertake military operations outside their territory: '… [Contracting States] obligations apply to those within the power or effective control of the forces of a State Party acting outside its territory…' para 28, Report of the Office of the High Commissioner on the outcome of the expert consultation on the issue of protecting the human rights of civilian in armed conflict UN Doc/A/HRC/14/40 (2 June 2010) , see also paras 11, 43, 60 (Civilian Report); similarly '…[A] State party must respect en ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.' HRC Comment 31 (n 2).

The second setback of extraterritorial application of human rights law to conflict situations is the belief by States that human right obligations do not follow their armed forces outside their boundaries.[22] That way States are able to claim their 'belligerent rights'.[23] As Meron stated:

> Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law. It allows an occupying power to resort to internment and limits the appeal rights of detained persons.[24]

While human rights will not end in times of war,[25] in reality they will not be enjoyed to the same degree as in times of peace. In contrast, the obligations imposed by humanitarian law and the rights it offers are achievable in the context of armed conflicts,[26] for which they were intended in the first place. However, many military operations carried out beyond borders today cannot be defined as armed conflicts. This is because these operations do not involve 'intense fighting among organized armed

[22] Netherlands, replies to concerns expressed by HRC, in 19, UN Doc CCPR/CO/72/NET/Add. 1 (29 Apr 2003); Israel in its Periodic Report to HRC 8, UN Doc. CCPR/C/ISR/2001/2 (4 Dec 2001); UK Conclusions and Recommendations on CAT. 4 (b) UN Doc CAT/C/CR/33/3 (10 Dec 2006); USA Considerations and Reports submitted under Article 40 of the Covenant, UN Doc CCPR/C/USA/3 (28 Nov 2005).

[23] Those rights include killing without forewarning, detaining without a trial and derogating from human rights obligations if they can prove humanitarian law should apply. Armed Conflict Report (n 3).

[24] T Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 240.

[25] '…Human Rights are rights inherent to humanity, they do not cease in times of war, because our humanity does not cease in times of war'. Verdirame (n 7) 689.

[26] Ibid 693.

groups'.[27] The uncertainty on what level of conflict is required to apply humanitarian law is only detrimental for the protection of civilians affected by the conduct of foreign States' troops. It would be naïve to expect armed forces to protect and promote the whole range of human rights they comply with on their sending States' territory. Yet, there are rights such as the right to life, the right not to be tortured and the right to liberty, that on their basic principled meaning attract extra protection when 'qualified' either as non-derogable, *ius cogens* norms or immune to reservation;[28] human rights that soldiers could be trained on.

It will not be an easy task to interconnect human rights law and humanitarian law. According to Lubell, the difficulty does not rest only in the difference on terminologies used between both disciplines but there is also a difference on conceptions[29] and beliefs.

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[27] Armed Conflict Report (n 3).

[28] H J Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals.*(3rd ed, OUP 2008) 77, 157-159; Shaw (n 8) 274; K Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective on Non-Derogable Rights' (2001) 12 EJIL 917, 921; In June 2009 the Strasbourg Court mended its rules of Court concerning the order in which it deals with cases, to give priority to particularly urgent cases. To implement this 'Court's Priority Policy' the Strasbourg Court has drawn a number of different categories. Category III includes: 'Applications which on their face raise as main complaints issues under Articles 2, 3, 4 and 5 (1) of the Convention "core rights", irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings'. In practice this means that an allegation of torture will normally be dealt with before and allegation of a violation of the right to freedom of speech concerning the same country. European Court of Human Rights, *The Court's Priority Policy* (June 2009) <http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf > accessed 20 October 2012.

[29] ie: the word 'proportionality' is used in both disciplines. However, when talking about State agents using force against and individual, while in human rights law it means 'the smallest amount of force necessary'; in humanitarian law 'proportionality' focus on 'the effect upon surrounding people and objects' not just the individual targeted. Lubell, 'Challenges Applying Human Rights' (n 16) 745.

2.3 Humanitarian Law beyond Borders

In principle, humanitarian law is only applicable in the context of an armed conflict[30] and military occupation.[31] Some observers contend that unless we are in situations of combatants on a battlefield using lethal force against each other and where there would be little controversy on accepting humanitarian law for the killings, there are many areas where the applicability of humanitarian law is unclear.[32]

> … [T]his relevance and applicability of various areas of international law usually takes place in a complex and dynamic environment in which at one moment traditional war fighting can occur, while simultaneously or immediately afterwards, the same troops can be involved in maintaining public order, in law enforcement, or in providing humanitarian assistance.[33]

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[30] '… [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved'. *The Prosecutor v Dusko Tadic – Case No. IT-94-1*-Appeals Chamber, (Judgement of 15 July 1999) ICTY, para 70.

[31] 'The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting party, even if the said occupation meets with no armed resistance' Geneva Conventions 1949 Article 2; 'Relevance of Human Rights provision is increased in the context of military occupation where considerations of military necessity are no longer as pressing as in the case of hostilities.' A Orakhelashvili, 'The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 EJIL 161, 164 (The Interaction Between Human Rights and Humanitarian Law).

[32] N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 246 (*Extraterritorial Use of Force).*

[33] 'According to [Gill and Fleck] is the complexity in the nature of contemporary operations and in the different branches of international law relevant to those operations that has led to the development of this new sub-discipline of international law: the "International Law of Military Operations"'. T D Gill and D Fleck, *The Handbook of the International Law of Military Operations* (OUP 2010) p 2-6 (*The Handbook of Military Operations*).

A question posed is: if States have the authority to determine the existence of an armed conflict; what if the States dispute the existence of a conflict to avoid the application of humanitarian law?[34]

2.3.1 *Humanitarian Law and Individual Protection: New Challenges*

It is expected that in armed conflicts States will operate outside their territory[35] and that humanitarian law will be applied to their conduct. The problems is that, humanitarian law seems to be challenged and not keeping peace with new warfare technologies, new ways of humanitarian intervention or the so called 'new wars'[36]. 'New wars' need to be regulated since in this type of war, 'civilian population, rather than enemy forces, are the primary targets of attacks',[37] they include wars like Yugoslavia, Rwanda or Burundi. Humanitarian law cannot regulate loosely organized groups of fighters, which do not follow any paradigm expected by humanitarian law. These fighters do not comply voluntarily with humanitarian law[38] and do not aim for military victory. Their objective is to displace or eliminate civilians.[39]

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[34] T Meron 'On the Inadequate Reach of Humanitarian Law and Human Rights Law and the Need for a New Instrument' 91983) 77 AJIL 598.

[35] EC Guillard, 'International Humanitarian Law and Extraterritorial State Conduct' in Coomans and Kamminga (n 4) 27.

[36] N Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 JCSL 225.

[37] Ibid 228.

[38] Ibid 240.

[39] '…[T]he "new wars" differ in fundamental respects from the conception of war that is embodied in [humanitarian law]. Instead of states and state-like entities that control territory and engage in sustained military action, the "new wars" feature militias, paramilitaries and loosely organized rebel groups for whom military victory is impracticable, inefficient or insufficient to achieve their aims.' Lamp (n 36) 236.

Likewise, humanitarian law cannot be applied to cases of humanitarian intervention. Humanitarian intervention involves the entitlement of the international community to intervene to protect threatened populations.[40] When they use force, it is not directed against territorial integrity or political independence of any State, and is also not incompatible with the UN purpose, ultimately it wants to protect human rights.[41] Such is the case in the 'Arab Spring' with the intervention of the West against the violent suppression by the Gaddafi regime, in which the broader international community used 'all necessary means' to protect civilian of other States.[42]

There are also questions about the applications of humanitarian law to the use of robotic weapons, unmanned combat and aerial vehicles, known as drones.[43] This new technology protects soldiers' lives but is breaking the traditional model on which humanitarian law is based, by removing one group of the combatants from the fight. Regardless, we still need to know in those cases, in which humanitarian law applies, the way in which this discipline interacts and can affect the application of human rights law.

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[40] The mandate of the International Commission on Intervention and State Sovereignty (ICISS) was to build a broader understanding of the problem of reconciling intervention and sovereignty and to foster global political consensus on how to move from polemics, and often paralysis, towards action within the international system, particularly through the United Nations. Under the chairmanship of Gareth Evans and Mohamed Sahnoun, ICISS presented its report 'The Responsibility to Protect' , to UN Secretary-General Kofi A. Annan (18 December 2001). The central theme of the report is that sovereign States have a responsibility to protect their own citizens, and when they are unwilling or unable to do so, that responsibility must be borne by the broader community of States.
<http://web.gc.cuny.edu/dept/rbins/ICISS/index.htm> accessed 28th December 2011

[41] R Van Steenberghe, 'The Law Against War or Jus Contra Bellum: A New Terminology for a Conservative View on the Use of Force? (2011) 24 LJIL 747,785.

[42] Henderson (n 5) 767. See n 5.

[43] WH Boothby, *Weapons and the Law of Armed Conflict* (OUP 2009) 230.

2.3.2 *Interplay between Human Rights Law and International Humanitarian Law*

While there is connection between humanitarian law and human rights law based on protecting human dignity;[44] both disciplines present many differences. Firstly, there is an age difference; humanitarian law is much older than human rights law. According to Bowring 'humanitarian law is to be found at the beginning of recorded history … human rights law only emerged in international law after World War I'.[45] Secondly, they have a different nature: humanitarian law is more conservative and State friendly, while human rights law is more revolutionary and State hostile. Thirdly, redress is different. In humanitarian law, actions are brought from one State against another one, victims do not have standing. In contrast, human rights law is the sphere of individual complaints.[46] Also, this difference in redress extends to reparations that are seen as weaker and outdated in the context of humanitarian law[47] when compared with the reparations offered by human rights instruments.[48] Lastly, there are differences in the enforcement mechanisms which are far more developed in the realm of human rights law.[49] Humanitarian law is not monitored by any treaties bodies and there is not an

[44] RE Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998) 1 YIHL 69.

[45] B Bowring, 'Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights' (2010) 14 JCSL 485, 489.

[46] Ibid 490. See text to n 9.

[47] EC Guillard, 'Reparations for Violations of International Humanitarian Law' (2003) 851 IRRC 529,554 (Reparations for Violations).

[48] Droege (n 7) 354.

[49] R Provost, *International Human Rights and Humanitarian Law (*CUP 2002); Verdirame (n 7) 691.

apparatus to supervise its implementation.[50] '[Human rights law] … deals with the inherent rights of the person to be protected at all times against abusive power … [humanitarian law] regulates the conduct of parties to an armed conflict.'[51] In general, the idea is that human rights law and humanitarian law when applicable simultaneously are complementary;[52] but the meaning of 'complementarity' is not clear.[53] This uncertainty also comes into play when humanitarian law and human rights law clash, which of the two categories should prevail? In principle, the concept of *lex specialis* can be used and it means that the discipline that is more specific in the given situation should apply.[54] Traditionally, humanitarian law prevails in armed conflicts. For example, prisoners of war can be detained until cessation of hostilities without legally challenging that detention; that is not allowed under human rights law.[55] Yet, the notion that humanitarian law in times of conflict is always *lex specialis* when incompatible with norms of human rights law is not an 'absolute rule'. In cases of 'calm' occupation human rights law can be followed in the use of force for maintaining public order[56] or

[50] HJ Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 856 ICRC 798.

[51] Droege (n 7) 310.

[52] HRC Comment 31 (n 2).

[53] *The Handbook of Military Operations* (n 33) 73.

[54] *The Handbook of Military Operations* (n 33) 74; Lubell states that for example in defining if a bombarded building is a military objective, we need to look at humanitarian law. On the other hand, if we are describing fair trial, human rights law is the framework with an answer. Lubell. *Extraterritorial Use of Force* (n 32) 239.

[55] *The Handbook of Military Operations* (n 33) 74.

[56] Experts agreed that human rights rules on the use of potentially lethal force are the rules to follow in 'calm occupation', including the obligations on the State to 'effect an arrest where possible' and to maintain public order and safety. *Expert Meeting on the Right to Life in Armed Conflict and Situation of Occupation (University Centre for International* Humanitarian Law, Geneva, 1-2 September 2005)

in areas of non-international conflict when the State has control over the territory.[57] Clearly, these situations are similar to circumstances of normality and peace.

The ICJ depicted the interplay between human rights law and humanitarian law in the *Nuclear Weapons* advisory opinion,[58] by considering humanitarian law as *lex specialis*:

> … [W]hatever a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[59]

However, if this opinion gave human rights a feeling of being displaced,[60] it was a short-lived one since the ICJ offered a different take on the relationship between humanitarian law and human rights law in the subsequent *Wall* advisory opinion,[61]

<http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf> accessed 29 April 2011 *(Expert Meeting on the Right toLlife).*

[57] M Sassoli and LM Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-Internationals Armed Conflict. (2008) 871 IRRC 599, 614.

[58] *Legality of the Threats or Use of Nuclear Weapons,* Advisory opinion (8 July 1996), ICJ Reports 1996, para 25 (*Nuclear Weapons* Advisory Opinion).

[59] Ibid.

[60] However this was not the reading of Ben-Naftali and Shany, both commentators inferred parallel application of both disciplines based on the *Nuclear Weapons* case: 'The thesis that the protection of human rights does not cease in time of war received a resounding confirmation by the ICJ in the *Nuclear Weapons* Advisory Opinion … it suggests that this primacy (humanitarian law as *lex specialis)* does not remove human rights law from consideration … The practical effects of this position would thus seem to suggest that gaps in protection of one regime, due to either derogation or inapplicability, may be bridged by the application of the other, and that each affects the interpretation of the other's norms.' O Ben-Naftali and Y Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Isr L Rev 17.

[61] *Wall* Advisory Opinion (n 2), para 106 .

stating that 'some rights may be exclusively matters of international humanitarian law; others may be exclusive matters of human rights law; yet others may be matters of both these branches of international law'.[62] But was this ICJ' statement any clearer?[63] The problem with the ICJ opinion is that it does still not explain how *lex specialis* works in practice.[64]

Admittedly, we will not get a clearer picture into the relationship between humanitarian law and human rights law by looking at contemporary scholars views on the subject. Commentators like Prud'homme qualify *lex specialis* as ineffective and ambiguous and doubts it can help solve any problems between both disciplines.[65] Prud'homme advocates for experts to attempt to understand each other's fields;[66] pushing for a model based on the theory of harmonization.[67] In this line, Martin goes as far as to promote interpreting some aspects of humanitarian law using human rights law with the view of generating more limits to the use of force.[68] In contrast, Droege believes that when

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[62] Ibid.

[63] Dennis stated that the ICJ did not offer its exact position in the interplay between both bodies of law [humanitarian law and human rights law], since it did not offer specific guidance on how to subdivide the rights into these categories. MJ Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupations' (2005) 99 AJIL 133 (Application of Human Rights).

[64] Hampson (n 1) 559.

[65] '… [I]n this fragmented and unorganized system that is international law, the theory of lex specialis seems less relevant.' N Prud'homme, '*Lex Specialis:* Oversimplifying a More Complex and Multifaceted Relationship? (2007) 40 Isr L Rev 356, 387; '… [A] number of commentators in legal literature criticize the lack of clarity of the principle of *lex specialis*'. Droege (n 67) 339 ; L Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers? (2006) 864 IRRC 881, 899

[66] Prud'homme (n 65) 394.

[67] Ibid 387.

[68] Martin argues that the principle of necessity should rule all use of lethal force in any discipline, ending any difference between war and peace time. FF Martin 'Using International Human Rights Law for Establishing a Unified Use of Force rule in the Law of Armed Conflict' (2001) 66 Sask L Rev 347; cf, it

there is a conflict between norms *lex specialis* will help, along with the ideas that in hostilities humanitarian law should prevail[69] and that a complementarity approach between humanitarian law and human rights law is the approach accepted in international law.[70] On the other hand, according to Shabas *lex specialis* is only used when the rights discussed are 'exclusively matters' of humanitarian law;[71] and human rights should not change to accommodate or seem complementary to humanitarian law.[72] Bowring maintains that considering humanitarian law and human rights law as having a relationship or even talking of them as complementary is an error, on his own words 'chalk is being compared with, or even substituted by cheese'.[73] Bowring cannot see how human rights bodies can interpret human rights norms in light of humanitarian law. In this same wave, it has been stated that confronting human rights professionals with humanitarian law or discussing human rights law with military personnel is similar to speaking to them in an unintelligible language.[74] In sum, there is little agreement and the exact interplay between humanitarian law and human rights law is not yet solved.

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is Green's opinion that despite admitting human rights apply in times of armed conflict and acknowledging the relevance of human rights in the interpretation of humanitarian law; the law of armed conflict still *lex specialis* . Moreover it is dangerous of Martin to extend and accept comments of regional human rights courts as the Strasbourg Court as 'universally valid' and significant for humanitarian law. LC Green, 'The "Unified Use of Force Rule" and the Law of Armed Conflict: A Reply to Professor Martin (2002) 65 Sask L Rev 427.

[69] Droege (n 7) 340.; '… [H]umanitarian law has prevalence over the ICCPR during armed conflict and military occupation'. Dennis, 'Application of Human Rights' (n 63) 141.

[70] Droege (n 7) 340.

[71] WA Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Ius ad Bellum*' (2007) 40 Isr L Rev 592, 597.

[72] Ibid 593.

[73] Bowring (n 45) 486.

[74] Rules of human rights law are not specific and hard to understand, not practical enough for soldiers, Lubell, 'Challenges Applying Human Rights' (n 16) 146; Verdirame (n 7) 704.

Generally, the relation between these two categories is not usually described as excluding one another.[75] In fact, the notion that humanitarian law is the law of war and human rights law is the law of peacetime is outdated.[76] It is accepted that human rights law is applicable during armed conflict, not just by scholars,[77] but by regional human rights bodies,[78] the HRC[79] and the ICJ. [80] Does it mean that in some circumstances both humanitarian law and human rights law can come into play? Do we need to assert the existence of an armed conflict or occupation to give priority to the application of humanitarian law? Will that mean that human rights violations are dependent on the conduct being permitted in humanitarian law? What about applying human rights law when humanitarian law is not applicable? Can an individual ask for State restrain and redress under human rights law in times of conflict?[81] Can States use derogations from

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[75] HRC General Comment 31 refers to both disciplines as being 'complementary, not mutually exclusive. HRC Comment 31 (n 2); cf, the US has in occasions advocated that human rights do not apply in times of armed conflict. P Alston, J Morgan-Foster and W Abresh, 'The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror' (2008) 9 EJIL 183, 196.

[76] Lubell , *Extraterritorial Use of Force* (n 33) 237; Verdirame (n 7) 689.

[77] JJ Paust 'The Right to Life in Human Rights Law and the Law of War' 65 (2002) Sask L Rev 411; Doswald-Beck (n 87) 881; F Bruscoli, 'The Rights of Individuals in Times of Armed Conflict' (2002) IJHR 45; cf, Dennis, 'Fuzzy Thinking All Around'(n 17) 480; 'The obligations assumed by States under the main international human right instruments were never intended to apply extraterritorially during periods of armed conflict'. GIAD Draper 'Human Rights and the Law of War' (1972) 12 Va J Intl L 326, 338.

[78] *Bamaca-Velazquez v Guatemala* Merits (25 November 2000), Inter-Am Ct. H.R. Series C No. 70 *Las Palmeras v Colombia* Preliminary Objections, (4 February 2000), Inter-Am. Ct. H.R.Series C No.67] *Abella v Argentina* Report No.55/97. Case 11.137, Inter-Am. Comm. H.R. 271, OEA/Ser.L./V/II 98.doc 6 (1997); C McCarthy, 'Human Rights and the Laws of War Under the American Convention on Human Rights' (2008) 6 EHRLR 762.

[79] HRC Comment 31 (n 2) para 10.

[80] *Wall* Advisory Opinion (n 2), para 106 .

[81] J Ross, 'Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror' in Commans and Kamminga (n 4) 37

the application of human rights law in times of conflict?[82] Will those States' derogations avoid tension between humanitarian law and human rights law?[83] However, the problem of the interplay between both disciplines seems to be reaching a new phase; a phase in which questions are not limited to the interaction between humanitarian law and human rights law, but if and how that interplay really works in practice. There is a growing sense that now is the time to step back and consider if the convergence between both disciplines is practical and realistic.

> … [M]any of the difficulties of parallel applicability of human rights law and humanitarian law can, in fact, be said to reflect problem areas in humanitarian law itself regardless of the concurrent applicability of human rights law… Accordingly, the solution to some of these problems lies less in legal theories of parallel applicability and more in the realm of solving long-standing debates within humanitarian law.[84]

There is almost a fear that the increasing use of human rights extraterritorially, will mean that humanitarian law will not have the need to adapt, strengthen or make States more liable for their conduct in conflicts under humanitarian law.[85] However, that is not the fault of human rights instruments or civilians affected by military operations

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[82] In the case of peace support operations or humanitarian interventions it is not possible to justify the use of derogations. Because derogations need to be based on the existence of a war or emergency threatening the States that send the troops abroad (Article 15 ECHR).

[83] M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (0UP 2011) 261.

[84] Lubell, *Extraterritorial Use of Force* (n 32) 247.

[85] Modirzadeh (n 7) 373.

abroad. Even those not happy with the idea of convergence, of human rights and humanitarian law in armed conflict,[86] admit that increasing liability of troops for human rights violations abroad will in time improve the behavior of States' forces around the world.[87] This increase on liability is warranted, particularly since States are more willing to accept the application of human rights law to armed conflicts on their territory rather than on foreign land.[88]

2.3.3 *Implications of International and Non-International[89] Conflicts for States' Liabilities*

Since humanitarian law was created to apply to conduct outside national borders,[90] it cannot come as a surprise then that non-international conflicts have fewer rules and do not offer as much protection as there is under international conflict.[91] There are deficiencies compared to the regulation of international conflicts; for example, arbitrary detentions are not regulated as in explaining the grounds for detention, it only focuses on the person's treatment after the detention.[92] Additionally there is no mention of

[86] '… [T]he increasingly legalistic insistence on convergence allows us to pretend that international law is doing more for civilians in armed conflict than it actually does.' Modirzadeh (n 7) 373

[87] Ibid.

[88] Sassoli and Olson (n 57) 603.

[89] The terms non-international conflict and internal conflict are used interchangeably in this chapter.

[90] Verdirame (n 7) 693.

[91] M Sassoli, 'Terrorism and War' (2006) 4 JICJ 959; Prud'homme (n 65) 365.

[92] J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence' (2005) 858 IRRC 375.

reparations in the laws of non-international conflicts.[93] In fact, contrary to what is happening extraterritorially, humanitarian law appears to have more difficulties to be used inside States' territory.[94] The promulgation in 1977 of two Additional Protocols to the Geneva Convention was seen as expanding the scope of the international conflict treaties to internal conflict. Additional Protocol I updated provisions in international armed conflicts on the wounded and the sick, and also deemed struggles for national liberation to be international conflicts.[95] Additional Protocol II dealt with high-intensity non-international conflicts.[96] Does it mean that human rights law applies 'domestically' during armed conflict and military occupations?[97] It is only when referring to internal conflicts that territory is mentioned in the treaties developing humanitarian law, such as in Common Article 3 to the Geneva Convention.[98] Actually the ICTY went even further

[93] Guillard, 'Reparations for Violations' (n 47) 554.

[94] W Abresh, 'A Human Rights Law of Internal Conflict: The European Court of Human Rights in Chechnya' CHRG J Working Paper 4 (2005) 3 (Human Rights Law of Internal Conflict).

[95] Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, entered into force December 7 1978; Protocol I accepted the 'new world of internationalized internal conflict, a recognition of peoples self-determination.' Bowring (n 45) 491.

[96] Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 UNTS 609, entered into force December 7 1978; Abresh, 'Human Rights Law of Internal Conflict' (n 94) 23.

[97] Humanitarian law and human rights law may overlap in cases of non-international conflicts with respect to non-combatants, so common Article 3 of the Geneva Convention and Additional Protocol II of 1977 apply to a State's own nationals as do human right treaties. MJ Dennis and AJ Surena 'Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice' (2008) 6 EHRLR 715.

[98] Common Article.3 reads: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely …. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. …'

than Common Article 3 on what it found to be customary law, even in non-international conflicts:[99]

> … [I]n the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, [and] torture … as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interest of States, must gradually turn to the protection of human beings it is only natural that the aforementioned dichotomy should gradually lose its weight.[100]

The fact is that many treaty rules and customary international humanitarian law[101] apply to both categories of armed conflicts.[102] There are, nevertheless, still differences

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There is a difference in the field of application of Common Article.3 and Additional Protocol II, Common Article 3 applies to any 'armed conflict not of an international character'; in contrast, Protocol II applies to armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

[99] '… [T]he Appeals Chambers has gone further than other bodies by determining that there are rules applicable to internal armed conflict with are not based upon either Common Article 3 or Additional Protocol II', C Greenwood 'International Humanitarian Law and the *Tadic* Case' (1996) 7 EJIL 265, 278; Lubell, *Extraterritorial Use of Force* (n 32) 132.

[100] *Tadic* (n 30) para 97.

[101] Henckaerts and Doswald-Beck concluded that out of 161 customary rules found, 159 apply in international armed conflicts and 148 apply in non-international armed conflicts. JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) rules 62 and 63.

[102] J Fleck, *The Handbook of International Humanitarian law* (2nd edn, OUP 2008) 6.

between international and non-international conflicts: such as the absence of combatant status in non-international conflicts. Only an individual with combatant status can be considered a prisoner of war. For humanitarian law, there is a fundamental difference between civilian and combatant status.[103] Admittedly, by keeping these two categories of international and non- international conflicts, States do not have to recognize the status or right to fight from insurgents.[104] States do not want to apply humanitarian law to internal conflicts because they do not want to show they are losing power on their territory; using Common Article 3 will give rebels a 'status' that in some cases could merit them privileges as great as immunity.[105] Applying Additional Protocol II indicates that an anti-governmental group has control over part of that State's territory, yet States do not want to appear weak.[106] On the other hand, using Additional Protocol I signals the existence of a colonial domination.We also need to recognize the difference between non-international conflicts and internal disturbances.[107] Non-international conflicts are often preceded by internal tensions, one has to determine at what point there is a transition from one to the other, based on a threshold of intensity and organizations of the parties. That transition will mean going from being governed by human rights law and national law to be governed by humanitarian law instead.[108] It

[103] Lubell, *Extraterritorial Use of Force* (n 32) 93.

[104] Ibid 103.

[105] Abresh, 'Human Rights Law of Internal Conflict' (n 94) 17.

[106] Ibid.

[107] 'After the Cold War lots of armed conflicts are being fought inside State borders with non-state actors and mercenaries, which not reach the threshold for the application of the II Additional Protocol to the Geneva Convention'. Prud'homme (n 65) 365.

[108] J K Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in *The Handbook of Military Operations* (n 33) 56.

can also swing the other way and it will be necessary to determine when a conflict changes from international to non-international. Did it happen in Afghanistan or Iraq? When is the international conflict a belligerent occupation? What happened when focus of intense violence and fighting erupt inside the military occupation? When does the occupation cease in favour of forces supporting the occupied State?[109] In general, there is a feeling that non-international conflicts are more akin and favourable to the application of human rights law. Common Article 3 to the Geneva Convention meant that humanitarian law found a point of contact with human rights law because both sought the protection of the State's inhabitants.[110] Droege advances a very interesting concept. Instead of worrying about the existence of international or non-international conflict in order to apply human rights, the turning point should be based on control. If the State has control over the situation, it can implement law enforcement functions within a human rights framework. If in contrast there is no control by the armed forces and the situation resembles a battlefield, humanitarian law provides the appropriate frame.[111] In fact, for some commentators there should be no distinction between international and non-international conflicts.[112] Nevertheless, the regulation of internal

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[109] F Hampson and I Salama 'Working Paper on the Relationship Between Human Rights Law and Humanitarian Law' (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd session, 21 June 2005, UN Doc E/CN.4/Sub.2/2005/) para 74.

[110] Droege (n 7) 313.

[111] Ibid 347.

[112] J Stewart, 'Toward a Single Definition of Armed Conflict in International Humanitarian law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313; D Willmott, 'Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statue of the International Criminal Court' (2004) 5 Melb J Intl L 196; E Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts' (2007) 20 LJIL 441.

armed conflict[113] by international law has made a lot of progress in the last decades. According to Sivakumaran, this has been through analogy to the law of international armed conflict, through resort to human rights law and finally through the use of international criminal law.[114] Yet, this author also formulates questions about the application of human rights to non-international conflicts. If international conflicts are fought between States, and non-international conflicts are fought between States and non-State armed groups or between opposing armed groups, how can human rights law regulate non-international conflicts when it can only bind a State?[115] Does this mean that, in the context of internal armed conflict, the non-State armed groups cannot be subjects of human rights obligations?[116] In reality, human rights law has been applied in hostilities of different degree and conducts inside States' territory, particularly in the case of the European Convention.

2.4 The European Convention and its Reach in a Military Context

The Strasbourg Court has been supervising the conduct of Contracting Parties' forces on their territory[117] and applying human rights law to the fighting and killings,[118]

[113] Sivakumaran prefers the descriptor internal to that of non-international conflict. According to Sivakumaran the term non-international should be a default category to catch conflict excluded from the international category. Internal armed conflict on his opinion includes also the overspill into territory of a third State. S Sivakumaran 'Re-Envisaging the International Law of Armed Conflict: A Rejoinder to Gabriella Klum' (2011) 22 EJIL 273.

[114] S Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 EJIL 219.

[115] Ibid 241.

[116] Ibid 221.

[117] The Strasbourg Court has supervised hostilities between the UK and the Irish Republican Army (IRA), Turkey and the Kurdistan Worker's Party (PKK) and Russia and rebels in Chechnya.

without reference to humanitarian law.[119] In contrast, the Inter-American human right system has used humanitarian law[120] in some hostilities cases.[121] The European Convention had to consider the situation of intense fighting on Russia's territory on the cases of *Isayeva, Yusupova and Bazayeva*[122] and *Isayeva*.[123] *Isayeva, Yusupova and Bazayeva* involved attacks by Russia using missiles to destroy two alleged insurgent vehicles, which were part of a civilian convoy escaping the city through a 'humanitarian corridor'.[124] *Isayeva* deals with the Russian strikes using 'free-falling high-explosion aviation bombs' on an outlying village (Katyr-Yurt) as insurgents retreated through it from Grozny.[125] The Strasbourg Court accepted that the volatile situation in the region demanded at times the use of lethal force by Russian forces to control it.[126] However, the Strasbourg Court also found that Russia's disregard, on the

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[118] Hampson (n 1) 561

[119] Abresh (n 75) 2; Lubell, 'Challenges Applying Human Rights' (n 16) 743.

[120] '... [T]he relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention'. *Bamaca-Velazquez* (n 78), para 209.

[121] Lubell, 'Challenges Applying Human Rights' (n 16) 742; 'The approach of the Inter-American Court of Human Rights converts these obligations [humanitarian law obligations that are binding upon States and sometimes non-State actors], by means of interpretation, into rights of individuals in armed conflict [that are] enforceable against a state'. McCarthy (n 78) 779; L Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case (1998) 38 IRRC 505; cf, in *Las Palmeras* case the Inter-American Court specified that it could not use humanitarian law because it was only empowered by States Parties to interpret human rights provisions. *Las Palmeras* (n 78), para 33; L Moir, 'Decommissioned? International Humanitarian Law and the Inter-American Human Rights System' (2003) 25 Hum Rts Q 182, 196.

[122] *Isayeva, Yusupova and Bazayeva v Russia* App no 57947-49/00 (ECtHR, 24 February 2005) (*Isayeva, Yusupova and Bazayeva).*

[123] *Isayeva v Russia Isayeva v Russia* App no 57950/00 (ECtHR, 25 February 2005) (*Isayeva).*

[124]*Isayeva, Yusupova and Bazayeva* (n 122), paras 195-197.

[125]*Isayeva* (n 123), para 190.

[126] 'The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal

planning and execution of the military operations, for the risks to civilians' lives amounted to a violation of Article 2 ECHR.[127] Evidently, under the European Convention the victims that brought the claim could only be considered civilians.[128] Abresh states that, in the above mentioned Russian cases, the only viable option for the Strasbourg Court was to use human rights law since humanitarian law is not developed enough to deal properly with non-international armed conflicts.[129] In contrast, if the Strasbourg Court were to use human rights law on the conduct of hostilities in international armed conflicts that will mean 'overreaching'.[130] Abresh reads Article 1 ECHR in a restrictive fashion:

> … Article 1 provides that states 'shall secure to everyone within their jurisdiction the rights and freedoms defined [in the ECHR]'. This affirmative obligation of states to protect the lives of their residents extends to the planning and execution of military operations.[131]

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armed insurgency … The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.'; the Strasbourg Court talks of law enforcement bodies to describe the Russian armed forces with their combat weapons and military aviation and artillery. *Isayeva* (n 123), para 180.

[127] *Isayeva* (n 123), para 187.

[128] 'If rebels complain, the complaints would be inadmissible and states will claim they were active part and they would have to prove that they were not "using or about to use" force against state forces.' Doswald-Beck (n 65) 884.

[129] Abresh (n 75) 7; Lubell agrees. Lubell, 'Challenges Applying Human Rights' (n 16) 744.

[130] Abresh (n 75) 7.

[131] Ibid 23.

Contracting Parties are bound to protect those within their jurisdiction, not just their residents. Following this reasoning, are we saying that the Strasbourg Court should condemn operations in the territory of a Contracting Party that ranked the killing of rebels over protecting town's residents? But in contrast, it should not denounce the same situation if the military operations were conducted outside Contracting Parties' territory and the residents were those of Iraq or Afghanistan? The difficulties with non-international conflicts, high or low intensity, is that humanitarian law has not much in the way to regulate these conflicts and in addition States are reluctant to admit to the existence of an armed conflict on their territory. Yet, international conflicts are not trouble-free in their relationship with humanitarian law either. For instance, in the event that hostilities in an international conflict do not cross the threshold of being an armed conflict or occupation, is humanitarian law applicable? Should the Strasbourg Court try to fill that gap in human protection from the conduct of its Contracting Parties' armed forces everywhere? Why should Contracting Parties' troops not consider the European Convention as a 'relevant source of law' outside their national territory? Particularly, when their conducts are not displayed in the context of a battlefield or belligerent occupation?[132] Answering the above questions hinges on the criterion and test to determine if the individuals are under the jurisdiction of Contracting Parties' military abroad. That criterion will determine their liability and application of the European Convention's obligations to the Contracting Parties' troops. When are individuals from other States under their jurisdiction? The Strasbourg Court seems to display a different

[132] It is generally agreed that in 'calm' occupations the 'law enforcement' model based on human rights law is applicable, see text to n 56; however situations on the ground can vary unexpectedly, not only in time but in different parts of the territory occupied, Doswald-Beck (n 65) 892.

set of rules for armed conflicts inside the Contracting Parties' territories and outside it; independently of the existence of an internal or international conflict.[133] Additionally, 'jurists have been loath to "second-guess" the military who operate often in the heated context and confusion of the battlefield … such operations historically fell outside both their area of professional competence and their ability to elicit all the facts.'[134] According to Martin, this 'reluctance to second-guess' is becoming less justified since modern armed conflicts have changed, nowadays planning and intelligence gathering are essential. The command of this planning of operations is something which jurists can examine and assess without being distracted by the idiosyncrasy of conduct on the heat of a battle.[135] While some commentators will agree with the idea that applying humanitarian law or the European Convention to situations of hostilities will not make much difference;[136] according to Bowring the outcome would be different because the application of humanitarian law is operated more leniently.[137] Admittedly, the European Convention's application extraterritorially in recent cases, in which Contracting Parties' forces were involved, is changing.[138] Jurisdiction and liability of Contracting Parties' troops is starting to be recognized outside their territory. The above

[133] See ch 5

[134] Martin (n 68) 382.

[135] Ibid.

[136] Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law' (n 31) 174; Droege (n 7) 347.

[137] 'In practice it is extremely difficult [to prove a high degree of recklessness on the conduct of military officers] the tendency will always be to pay deference to the judgment of responsible commanders'. Bowring (n 45) 492.

[138] See Ch 5; *Al-Skeini and others v the UK* App no 55721/07 (GC, 7 July 2011); *Al-Jedda v the UK* App no 27021/08 (GC, 7 July 2011).

consideration should avoid at all cost the involvement of 'human rights imperialism'; it is not human rights imperialism to expect Contracting Parties' forces to observe the European Convention values when they exercise jurisdiction over individuals extraterritorially. In Judge Bonello's words in the *Al-Skeini* case, 'those who export war ought to see to the parallel export of guarantees against the atrocities of war'.[139]

2.5 Conclusion

After the introduction of human rights into the international scene, States accepted that they held obligations towards individuals. However, States tend to limit that acceptance of human rights obligations to their territory. The problem for individuals is that States are still reluctant to admit that they owe human rights' obligations outside their national boundaries; [140] particularly, in the area of military operations abroad.[141] One of the obstacles in the advance of the application of human rights extraterritorially, in the context of conflicts, is that States are sticking to the notion that humanitarian law is the discipline that regulates armed conflicts and protects individuals in foreign territory.

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[139] *Al-Skeini* (n 138) (Concurring opinion of Judge Bonello), para 38.

[140] H Hannum, 'Remarks' in 'Bombing for Peace' (n 4) 109.

[141] Government representatives do not acknowledge human rights violations but infringements of humanitarian law: 'I think anything that suggests that basic rules of war, conflict and engagement have been broken … are extremely serious and need to be looked at.' The deputy prime minister Nick Clegg in Wikileaks Iraq war logs: Nick Clegg calls for investigation of abuse claims.in <http://www.guardian.co.uk/world /2010/oct/23/iraq-war-logs-nick-clegg/print> accessed 10 December 2010

Yet in reality, the laws of the war are failing to protect civilians because their rules are not keeping up with the ever increasing non-traditional models of armed conflicts.[142] So, if both disciplines are limited to help civilians caught in conflicts abroad, how are those civilians protected? The interplay between humanitarian law and human rights law is not clear and does not answer the above question of civilian protection in military conflicts. The solution may be in the form of one that accepts more readily human rights application to conflicts abroad. In this context, an instrument such as the European Convention cannot afford to keep a restrictive view on extraterritorial jurisdiction.[143] The Strasbourg Court has an unprecedented opportunity to reduce the protection gap in which victims of Contracting Parties' forces conduct abroad are left. The protection gap is the result, on the one hand, of the shortcomings of humanitarian law to adapt to new warfare conduct; on the other hand, the gap is linked to limitations on applicability of human rights law extraterritorially. Since the application of the European Convention to Contracting Parties' troops abroad is connected to the idea of

[142] New forms of warfare : helicopter killings, or predator drones that launch missiles. CIA killed al-Qaeda suspects in Yemen' *BBC News*, (5 Nov 2002) <http://news.bbc.co.uk/2/hi/middle_east/2402479.stm> accessed 13 December 2010; B Whitaker and O Burkeman, 'Killings probes the frontier of robotics and legality' *The Guardian* (Cairo, New York, 6 November 2002) <http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida > accessed 15 December 2010
'An Apache helicopter killed two Iraqis, suspected of firing mortars, as they tried to surrender. A military lawyer is quoted as saying: they cannot surrender to aircraft and are still valid targets,' in R Fisk, 'The Shaming of America' *The Independent* (24 October 2010) <http://www.independent.co.uk/opinion/commentators/fisk/robert-fisk-the-shaming-of-america-2115111.html> accessed 20 December 2010; See also S D Murphy, 'International Law, the United States, and the Non-Military "War" Against Terrorism'(2003) 14 EJIL 347, 363.

[143] This limited view runs contrary to recognised principles of universality of human rights and non-discrimination, in Skogly *Beyond National Borders* (n 11) 112; '…[The Strasbourg Court] should find jurisdiction over all actions in which states subject to the Court's jurisdiction are arguably complicit.' Farer, 'Bombing for Peace' (n 4) 106.

extraterritorial jurisdiction, the next chapter will be devoted to unraveling and examining the Strasbourg Court' jurisprudence on the subject.

Chapter Three : Extraterritorial Jurisdiction in the European Convention

3.1 Introduction

The Council of Europe is facing changes inside and outside its territory. The world and Europe have changed greatly in the last 60 years since the creation of the European Convention. Inside the *espace juridique* of the Council of Europe, there are latent and explicit territorial disputes, particularly in the unstable post-communist area.[1] Outside the *espace juridique*, the European Convention has to deal with a globalized and interconnected world, where the 'war on terror' is blinding Contracting Parties into justifying human rights violations.[2] Marty, Rapporteur for the Committee on Legal Affairs and Human Rights of the Council of Europe, acknowledged the, 'legal and moral quagmire into which we have collectively sunk as a result of the US-led "war on terror".'[3]

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[1] 'The post-communist successor states, lacking democratic experience and material resources, have proved incapable of settling minority complaints short of violence, separation and outside military intervention.' C Fink, 'Minority Rights as an International Question' (2000) 9 CEH 397; SM Poulter, 'The Rights of Ethnic, Religious and Linguistic Minorities' (1997) 3 EHRLR 254, 256.

[2] LN Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law' (2006) 37 Case W Res J Intl L 309, 336 ; 'European Countries have been backing the illegal transportation of detainees to secret locations to interrogate and possibly torture … a secret memo reveals the UK government knows rendition is illegal but it had no idea about what it has been letting the Central Intelligence Agency of the US governmente (CIA) get away with on British soil.' in M Bright, 'Rendition: the cover-up' *NewStatesman* (23 January 2006) <http://www.newstatesman.com/200601230005> accessed 25 May 2010; all the detention were kept secret and 'state secrecy' and 'national security' still being used today by European governments (Poland, Romania, Italy, Germany and Russia). L van den Herik, 'Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges' (Final Report Poelgeest Seminar, Leiden University, 10-13 April 2007).

[3] '… [T]errorists *can* and must be combated by methods consistent with human rights and the rule of law.' D Marty, 'Parliamentary Assembly Report: Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report' AS/Jur.Doc.No.11302 rev (7 June 2007) para 66.

With this backdrop the question remains if the Strasbourg Court is monitoring and being proactive enough towards individuals caught by Contracting Parties' military operations, inside the Council of Europe's volatile territories and more significantly outside it. Closely linked with that question is the idea of jurisdiction; victims of human rights violations need to be under the jurisdiction of a Contracting Party just to have their application admitted under the Strasbourg Court. A common denominator in all the case-law concerning jurisdiction is the premise that jurisdiction is territorial and exceptionally extraterritorial, which was the notion of jurisdiction considered in the *Bankovic* case.[4] Traditionally, the Strasbourg Court had a tendency to find 'exceptional' jurisdiction in two types of cases: on the one hand, those inside the '*espace juridique'* where Contracting Parties have control over territory outside their own. On the other hand, cases involving Contracting Parties' agents displaying their authority through detentions and arrests of individuals abroad or their activities on consular, diplomatic or 'quasi-territorial' locations. These two exceptions will be dealt with in sections 2 and 3. It was not the intention to offer a chronological report of the Strasbourg Court's jurisprudence in this chapter. Hence, we start with the territorial control test and go on to the agents' authority and control test. I argue that the latter test should be the favoured test to use. Admittedly, the Strasbourg Court is starting to uncover jurisdiction in new exceptional circumstances, albeit Contracting Parties' conduct not fitting into the accepted extraterritorial jurisdiction tests. These new exceptions will be examined in the last part of this chapter, sections 4 and 5.

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[4] *Bankovic and Others v. Belgium and 16 Other Contracting States* App no 52207/99 (GC Admissibility Decision, 12 December 2001).

3.2 The Accepted 'Territorial' Meaning of Extraterritorial Jurisdiction inside the *Espace Juridique:* The Effective Control over an Area

Article 1 ECHR establishes: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Hence, the existence of jurisdiction is not only a pre-condition[5] for the admission of a complaint under the Strasbourg Court,[6] but also indispensable to later consider liability of the Contracting Parties for their conduct. When discussing jurisdiction one does it on the basis that it is territorial, only in exceptional circumstances is it extraterritorial. There is an assumption that the European human right system sits in a comfortable climate of established democracies inside the *espace juridique*.[7] In reality, the Council of Europe is handling territorial disputes in northern Cyprus and in the countries of central and Eastern Europe. On the conflictive areas, Contracting Parties show different standards of protection of civil and political rights,[8] and the organs of the European Convention are confronted with new and very serious breaches of human rights. To be precise, the Strasbourg Court is dealing with forced

[5] 'The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.' *Ilascu and Others v. Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), para 311.

[6] R White and C Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 89 ; M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 411.

[7] JM Pasqualucci , *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP 2003) 5.

[8] J Rehman, *International Human Right: A Practical Approach* (Pearson Education Limited 2003) 168

disappearances[9] and extrajudicial executions,[10] and more worryingly is dealing with Contracting Parties permitting these practices inside their territory and the *espace juridique*. The bleak picture shows problems in northern Cyprus with the creation of the TRNC; in the early 90's the break up of Yugoslavia; at the same time the dismemberment of the Soviet Union, generated more secessionist entities. In 1992 Russian Transdniestrian rebelled with Moscow's military backing against the Moldovan government; Russia also helped South Ossetia and Abkhazia separating from Georgia.[11] Within Azerbaijan in 1991, conflicts started with Armenia over the enclave

[9] 'Having regard to previous cases concerning disappearances of people in Chechnya which have come before the Court (see, among others, *Bazorkina… Imakayeva…Luluyev…Baysayeva…* and *Alikhadzhiyeva v. Russia*), the Court considers that, in the context of the conflict in the Chechen Republic, when a person is detained by unidentified servicemen without any subsequent acknowledgement of the detention, this can be regarded as life-threatening. The absence of Ayub Takhayeva or of any news of him for more than five years supports this assumption.' *Takhayeva and others v Russia* App no 23286/04 (ECtHR, 18 September 2008), para 79; the Strasbourg Court has found in three cases of Chechen disappearances that Russia violated substantive aspects of Article 2 ECHR (liability of the presumed deaths was attributable to Russia), also violations of procedural aspect of Art 2 ECHR (failure to carry our effective criminal investigations into the circumstances surrounding the disappearances). Further the Strasbourg Court found violations of Article 3 (due to distress suffered by the applicants as a result of the disappearances of their relatives) and Article 5 (due to the unacknowledged detention of the applicants' relatives). The cases referred to are: *Matayeva and Dadayeva v. Russia* App no 49076/06 (ECtHR, 19 April 2011) (Request for referral to the Grand Chamber pending); *Maayevy v. Russia* App no 7964/07 (ECtHR, 24 May 2011) and *Malika Alikhadzhiyeva v. Russia* App no 37193/08 (ECtHR, 24 May 2011).
Disappearances are also registered in northern Cyprus: *Varnava v Turkey* App nos 16064-16073/90 (GC, 18 September 1990); in the *Varnava* case the Strasbourg Court examined cases of enforced disappearance emerging from the Cyprus conflict, N Kyriakou, 'Enforced Disappearances in Cyprus: Problems and Prospects of the Case Law of the European Court of Human Rights' (2011) 2 EHRLR 150.

[10] Applicants complained about extra-judicial executions of their relatives by Russian Army personnel in Grozny at the end of January 2000. The bodies of Mr Khashiyev's brother and sister and two of his sister's sons and Ms Akayeva's brother were found with numerous gunshot wound. *Khashiyev and Akayeva v Russia* App nos. 57942/00 and 57945/00 (ECtHR, 24 February 2005).

[11] '… Mr Lavrov (Russian Foreign Minister) … warned the West it could "forget about" the sanctity of international borders in the case of Georgia- strongly implying that Russia would establish South Ossetia and Abkhazia as virtually independent, or even incorporate them into Russia itself'. S Walker, 'The new Cold War: Crisis in the Caucasus' *The Independent* (Tbilisi, 17 August 2008) <http://www.independent.co.uk/news/world/europe> accessed 28 August 2009;
'The risk of a new era of east-west confrontation triggered by Russia's invasion of Georgia heightened yesterday when Moscow reserved the right to launch a nuclear attack on Poland because it agreed to host US rockets as part of the Pentagon's missile shield.' L Harding and H Womack, 'Moscow warns it could

of Nagorno- Karabakh.[12] In the Northern Caucasus Chechen requests for independence were rushed by Russia.[13] All these entities within Contracting Parties' territory are in existence today, all 'internationally unrecognized'.[14] With this state of affairs in parts of its own territory, how does the Council of Europe promote the protection of all its citizens? The answer can only be one that incorporates an avoidance of any human rights 'vacuum' on its territory.[15] This Council of Europe worry may be underlying the Strasbourg Court's territorial control test. The two main cases in this part of the chapter are related to the idea of territorial control of Contracting Parties as the trigger for jurisdiction. On the one hand, the *Loizidou case,* an example of the territorial control of a Contracting Party outside its own territory. On the other hand, the *Ilascu* case where a

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strike Poland over US missile shield ' *The Guardian* (Moscow, Tbilisi, 16 August 2008) <http://www.pressdisplay.com> accessed 28 August 2009;
'David Cameron states: We must make Moscow pay for this blow against democracy' '… Russia is trying to frighten neighbors, making it clear the ex-Soviet pact states enjoy only a limited sovereignty. Today it is Georgia. Tomorrow will it be Ukraine? Or the Baltic states? M Franchetti, 'The new cold war hots up' *Times Online* (Tbisili, 17 August 2008) <http:// www.timesonline.co.uk> accessed 28 August 2009.

[12] Displacements from their homes during the Armenian-Azerbaijani conflict over Nagorno-Karabakh, have resulted on complaints by Azerbaijani and Armenian refugees. The refugees complained about being forced to flee their homes. Minas Sargsyan complains about the refusal by the Azerbaijani Government to allow him access to his property and home relying on Article 1 of Protocol No.1 and Article 8 ECHR. *Sargsyan v. Azerbaijan* App no 40167/06 (GC, Admissibility decision, 14 December 2011); Elkhan Chiragov and others had very similar complaints, only this time against Armenia. *Chiragov and others v. Armenia* App no 13216/05 (GC, Admissibility decision, 14 December 2011).

[13] A Rothacher, 'Clashes and Dialogues of Civilizations Revisited- The Case of Contemporary East Asia and Europe' (2008) 6 AEJ 129, 138; W Danspeckgruber and T Felgenhauer, 'Minorities in the Former Soviet Union: Some Fundamental Legal and Political Issues' (2001) Minorities web 7 <http://www.ics.si.edu/ees/special/2001/mdansp.pdf> accessed 10 July 2009.

[14] S Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 493,494.

[15] 'No vacuum ought to occur in the (pan-European) legal space [*espace juridique*] … the case law of the [Strasbourg] Court reflects a serious concern to prevent any gaps.' Report of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Doc. 9730, "Areas where the European Convention on Human Rights cannot be implemented" (Council of Europe, 11 March 2003) para 14 <http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9730.htm > accessed 20 September 2010 (Areas Report).

Contracting Party with limited control over its own territory still hold positive obligations. The facts in both cases take place inside the *espace juridique* of the European Convention.

3.2.1 *Loizidou: The Introduction of Territorial Control*

The *Loizidou* case,[16] involved Titina Loiziduo and other women, all Cypriot nationals owning land in the area occupied by Turkey in northern Cyprus. All the women marched across the border in protest for not being able to enjoy their properties. They were detained by Turkish troops and later released.[17] Mrs Loizidou claimed that Turkey, the Contracting Party interfering with her right to enjoy her possession, was not the legitimate Government of northern Cyprus where her property was situated.[18] In fact, it is with this case that the Strasbourg Court starts discussing territorial control extraterritorially, declaring that, [19] 'the concept of "jurisdiction" under this provision (Article 1 ECHR) is *not restricted to the national territory* of the High Contracting Parties.'[20] In the preliminary objections in *Loizidou*, the Strasbourg Court established a list of circumstances in which Contracting Parties will be considered to have jurisdiction over victims of human rights' violations outside their national territory. Firstly, extradition or expulsion cases, the extraterritoriality comes from the possibility

[16] *Loizidou v Turkey* App no 15318/89 (Preliminary Objections, 23 March 1995), (*Loizidou* Preliminary Objections).

[17] Ibid p 10 -12.

[18] *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996), para 49 (*Loizidou* Merits).

[19] J Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) CHRGJ Working Paper 1, 11.

[20] *Loizidou* Preliminary Objections (n 15), para 62 (emphasis added).

of transferring that person to another State where torture or death may be awaiting.[21] Secondly, acts of authorities on behalf of a Contracting Party, wherever performed inside or outside the Contracting Party's territory as long as they 'produce effects' outside national boundaries.[22] Lastly, military action outside national territory involving 'effective control' wherever that control is exercised directly by the 'armed forces' or a 'subordinate local administration'.[23] Since it was accepted that the reason Titina Loizidou could not access her property was the presence of Turkish troops, the Strasbourg Court found Turkey to have 'jurisdiction';[24] yet it was not specified in which of the above extraterritorial jurisdiction exceptions *Loizidou* would fit.

In the merits stage in *Loizidou*, the Strasbourg Court reiterated that jurisdiction is not restricted to national territory,[25] and it added two new details. On the one hand, that liability of Contracting Parties can take place also by omission declaring that, 'the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.'[26] On the other hand, the Strasbourg Court introduced the concept of 'overall control'.[27] The European

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[21] *Loizidou* Preliminary Objections (n 15), para 62; N Mole, 'Case Comment- *Issa v Turkey*: Delineating the Extra-Territorial Effect of the European Convention on Human Rights' (2005) EHRLR 86.

[22] *Loizidou* Preliminary Objections (n 15), para 62.

[23] Ibid, para 62.

[24] Ibid, paras 63-64.

[25] Loizidou Merits (n 17), para 52.

[26] Ibid.

[27] This concept was previously used by the European Commission: '… [T]he Commission found that the applicant has been and continues to be denied access to the northern part of Cyprus as a result of the presence of Turkish forces in Cyprus which exercise an "overall control" in the border area (the report of the Commission of 8 July 1993, p. 16, paras. 93-95). *Loizidou* Merits (n 17) para 56.
The part-time European Commission and the Strasbourg Court became the full-time Strasbourg Court after Protocol XI (1998).

Convention needed a concept that would not require Turkey's 'detailed control over policies and actions of the authorities of the TRNC'.[28] In fact, it required a more moderate threshold from that offered in international public law.[29] The solution was to attach to the 'large number' of Turkish troops 'effective overall control' over the area of northern Cyprus, so their activities would qualify as under Turkey's jurisdiction and become Turkey's liability.[30] Moreover, Turkey finds itself as guarantor of the full range of rights and freedoms defined in the European Convention; as the Strasbourg Court established that, '… [Turkey's] obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.'[31] The Strasbourg Court had to find Turkey liable otherwise it would have created a **'**vacuum' of protection of rights and freedoms in the area. Since the occupation of an area usually involves dismantling the existing executive, legislative and judicial structures it leaves the inhabitants in a more vulnerable position. Particularly those individuals that previously had the protection of the European Convention [32] and that were living inside the *espace juridique*. In sum, we have a combination of three crucial elements to sustain a test that will not let territorial issues inside the *espace juridique* affect the rights and freedoms protected there. These elements are: firstly, that the

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[28] *Loizidou* Merits (n 17), para 56.

[29] Article 8 of the ILC on State Responsibility reads: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the persons or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'.

[30] L Hammer, 'Re-Examining the Extraterritorial Application of the ECHR to Northern Cyprus: The Need for a Measured Approach' (2011) 15 IJHR 858.

[31] *Loizidou* Merit (n 1), para 56.

[32] S Kavaldjieva, 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse? (2006) 37 Geo J Intl L 507, 515.

Strasbourg Court came up with an idiosyncratic 'territorial control test' limited to the *espace juridique,* a way to uphold the legal values of the European Convention on all its territory. Secondly, the test will attach 'all' rights and obligations to the Contracting Party. If the intention is to protect effectiveness inside the European Convention's territory, all inhabitants should have equal protection of all human rights everywhere inside the *space juridique.* Thirdly, it is paramount to avoid a vacuum of individual human rights within the Council of Europe's territory; reducing the vacuum will promote stability. Admittedly, the case of *Loizidou* was not a one-off case; an estimated 80 per cent of properties in northern Cyprus were owned by Greek-Cypriots.[33] Consequently, more cases will be heard by the Strasbourg Court, with exactly the same demands as in *Loizidou*.[34] This concern emerged in the dissenting opinions of the *Loizidou* case; Judge Bernhardt argued that, 'The case of Mrs Loizidou is not the

[33] 'When the Turkish army overran the north, as much as 80% of property there belonged to Greek-Cypriots, who either fled or lost their lives. In many cases they or their heirs still hold the title deeds, even though the property has been seized by Turkish-Cypriots, developed or, in some cases, sold to foreigners … Europe's aspirations for a bigger role in the world would be dented: if it cannot solve a dispute in its own back yard, how can it do much elsewhere?' 'A Mediterranean Maelstrom' *The Economist (*Nicosia, 10 December 2009) <http://www.economist.com/displayStory.cfm?story_ID=15073982> accessed 20 May 2010 (Economist article).

[34] In the *Demades* case the applicant states that since 1974 he has been prevented by the Turkish armed forces from having access to his property, using and enjoying possession of it as well as developing it. The Strasbourg Court did not see any reason to depart from the conclusions which it reached in the *Loizidou* and *Cyprus v. Turkey* cases. Accordingly, it concluded that there has been and continues to be a violation of Article 1 of Protocol No.1. *Demades v Turkey* App no 16219/90 (ECtHR, 31 July 2003); Nonetheless recently in the *Demopoulus case* it was established by the Grand Chamber that applicants with similar complaints to that of Mrs Loizidou, now could bring a claim before the Immovable Property Commission (IPC). The Strasbourg Court concluded that the occupation is beyond its competence to resolve, but applicants who do not use the IPC, will have their applications rejected for non-exhaustion of domestic remedies. The Strasbourg Court also stressed that this admissibility decision does not mean an obligation to use the IPC; the claimants can always await for a political solution. *Demopoulos and others v Turkey* App nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04…(GC, Admissibility Decision, 1 March 2010), paras 75, 103, 127-129; Judge Loucaides criticized the Grand Chamber declaration that the IPC, set up in the occupied area, was a valid remedy to exhaust before going to the Strasbourg Court. L Loucaides 'Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulus* Case?' (Case Comment)' (2011) LJIL 435.

consequence of an individual act of Turkish troops directed against her property or her freedom of movement, but it is the consequence of the establishment of the borderline in 1974 …'[35] In fact, if in the *Loizidou* case the Strasbourg Court could not justify jurisdiction based on the authority and control[36] of Turkish forces; the option left was to use the 'effective overall control' test as a mechanism to protect human rights in northern Cyprus. Albeit, acknowledging the fact that one cannot detach Mrs Loizidou's claim from the long-standing conflict in northern Cyprus, and admitting to the need of a large scale political solution.[37]

3.2.2 *Ilascu: The 'Share' Control Situation*

In *Ilascu and Others v Moldova and Russia*[38] the Grand Chamber addressed the concepts of jurisdiction and extraterritorial application of the European Convention.[39] A group of four Moldovans formulated an application against the Republic of Moldova and Russia for breaches of their fundamental human rights. They were arrested in 1992

[35] (Dissenting opinion of Judge Bernhardt joined by Judge Lopes Rocha) in *Loizidou* Merits (n 18) p 24.

[36] cf, According to Talmon jurisdiction could be based in cases like this on the authority and control test. Talmon (n 14) 513.

[37] '…I see much reason to consider this seriously a …legitimate issue of this Court's effectiveness in resolving human rights problems. This problem is even more difficult in respect of individual cases, such as the present one, which are inextricably linked to, and also depend upon the solution of a larger scale inter-communal ethnic and/or political conflict.' (Dissenting Opinion of Judge Jambrek) in *Loizidou* Merits (n 18) p 32, para 8-9; White questioned whether the right of individual petition is the best way of tackling disputes which flow from major unresolved political questions. R White, 'Tackling Political Disputes Through Individual Applications' (1998) 1 EHRLR 61, 67.

[38] *Ilascu* (n 5).

[39] M Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization' (2005) 52 NILR 349, 359 (Extraterritorial Application).

by Transdniestrian[40] security forces, tried and found guilty on terrorism-related charges and imprisoned; while in prison they were allegedly beaten and tortured by Transdniestrian and Russian military forces.[41]The Strasbourg Court stated that, 'the words 'within their jurisdiction' in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial… This presumption may be limited in exceptional circumstances…'[42]

> In order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of limiting the effective exercise of a State's authority over its territory, and on the other the State's own conduct. The undertaking under Article 1 of the Convention include … positive obligations to take…steps to ensure respect for those rights and freedoms … *Those obligations remain even where the exercise of the State's authority is limited in part of its territory* …[43]

The Strasbourg Court offers a wide interpretation of jurisdiction. The 'effective control' needed to engage obligations seem to have been lowered. On the one hand, Russia had jurisdiction over the applicant because the Moldovan Republic of Transdniestria (MRT) was under its 'decisive influence'.[44] On the other hand, Moldova despite not having real

[40] Forces of the 'Moldavian Republic of Transdniestria' a part of the former Moldavian Soviet Socialist Republic that had Russian support.

[41] *Ilascu* (n 5), paras 5-10.

[42] Ibid, para 312 .

[43] Ibid, para 313 (emphasis added).

[44] Ibid, paras 382, 392.

control over the area still had positive obligations towards the applicants. [45] Undoubtedly, the fact that in this case jurisdiction could be contained inside the *espace juridique* avoiding a vacuum,[46] made the Strasbourg Court more clear and liberal on the reach of obligations for Contracting Parties. The main feature in this case is that a Contracting Party with limited control over its own territory can still hold jurisdiction over it. Furthermore, in contrast with the *Loizidou* case in which the applicant only sought Turkey's responsibility,[47] in the *Ilascu* case the applicants made a dual-complaint. The case was against not only the outsider Contracting Party with influence on the territory, but also against the legitimate government.[48] The facts of the case developed within a volatile Caucasus setting.[49] Two points to remember: firstly, there is a need to safeguard one of the main purposes of the Council of Europe, the creation of a 'stable democratic' Europe. [50] Secondly, in these unnerving circumstances there is the

[45] Ibid ,paras 322, 368; A Mowbray, *European Convention on Human Rights* (3rd edn, OUP 2012) 67.

[46] '…[I]f the territorial State is thus prevented from exercising authority and control over an area, it is considered to retain a limited jurisdiction there, with the consequence that the State is under an obligation to take all possible positive measure for the protection of human rights of the civilian population inside the area.' KM Larsen 'Territorial Non-Application' of the European Convention on Human Rights' (2009) 78 Nord J of Intl L 73, 93.

[47] Ibid 88.

[48] A further application against Russia and Moldova was issued by Ilja Kirev. Mr Kirev initially lodged the complaint against the 'unrecognised' MRT and Russia for failing to stop the effect of inflation on its savings deposited on a Bank in MRT under Article 1 of Protocol No.1, the Strasbourg Court *ex officio* considered that the Bank was on the territory of the Republic of Moldova, and the application was to be examined in respect of Moldova and Russia. The Strasbourg Court did not decide which State was responsible for the MRT authorities' acts, since it found the complaints inadmissible. *Kirev v Moldova and Russia* App no 11375/05 (ECtHR, Admissibility Decision 1 July 2008).

[49] '… In practice there may be very serious problems in areas such as Transdniestria, Abkhazia and Chechnya. There may be virtually no individual access to court; there may be no independent and impartial courts; if a complaint reaches Strasbourg it may be almost impossible to establish the facts and to determine who is responsible for violations; it may be equally difficult to ensure compliance with any Court judgments…'. Areas Report (n 15) para 55; C Dupre, 'After Reforms: Human Rights Protection in Post-Communist States' (2008) 5 EHRLR 621.

[50] White and Ovey (n 6) 4.

problem of identifying which Contracting Parties owe obligations.[51] According to Gondek the Strasbourg Court in the *Ilascu case* put the emphasis on the positive obligations Moldova owed the applicants, so they would fall under Moldova's jurisdiction. Instead the Strasbourg Court should have asserted first if the applicants were within Moldova's jurisdiction and then established if the Contracting Party owed any obligations to Mr Ilascu and the others. [52]

Another case in the region with a strong territorial link to jurisdiction is *Assanidze v Georgia.*[53] In this case the applicant was Tengiz Assanidze; Mr Assanidze after being acquitted by the Supreme Court of Georgia for illegal financial dealings was still in the custody of Ajarian authorities. The applicant complained about the inefficiency of Georgia's central authority to secure his release.[54] The Strasbourg Court did hold again a Contracting Party liable for protecting human rights on its territory, even when the Contracting Party is experiencing difficulties in the exercise of the 'effective control' over its land:

> … Georgia has ratified the Convention for the whole of its territory. Furthermore, it is common ground that the Ajarian Autonomous Republic has no separatist aspirations and that no other State exercises effective overall control there … On ratifying the Convention, Georgia did not make any specific reservation under Article 57 of the

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[51] Larsen (n 46) 74.

[52] *Ilascu* (n 38), para 322; Gondek , 'Extraterritorial Application' (n 39) 359.

[53] *Assanidze v. Georgia* App no. 751503/01 (ECtHR, 8 April 2004).

[54] Ibid, paras 21, 145.

> Convention with regard to the Ajarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory.[55]

The Strasbourg Court found that Georgia had jurisdiction over the Ajarian Autonomous Republic.[56] Central Government should ensure compliance from all the regional parts of the Contracting Party. Particularly, when that region is engaged in activities that involve violations of human rights; [57] Georgia accepted the subject of the complaint was under its jurisdiction.[58] Likewise, Russia did the same in the Chechnya cases.[59] Both Contracting Parties were unwilling to acknowledge, that they did not have control or exercise jurisdiction over their own territory due to rebellion.[60] According to Talmon, 'the effective overall control of outside power is used to equate the authorities of the secessionist entity with the de facto state organs or agents of the outside power for whose acts it may generally be held responsible.'[61] Talmon believes, on the one hand, that the 'effective overall control' test is unsuitable to attribute liability to the outside power, because it stretches States' liability excessively.[62] On the other hand, he

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[55] Ibid, para 140.

[56] '…The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence…' *Assanidze* (n 53), para 139.

[57] Kavaldjieva (n 32) 513.

[58] *Assanidze* (n 53), paras 133-134 .

[59] *Isayeva, Yusupova and Bazayeva v Russia* App no 57947-49/00 (ECtHR, 24 February 2005); *Isayeva v Russia Isayeva v Russia* App no 57950/00 (ECtHR, 25 February 2005). Russia never disputed the applicants were under its jurisdiction.

[60] *Takhayeva* (n 9), para 52; Larsen (46) 83.

[61] Talmon (n 14) 513.

[62] Ibid 517.

claims it is an unnecessary test, since following the Strasbourg Court's 'authority and control' test, jurisdiction would be assigned to the conduct of officials of the Contracting Parties.[63] Two observations come to mind. First, the effective overall control test is a jurisdiction test; it is not a State responsibility test.[64] Secondly, attaching liability, in a case such as *Loizidou*, to an agent of Turkey for a long standing political problem is unworkable. In the case of *Ilascu*, admittedly the Russian agents that arrested, detained and transferred the applicants exercised personal authority over them. On the other hand, although there were dissenting opinions against attaching any obligations to Moldova,[65] particularly in the Caucasus tense area where facts, responsibilities and compliance with judgements are difficult to materialize,[66] there is arguably some value for the 'effective overall test'. The Council of Europe knows that Eastern Europe will take time to adjust to a different 'human rights culture'.[67] Additionally, the European Convention still has to deal with the unpredictable situation of northern Cyprus.[68] In this context and inside the *espace juridique*, the 'overall effective control' is possibly needed. More than a jurisdictional territorial test, the

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[63] 'A separate control test was thus not necessary in order to hold Turkey responsible for violations of the [European Convention] in northern Cyprus.' Talmon (n 14) 513.

[64] See ch 1.

[65] 'There is nothing to show that Moldova actually had any direct or indirect *authority* over the territory where the applicants were detained or over the applicants themselves. Moldova was in no way responsible for the illegal detention of the applicants or for the continuation of such detention.' (Partly Dissenting opinion of Judge Loucaides) in *Ilascu* (n 5) p 140.

[66] Text to note 49.

[67] '…[I]t would be a mistake to believe that one can establish a "human rights culture" within a few years.'.
Areas Report (n 15) para 59.

[68] Economist article (n 33).

'overall effective control' is a mechanism of human rights protection in problematic areas and for problematic Contracting Parties. Indeed, the latter mechanism is secondary to the Contracting Parties' agents 'authority and control' test.

3.3 The Internationally Endorsed Extraterritorial Jurisdiction under 'Authority and Control' of Contracting Parties' Agents

Some of the cases under consideration in this section precede the *Loizidou* case. The 'authority and control' test presents differences to the 'overall effective control' over a territory. Firstly, the authority and control test is not limited to the e*space juridique*. Secondly, this test is not guaranteeing all rights and freedoms included in the European Convention. Lastly, it is not filling a vacuum of human rights in third countries. Those three differences make the 'authority and control' test more flexible and capable of expanding jurisdiction extraterritorially compared to using the territorial test. This section presents three groups of internationally recognized extraterritorial jurisdiction; it is common in all of them that the conduct of the Contracting Parties' officials is voluntarily bringing individuals under their jurisdiction, so there is no jurisdiction dispute. The three groups of cases show recognition that Contracting Parties' agents conduct outside their national territory, can have consequences for the sending Contracting Parties. The first group of cases includes decisions regarding the conduct of staff in consulates and embassies. The second group refers to the case of *Hess*, involving Contracting Parties' agents controlling a prison outside their national territory. Lastly, we look at cases of extra-territorial arrests abroad by Contracting

Parties' agents with the intention of bringing the applicants back to a Contracting Party territory.

3.3.1 *Consulates, Embassies and 'Quasi-Territorial' Location*

In *X v Germany*[69], the applicant was a German national living in Morocco with a Spanish refugee passport.[70] X complained of a German consular agent that was requesting his deportation from Morocco.[71] X maintained that Germany was responsible for acts committed by its consular representatives.[72] Despite the complaint being found inadmissible based on the facts, the European Commission admitted that, 'the diplomatic and consular representatives of their country of origin [a Contracting Party] perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention.'[73] Another case is *X v UK*,[74] a British mother criticized the British consulate in Jordan for not doing enough to recover her child. Her daughter was taken there by her husband.[75] The European Commission found no breach since it considered the consular authorities did all they could. [76]

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[69] *X v the Federal Republic of Germany* App no 1611/62 (Commission Decision, 25 September of 1965).

[70] Ibid 158.

[71] Ibid 160.

[72] ibid 162.

[73] Ibid 168.

[74] *X v United Kingdom* App no 7547/76 (Commission Decision, 15 December 1977).

[75] Ibid 73-74.

[76] Ibid 74.

However jurisdiction was identified with a formula that will be repeated verbatim in later similar cases:

> …[F]rom the constant jurisprudence of the Commission … authorized agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that state to the extent that they exercise authority over such persons or property. In so far as they affect such persons or properties by their acts of omissions, the responsibility of the State is engaged.[77]

In *Gentilhomme v France,*[78] three French mothers married to Algerian nationals and living in Algeria objected to their children no longer being able to attend the French school.[79] The Strasbourg Court in this case recognised under the 'authority and control' jurisdiction test that positive obligations of Contracting Parties' agents are restricted by the 'host' State.[80] In fact, the alleged violation was clearly Algeria's decision and out of France's power. One more case in this line of complaints on diplomatic and consular staff is the case of *WM v Denmark.*[81] The applicant together with 17 other citizens of the then German Democratic Republic entered the Danish Embassy; they requested negotiations with German authorities to get permits to leave for the Federal Republic of Germany. The ambassador phoned the police who took the applicants with them, adults

[77] Ibid.

[78] *Gentilhomme Schazff-Benhadji and Zerouki v France* App nos 48205/99, 48207/99 and 48209/99 (ECtHR, 14 May 2002).

[79] Ibid, para 20.

[80] H King 'The Extraterritorial Human Rights Obligations of States' (2009) 9 HRLR 521, 550.

[81] *W.M v Denmark* App no 17392/90 (Commission Decision, 14 October 1992), p 1-2.

were detained and children placed in children's homes.[82] The European Commission found that the acts of the Danish ambassador 'affected' the applicant and brought him within the jurisdiction of Denmark.[83] However the European Commission did not find that the Danish diplomatic authorities interfered with the rights WM alleged and the application was found inadmissible.[84]

A different case is *Drozd and Janousek v France and Spain.*[85] This time, the Contracting Parties' agents complained against are Spanish and French judges. The applicants were Spanish and Czech, both individuals convicted in Andorra for armed robbery.[86] Drozd and Janousek complained of procedural mistakes in their trial.[87] France and Spain were made respondent given that Andorran' courts are run by French and Spanish judges. However, the Strasbourg Court established that the judges from France and Spain when acting as members of Andorran courts were not doing it as French or Spanish judges. [88] Consequently, the Strasbourg Court did not have jurisdiction to examine the merits of the case. Nonetheless, the Strasbourg Court recognized the 'authority and control' test, establishing that the term jurisdiction is not

[82] Ibid p 1-2.

[83] Ibid 5.

[84] Ibid 8.

[85] *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 of June 1992).

[86] Ibid, para 11.

[87] Ibid, para 82.

[88] Their judgments are not verified by French or Spanish authorities. *Drozd and Janousek* (n 85), para 96.

limited to the national territory of the Contracting Parties and that their liability can be involved because of acts of their agents producing effects outside their own territory.[89]

3.3.2 *Prisons: the Hess Case*

The wife of Rudolf Hess, a Nazi war criminal sentenced to life imprisonment, directed a complaint regarding his 'solitary confinement' in Spandau prison; Spandau was capable of holding 600 prisoners.[90] The prison where Mr Hess was held was in the 'British sector'; Mrs Hess addressed her complaint against the UK only. However, the allied military prison was under the control of the US, France and the former Soviet Union too. Accordingly, the European Commission considered that the administration of the UK over Spandau prison was not one of exclusive jurisdiction because the 'joint authority cannot be divided into four separate jurisdictions'; hence the application was declared inadmissible.[91] However, the European Commission acknowledged the possibility of extraterritorial jurisdiction, had the administration of the prison been considered under UK's jurisdiction; the European Commission declared that there was 'no reason why the acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention'.[92] The value of the European Commission decision is the recognition of liability of Contracting Parties' agents for their conduct outside their national territory.

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[89] Ibid 91.

[90] *Ilsa Hess v United Kingdom* App no 6231/73 (Commission Decision, 28 May 1975) p72.

[91] Ibid 74.

[92] Ibid 73.

3.3.3 *Arrests Abroad and Detentions*

The following are a string of cases in which Contracting Parties' agents seized presumed felons outside their national territory, with the intention to get them back to their sending Contracting Parties.

The first case is *Stocke v Germany,*[93] in this case a German citizen alleged an unlawful detention by German and French agents. Stoke fled Germany to avoid arrest suspected of tax offences. Mr Stoke first went to Luxembourg and then France where he was apprehended.[94] The Strasbourg Court declared his arrest did not violate the European Convention.[95] Nonetheless, the European Commission on its report on the case still recognized the existence of the control and authority test establishing that, 'authorized agents of a State … bring any other person "within the jurisdiction" of that State to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of the State is engaged.'[96]

In the following cases the arrests and detentions took place outside the *espace juridique*. First is the case of *Freda v Italy;*[97] Freda was arrested in Costa Rica by the local police, handed over to Italian police officers and taken to Italy in an air force aeroplane. He was accused of murder in Italy and absconded. The application was declared inadmissible.[98]

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[93] *Stocke v. Germany* App no 11755/85 (ECtHR, 18 February 1991).

[94] Ibid, paras 8-19.

[95] Ibid, para 55.

[96] *Stocke v. Germany* App no 11755/85 (Commission Case Report, 12 October 1989), para 166.

[97] *Freda v Italy* App no 8916/80 (Commission Decision, 7 October 1980).

[98] Ibid 257.

> … [T]he applicant was taken into custody by officers of the Italian police and deprived of his liberty in an Italian Air Force aeroplane. The applicant was accordingly from the time of being handed over in fact under the authority of the Italian State and thus within the 'jurisdiction' of that country …[99]

Next, a case with very similar circumstances, the case of *Illich Sanchez Ramirez v France*;[100] Illich Sanchez Ramirez, the notorious 'Carlos the Jackal', was arrested by Sudanese security forces and handed over to French police officers, who conducted him to a French military aircraft.[101] The European Commission decided the application was ill-founded, since there was a lawful arrest warrant issued and Illich was on the run for his involvement on a terrorist attack in Paris.[102]

> According to the applicant, he was taken into the custody of French police officers and deprived of his liberty in a French military aeroplane … from the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction of France …[103]

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[99] Ibid 256.

[100] *Illich Sanchez Ramirez v France* App no 28780/95 (Commission Decision, 24 June 1996).

[101] Ibid 156.

[102] Ibid 162.

[103] Ibid 161.

Last is the case of *Ocalan v Turkey*,[104] Ocalan was a leader of the PKK a Kurdish opposition group; he was accused of being a terrorist by Turkey. Mr Ocalan escaped to a Greek embassy in Kenya but was 'forcibly' transferred to Turkey.[105] The case went to the Grand Chamber.[106]

> The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport.
>
> It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory …[107]

The above cases referred to 'irregular' or 'disguised' extraditions; the applicants were all presumed criminals that needed to stand trial on the respondent Contracting Parties. All the applicants were forcibly taken into custody by Contracting Parties' agents with cooperation from the host State's authorities. More importantly, jurisdiction is not contested in any of the cases. How can Contracting Parties dispute jurisdiction when they purposely seek to apprehend the applicants through their agents and bring them under their jurisdiction? The European Commission and the Strasbourg Court are not

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[104] *Ocalan v. Turkey* App no 46221/99 (ECtHR, 12 March 2003) (*Ocalan* Merits).

[105] Ibid, paras 14-17.

[106] *Ocalan v. Turkey* App no 46221/99 (GC, 12 May 2005). The Strasbourg Court as a Grand Chamber found violations of Article 5 ECHR: para 105, Article 6 ECHR: para 118 and Article 3 ECHR: para 175. (*Ocalan* GC).

[107] *Ocalan* Merits (n 104), para 93.

really clear on the cases discussed about what triggers jurisdiction. Was it the conduct of the Contracting Parties' agents or the quasi-territorial locations where the applicant were delivered to? Was it that the Contracting Parties' agents physically apprehended the applicant or was it that the applicants were kept in a prison controlled by Contracting Parties' agents or kept on board of a registered plane? According to Thienel, the trigger of jurisdiction is not down to territorial control but Contracting Parties' agent control:[108]

> … [T]he sending state's agents there [embassy cases] 'exercise authority' over the persons they deal with. Prisoners in military installations abroad are therefore as much within the state's 'jurisdiction' as anyone else who is brought physically within the full 'effective … authority' of state agents.[109]

The real significance of these early cases comes in the form of recognition by the European Commission and the Strasbourg Court that Contracting Parties' agents can make their sending Contracting Parties liable for their conduct abroad. Furthermore, we begin to recognise the attributes of the 'authority and control' test. Firstly, the Contracting Parties are not compelled to secure the 'entire range' of the European Convention's freedoms and rights, because the host State restricts the obligations of the Contracting Parties. Secondly, in the case of arrests and detentions, there is no

[108] cf, in the case of *Al- Skeini* , under the British domestic court, Greenwood, representing the UK government, stated that jurisdiction in *Ocalan* was based on the 'special exception of a Turkish aircraft'. *Al- Skeini and others v Secretary of State for Defense* [2004] EWHC 2911 (Admin), [2005] 2 WLR 1401, para 194 (*Al-Skeini* DC).

[109] T Thienel, 'Case Comment. The ECHR in Iraq: The judgment of the House of Lords in R (Al-Skeini) v Secretary of State for Defence (2008) 6 JICJ 115, 127.

difference between cases inside (*Stoke*) or outside (*Ocalan*) the *espace juridique.* Lastly, there is no fear of vacuum of human rights: the European Commission and the Strasbourg Court consider that 'the Convention does not require the Contracting Parties to impose its standards on third States or territories'.[110]

3.4 Beyond Territorial Conceptions?

In this section we will see the predominance of the 'territorial control' test in the *Bankovic* case and how the Strasbourg Court is uncovering extraterritorial jurisdiction in new exceptional circumstances.

3.4.1 *Bankovic: the Regional Scope of the European Public Order*

The significance of the controversial[111] *Bankovic* case comes as stated by Gondek, 'from the fact that for the first time the meaning of jurisdiction and the extraterritorial scope of the Convention were addressed in a comprehensive manner by the Grand Chamber …'[112] The facts of the case unfold after unsuccessful diplomatic initiatives from the international community trying to negotiate a peace agreement between Serbian and Kosovar Albanian forces. NATO announced air strikes over the territory of the Federal Republic of Yugoslavia (FRY). As a result of the air strikes the Radio

[110] *Drozd and Janousek* (n 85), para 110.

[111] '…[T]here have been few admissibility decisions which have given rise to such adverse comment and controversy as the *Bankovic* case.' M O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after *Bankovic*' in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 125; V Mantouvalou , 'Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality' (2005) 9 IJHR 147, 153; R Wilde, 'Triggering State Obligations Extraterritorially: the Spatial Test in certain Human Rights Treaties' (2007) 40 Isr L Rev 503, 515 (Triggering State Obligations).

[112] Gondek, 'Extraterritorial Application' (n 39) 356.

Televizije Srbije facilities in Belgrade were destroyed killing sixteen people and injuring as many. The applicants were victims of the bombing and relatives of the deceased. [113] The main question faced by the Strasbourg Court in this admissibility decision was whether the applicants were within the jurisdiction of the Contracting Parties (also members of NATO), which participated in the NATO bombing operation in Belgrade. Additionally, there was the problem of considering whether jurisdiction in this case would be based on control over the territory or control over the people. On the one hand, the applicants argued that the control exercised by the Contracting Parties, in the form of high-altitude precision aerial bombing, amounted to 'limited' control over territory.[114] On the other hand, the respondent Contracting Parties denied the victims were under their jurisdiction, because there was not a 'structured relationship' or any exercise of 'legal authority' that could link them with the applicants.[115] The Strasbourg Court followed the Contracting Parties plea and declared the application inadmissible, based on the fact that the applicants were not within the jurisdiction of the Contracting Parties according to Article 1 ECHR. The essential point established in the *Bankovic* case by the Strasbourg Court is the notion that jurisdiction in Article 1 ECHR is essentially territorial.[116] The Strasbourg Court in this case seems to present a really

[113] *Bankovic* (n 4), paras 6-11.

[114] '…[T]he applicants argue that, given the size of the air operation and the relatively few air casualties, NATO's control over the airspace was nearly as complete as Turkey's control over the territory of northern Cyprus … The control was limited in scope (airspace only), the Article 1 positive obligation could be similarly limited …' *Bankovic* (n 4), para 52.

[115] *Bankovic* (n 4), para 36.

[116] *Bankovic* (n 4), paras 59, 61; M Gondek ,*The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 369-371 (*The Reach of Human Rights*).

narrow set of exceptional circumstances, in which jurisdiction is exercised extraterritorially. There are references to cases of extradition and to 'unintended' actions by officials of Contracting Parties outside their national territory. However, both categories of extraterritorial jurisdiction are dismissed by the Strasbourg Court. In the cases of extradition because liability is down to conduct of the Contracting Party while the individual is still on its territory, clearly within the Contracting Party's jurisdiction. On the other hand, in cases such as *Drozd and Janousek*,[117] where even though the Strasbourg Court admitted that liability of a Contracting Party could be engaged by the conduct of their officials abroad, in the end it was decided that liability was not to be attributed to the respondent Contracting Parties.[118] Furthermore, the Strasbourg Court established primacy of the territorial control test, shaped in the *Loizidou* case, over the 'authority and control' test establishing that, 'since Turkey had such "effective control", its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support.'[119] Subsequently, the exceptional circumstances for extraterritorial application the Strasbourg Court is openly backing in *Bankovic* are: on the one hand, 'effective control'[120] over an area that may result from military occupation or from the 'acquiescence or consent' of the territorial State, in which the Contracting Party is exercising 'public powers' normally to be exercised by the

[117] *Drozd and Janousek* (n 85).

[118] *Bankovic* (n 4), paras 67-69.

[119] Ibid, para 70.

[120] No 'overall' effective control as it was established in the *Loizidou case.*

territorial government;[121] and accepted by customary law and provisions of treaties, the conduct of 'diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State'.[122] An interesting development in the *Bankovic* case is the introduction of the 'gradual control' idea by the applicants.[123] So, although the applicants recognised that the control of the respondent Contracting Parties was not as extensive as in previous cases under the Strasbourg Court, for example the Cyprus's cases. The respondent Contracting Parties should be liable for the amount of control they had at the time of the action that resulted in injuries and loss of lives.[124] This idea was dismissed by the Strasbourg Court that could not envisage a 'divided and tailored' protection by the European Convention. The Grand Chamber unanimously dismissed the claim.[125] It ruled that the applicants were not under the jurisdiction of the respondent Contracting Parties. Firstly, the Strasbourg Court stated that the Contracting Parties involved had not enough control over the victims to be made liable.[126] Secondly, there was the argument that Yugoslavia was not a Contracting Party of the Convention at that time;[127] meaning there would not be a 'vacuum' in the

[121] *Bankovic* (n 4), para 71.

[122] Ibid, para 73.

[123] Ibid, para 46.

[124] T Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the ECHR'(2005) 14 J Transnatl L & Poly 159, 185.

[125] Ibid 186.

[126] *Bankovic* (n 4), paras 75-78, 82.

[127] *Bankovic* (n 4), para 80; the bombing occurred in Serbia, which became a member of the Council of Europe and subsequently part of the ECHR in 2003 < http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp> accessed 10 April 2010.

protection of human rights.[128] Lastly, the Grand Chamber presented a concept of jurisdiction 'restricted' to the *espace juridique* of the European Convention:[129]

> The Convention is a multi-lateral treaty operating … in an essentially regional context and notably in the legal space of the Contracting States … the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.[130]

This case was considered by a number of authors as a step backwards in the advancement of human rights protection, complaining that the decision was too political. The Strasbourg Court simply capitulated under the implications of displeasing multinational operations forces, and the powerful countries behind them.[131] In the words of Lawson:

> Would it not have been preferable for the Court to squarely address that concern [the serious international repercussions of reviewing military missions abroad] and perhaps

[128] *Bankovic* (n 4), para 80; this argument was intended to individuals that previously enjoyed the rights and freedoms of the European Convention, otherwise as Thienel affirms it would mean that 'whenever the European Convention did not apply to an area, anywhere in the world, there was a regrettable vacuum in … human rights protection'. Thienel (n 109) 120; R Wilde 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action? (2005) 2 EHRLR 115, 119 (The Legal Space).

[129] A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights (2003) 14 EJIL 530; Kavaldjieva (n 32) 522.

[130] *Bankovic* (n 4), para 80.

[131] A Ruth and M Trilsh, 'Bankovic v Belgium' (2003) 97 AJIL 168, 172.; K M Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test. (2008) 19 EJIL 509, 527.

> develop some sort of 'political question' doctrine, rather than to advance a number of semi-convincing arguments to deny jurisdiction?[132]

Besides, another solution would have been for the Strasbourg Court not to use a test of jurisdiction that is best suited to apply inside *espace juridique* of the Council of Europe. Admittedly, using the 'authority and control' test may not have, at the time, made a substantial difference to the outcome of the Strasbourg Court's decision but it may have avoided confusion. I would argue that the test based on control over individuals is the correct one to use outside the *espace juridique*; because there is no pressure to secure the 'entire range' of the European Convention rights; only those rights linked to the acts or omissions of the Contracting Parties' agents.[133] In addition, it would have offered a kinder scenario for Lawson's gradual control concept.

3.4.2 *Issa: Avoiding Double Standards*

In the *Issa* case, the Strasbourg Court is confronted with interpreting the 'effective control' principle in a territory (Iraq) outside the *espace juridique* of the European Convention. *Issa and Others v Turkey* [134] concerned the conduct of Turkish military forces deployed in Iraq. These Turkish forces had allegedly beaten up a group of shepherds working in the area. The shepherds were forcibly taken away and days later

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[132] R Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights in Coomans and Kamminga (n111) 116 (Life After Bankovic).

[133] Where there is no effective control as in Cyprus, the State is not compelled to secure the 'entire range' of the Convention's freedoms and rights, but respect the individual's rights 'to the extent that it exercises authority over such persons.' Areas Report (n 15) para 41.

[134] *Issa and others v Turkey* App no 31821/96 (ECtHR, Admissibility Decision, 16 November 2004).

were found shot dead and mutilated. However, the Strasbourg Court found that the applicants did not provide enough proof of Turkish involvement. The Strasbourg Court requested as proof the 'identity of the commander' along with **'**detailed description of the Turkish soldiers' uniforms' or some 'independent eye-witness account'.[135] In contrast, the Strasbourg Court gave weight to information volunteered by Turkey concerning intense fighting between the PKK and Kurdistan Democratic Party (KDP) militants' in the area,[136] implying the possibility that some of these militants were responsible for the facts attributed to the Turkish forces. The Turkish government claimed, they were not liable for the detention and killings of the shepherds and that they had no military records of their troops ever been in that exact area, or being involved with the shepherds.[137] Subsequently, the Strasbourg Court had to rule against jurisdiction based on lack of evidence. Kavaldjieva states that 'the [Strasbourg] Court in *Issa* curbed the Convention's reach by raising the evidentiary burden.'[138] In *Issa* jurisdiction was not questioned prior to the admissibility stage.[139] Turkey had the same amount of troops in northern Cyprus as in northern Iraq, around 35,000 thousand

[135] Ibid, para 77.

[136] 'The PKK was active in the Bahdinan (Duhok province) region at the time of the incident and many confrontations were reported between KDP peshmergas and the PKK'. *Issa* (n 134), paras 46, 77 and 79.

[137] *Issa* (n 134), para 25; Abdel-Monem (n 124) 184.

[138] Kavaldjieva (n 32) 527.

[139] Turkey submitted that 'the need had arisen to examine the issue of "jurisdiction" in the instant case, having regard to the Court's inadmissibility decision of 12 December 2001 in the case of *Banković and Others* …. They contended that in its *Banković* decision the Strasbourg Court had departed from its previous case-law on the scope of interpretation of Article 1 of the Convention.' *Issa* (n 134), para 52. However, the Strasbourg Court assessed that Turkey did not explicitly raise the issue of jurisdiction prior to the admissibility decision. *Issa* (n 134), para55.

ground troops.[140] The reasons, arrangement and period of time they were stationed were not the same. In the *Loizidou* case, Turkey claimed to position its troops permanently in northern Cyprus as the TRNC did not have enough forces of its own.[141] As a result they helped by continually patrolling the 'whole' area and the checkpoints in all borders between the north and south of Cyprus.[142] In *Issa* the Turkish troops were deployed in a 'particular' area of northern Iraq for a limited time of six weeks[143] with the objective of chasing and killing terrorists.[144] Both cases have the same respondent state Turkey; the facts complained about occurred outside the national territory of Turkey. However, the crucial difference is that in *Issa* the facts took place outside the *espace juridique.*

Issa offers a recapitulation of when jurisdiction can be established extraterritorially. Firstly, in cases of military action that entails 'effective control' of an area.[145] Secondly, jurisdiction is determined by Contracting Parties' authorities that use 'overall control' over an area outside their national territory.[146] Lastly, jurisdiction is found when Contracting Parties' agents operating outside their national territory exercise 'authority

[140] *Issa* (n 130), paras 63, 75.

[141] *Loizidou* Preliminary Objections (n 16), para 56.

[142] '… [M]ore than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication.' *Issa* (n 134), para 75.

[143] '…19 March and 16 April 1995.' *Issa* (n 134), para 73.

[144] '… [C]ross-border operation … was aimed at pursuing and eliminating terrorists who were seeking shelter in northern Iraq.' *Issa* (n 134), paras 58, 63 and 73.

[145] *Issa* (n 134), para 69.

[146] Ibid, para 70.

or control' over persons.[147] In the latter exceptional circumstance to find extraterritorial jurisdiction:

> … Accountability … stems from the fact 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.[148]

As stated by White and Ovey the Strasbourg Court 'expressly rejected the Turkish Government's submissions based on *Banković* and instead cited decisions of the Inter American Commission of Human Rights and the United Nations Human Rights Committee …'[149] Yet in the *Issa* case, it is still not clear if the Strasbourg Court would have used the 'authority and control' test based on the Turkish troops physically apprehending the shepherds,[150] or used the 'effective overall control' of the same troops over a particular portion of the territory of northern Iraq.[151] There are reasons for preferring the 'authority and control' test in cases like *Issa.* Firstly, the Strasbourg

[147] Ibid, para 71.

[148] Ibid.

[149] White and Ovey (n 6) 92; the Strasbourg Court in *Issa* referred to '*Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999 … and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, respectively …' *Issa* (n 134), para 71; *Lopez Burgos v Uruguay* (1981) 68 ILR 29, Communication No. R12/52 UN Doc. Supp. N.40 (A/36/40) at 176 (1981), para 12; *Celiberti de Casariego v Uruguay* (1981) 68 ILR, Communication No. 56/1979/ UN Doc. CPPR/C/OP/1 at 92 (1984), para 10.

[150] *Issa* (n 134) ,para 72.

[151] Ibid, para 74.

Court almost dismisses that the facts occurred outside the *espace juridique*,[152] declaring that 'it would follow logically that they were within the jurisdiction of Turkey … not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States.'[153] Secondly, as Lawson states, no one would demand that the Turkish army personnel would 'secure the entire range of substantive rights set out in the Convention' to the Iraqi shepherds under their control.[154] Lastly, there is no fear of human rights vacuum created in north Iraq.

Issa seemed to have steered the Strasbourg Court's jurisprudence into a new era. This case's theme is that of a swift and contained inclusion of Contracting Parties' forces on the territory of another State to catch terrorists. This could be seen as a new trend of Contracting Parties' conduct, something that the European Convention may have to deal with for an unforeseeable amount of time, after the launch of the war on terror. This type of conduct will fit better into an 'authority and control'-type test. The authority and control test is a more flexible and workable test than a test based on territorial control. Furthermore, a personal control test is not only more appropriate to use outside the *espace juridique*, but is developing into a new test inside the *espace juridique.*[155] as we will see in the next section.

[152] P Leach, 'The British Military in Iraq – The Applicability of the *Espace Juridique* Doctrine under the European Convention on Human Rights' (2005) PL 448; Wilde, 'The Legal Space' (n 128) 123.

[153] *Issa* (n 134), para 74.

[154] Lawson 'Life After Bankovic' in Coomans and Kamminga (n 111) 105.

[155] Text to notes 191-193.

3.5 Contracting Parties' Conduct outside the *Espace Juridique* and a New Jurisdiction Criterion

This section revolves around the answer to a question posed by the English court in the *Al- Skeini* case, '[H]ow wide and how important is the other exception to the territoriality principle acknowledged in the jurisprudence, expressed in terms of the authority or control of state agents of [Contracting Parties], wherever those agents operate?'[156]

3.5.1 *New Cases in Northern Cyprus: Without Personal Control*

Admittedly, there has been a shift from a set conception of northern Cyprus cases falling into the control of an area test to accepting new cases fitting into an authority and control test. We are dealing with cases in which Contracting Parties' agents conduct produces effects even outside the northern Cyprus territory.[157]

The 'territorial control' test would be more fitting to cases in which: on the one hand, the authority and control test is impracticable; and on the other hand, the facts materialize inside the *espace juridique*. [158] In the prior cases, in which the Strasbourg Court used the 'authority and control' test jurisdiction was not contested.[159] Now, in a

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[156] *Al-Skeini* DC (n 108), para 249.

[157] '…[C]ontrol over individuals … (is) clearly significant in rendering human rights obligations applicable even when the territorial control test is not met.' Wilde, 'Triggering State Obligations' (n 111) 511; J Cerone 'Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context'. (2007) 40 Isr L Rev 72.

[158] Cases where the Strasbourg Court has used the territorial control test to make sure Contracting Parties' conduct inside the *espace juridique* endeavours to respect and promote all the range of the European Convention rights and freedoms; wherever inside or outside their national territory, avoiding any human rights vacuum inside the *espace juridique* and promoting stability in the area.

[159] A exception of *Drozd and Janousek* (n 85).

recent string of cases in northern Cyprus the 'authority and control' test is evolving. These new cases are bringing a different outlook: they refer to the right to life of the applicants, one of the most fundamental provisions that 'enshrines one of the basic values of the democratic societies making up the Council of Europe'.[160] In addition, they concentrate on the conduct of Turkish agents seemingly less worried about the long standing 'politic affairs' in Cyprus.[161] The first case is that of *Salomou,*[162] in principal, another one in the long line of cases regarding the Turkish occupation of northern Cyprus. The Strasbourg Court considered the matters complained were 'within the jurisdiction' of Turkey; hence the issue of jurisdiction was not raised at the admissibility stage.[163] Solomos Solomou was a young Greek Cypriot that attended the funeral of a man killed during a demonstration against 'Turkish occupation' in Northern Cyprus. After the funeral, Solomos and others ran to the Turkish side of the buffer zone chased by United Nations Force in Cyprus (UNFICYP) personnel. Mr Solomos rushed into Turkish occupied territory unarmed and then decided to climb a pole with the Turkish flag; three meters up the pole he was hit by five shots fired from the Turkish side and he was fatally injured.[164] Only twelve years after *Loizidou*, the Strasbourg Court presents some modifications when referring to the exceptional circumstances of extraterritorial jurisdiction. Firstly, there is no mention of extradition

[160] *Isaak v Turkey* App no 44587/98 (ECtHR, 24 June 2008), para 103 (*Isaak* Merits).

[161] Text to note 37.

[162] *Solomou and others v Turkey* App no 36832/97 (ECtHR, 24 June 2008) (*Solomou* Merits).

[163] Turkey did not raise the issue of jurisdiction previous to the admissibility stage. *Solomou and others v Turkey* App no 36832/97 (ECtHR Admissibility Decision, 18 May 1999), 3 (*Solomou* Admissibility Decision); *Solomou* Merits (n 162), para 40.

[164] *Solomou* Merits (n 162), paras 8-12, 25.

or expulsion as an exceptional circumstance. Secondly, it identifies as a test the internationally accepted effective control of an area as a consequence of military action.[165] Thirdly, it recognizes the test of authority and control through Contracting Parties' agents' conduct and introduces the need to avert double standards by those agents, introduced in *Issa*.[166] Fourthly, it includes the case of 'private individuals' that violate rights of other individuals with the 'acquiescence or connivance' of the authorities of the Contracting Party (particularly in the case of self-proclaimed authorities without international backing).[167] Lastly, it names the effective overall control, 'in the particular situation concerning Cyprus', attaching to Turkey the obligation to secure the entire range of the European Convention's rights in northern Cyprus.[168] The Strasbourg Court used the 'authority and control' test to establish jurisdiction in *Solomou*:

> In the present case, the Court must therefore ascertain whether Mr Solomou came under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the acts of the Turkish and 'TRNC' soldiers and/or officials.[169]

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[165] Ibid, para 44.

[166] The Strasbourg Court did not mention the *Issa* case where this notion was launched; neither did the Strasbourg Court acknowledge the original source of the notion in the Inter-American Commission and the HRC. *Solomou* Merits (n 162), para 45.

[167] *Solomou* Merits (n 162), para 46; does it mean that actos of private individual can attach liability to a Contracting Party? B Miltner, 'Broadening the Scope of Extraterritorial Application of the European Convention on Human Rights? (2007) 2 EHRLR 172, 179.

[168] Ibid, para 47.

[169] *Solomou* Merits (n 162), para 49.

The Strasbourg Court considered that Mr Solomou was under the authority and control of Turkey through its agents.[170]

Next is the case of *Isaak,*[171] Anastasios Isaak had joined a motorbike rally demonstration to protest against the occupation of northern Cyprus. He and others left their motorbikes and proceeded to enter the UN buffer zone unarmed, against the Cypriot police and UNFICYP requests. At the same time Turkish civilians and uniformed police men were let into the UN buffer zone from the Turkish side. Anastasios was cut off from his friends, chased and thrown to the ground were he was kicked and beaten until he lost consciousness. Mr Isaak was surrounded by some TRNC policemen and approximately a dozen civilians; one of which threw a large stone at Anastasios' head. Two officers of UNFICYP dragged him to the area controlled by Cyprus; at that time he had no pulse and was not breathing. Mr Isaak was pronounced dead at the hospital.[172] As in the *Solomou* case, the Strasbourg Court needed to determine if he was under the authority and effective control of Turkey as a consequence of 'acts' from Turkish soldiers, TRNC' officials and policemen present in the events.[173] The issue of jurisdiction only arose in the admissibility stage,[174] not in the merits judgement.[175]

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[170] Ibid, para 51.

[171] *Isaak* Merits (n 160).

[172] *Isaak* App no 44587/98 (ECtHR Admissibility Decision, 28 of September 2006), 2-4 (*Isaak* Admissibility Decision).

[173] Ibid 21.

[174] Ibid 17-21.

[175] Turkey's only objection was failing to exhaust domestic remedies. *Isaak* Merits (n 160), paras 59-64.

Mr Solomou was not in the TRNC zone as Mr Isaak was, but in the UN buffer zone, a sector situated between the Turkish and Greek Cypriot ceasefire lines. The Strasbourg Court declared that 'even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents (see *Issa and Others*, cited above).'[176] The Strasbourg Court acknowledged where it happened and still found that Mr Isaak was within Turkey's jurisdiction.[177] Furthermore, it uses *Issa* as an example-case for extraterritorial jurisdiction through the authority and control test.[178]

Finally is the case of *Andreou v Turkey;*[179] Ms Andreou was a British national that lived in Cyprus and died in 2005. Georgia Andreou attended the funeral of Anastasios Isaak[180] a friend of her son. As Ms Andreou and others went to the spot of Mr Isaak's killing, outside the buffer zone, she watched Solomos Solomou[181] being shot. Immediately after the shooting, Turkish/ Turkish-Cypriot soldiers opened fire on the multitude. Georgia Andreou got hit in her abdomen.[182] In the decision of *Andreou*[183]

[176] *Isaak* Admissibility Decision (n 172) 21.

[177] Turkey's argument against jurisdiction was that : 'it was not possible to invoke Turkish responsibility in respect of the alleged violation of Convention within the UN buffer-zone…' *Isaak* Admissibility Decision (n 172) 18.

[178] *Isaak* Admissibility Decision (n 172) 19-21.

[179] *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009) (*Andreou* Merits).

[180] *Isaak* Merits (n 160).

[181] *Solomou* Merits (n 162).

[182] *Andreou* Merits (n 179), paras 11-14.

[183] *Andreou v Turkey* App no 45653/99 (ECtHR Admissibility Decision, 3 June 2008), 11 (*Andreou* Admissibility Decision).

Turkey brought its lack of jurisdiction as an objection to admissibility,[184] the respondent Contracting Party contended that the applicant was not in the territory of Turkey or the TRNC. Furthermore, it stated that it had not actual jurisdiction or control over northern Cyprus, the UN-controlled buffer zone or the Greek-Cypriot National Guard ceasefire line, where Georgia Andreou was hit by the bullet.[185] The exceptional circumstances for jurisdiction are identical to those in the *Isaak* and *Solomou* cases.[186] However, the Strasbourg Court established when referring to preliminary issues that:

> … [E]ven though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was *the direct and immediate cause* of those injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 of the Convention.[187]
>
> … [I]n exceptional circumstances, the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of Article 1 of the Convention.[188]

[184] Ibid 7.

[185] Ibid 8.

[186] *Andreou* Admissibility Decision (n 183) 9-10; *Isaak* Admissibility Decision (n 172) 19- 20; *Solomou* Merits (n 162) paras 44-47.

[187] *Andreou* Admissibility Decision (n 183) 11; *Andreou* Merits (n 180), para 25, (emphasis added).

[188] *Andreou* Admissibility Decision (n 183) 10-11.

The Strasbourg Court is introducing the idea that if there is a 'direct and immediate link' between the conduct of Contracting Parties' agents and the violation of an individual's human right, that individual is under the jurisdiction of that Contracting Parties.[189] In all three cases, while the conduct of the Turkish agents took place outside that Contracting Party's territory, (the TRNC' territory in *Solomou*, the buffer zone in *Isaak* and the Greek-Cypriot ceasefire line in *Andreou*), Turkey's agents were all still inside the *espace juridique.* Connected to this statement, is the Strasbourg Court's remark in the *Andreou* decision stating that unlike the applicants in *Bankovic*, Ms Andreou was still inside *espace juridique* of the European Convention.[190] Was this remark necessary? Is the Strasbourg Court implying that if Georgia Andreou happened to be outside the *espace juridique* when she was hit, she would not have been within Turkey's jurisdiction? Fortunately, inside the *espace juridique* the control and authority test is evolving. Firstly, 'private individuals' with the connivance and acquiescence of Contracting Parties' authorities can attach liability to that Contracting Parties;[191] the acquiescence and connivance test provides a new link between the Turkish agents and the applicants, a link that could not be found on the previous Strasbourg Court's description of the authority and control test. Secondly, there is no need of physical apprehension of the applicant; if the Contracting Parties' agent conduct is the 'direct and immediate' cause of the human rights' violation the individual is within the jurisdiction of the Contracting Party. Thirdly, the Strasbourg Court encourages

[189] Lawson 'Life After Bankovic' in Coomans and Kamminga (n 111) 105.

[190] *Andreou* Admissibility Decision (n 184) 11.

[191] *Solomou* Merits (n162), para 46; Miltner (n 169) 179.

preventive measures by Contracting Parties' agents to help future victims of violations.[192] There is recognition by the Strasbourg Court of the need to include positive obligations to safeguard life under Article 2 ECHR.[193] While the authority and control test is developing as a more comprehensive test to protect the individual; the progression is still limited to the confines of the *espace juridique* at the time of these new Cyprus cases. Would the Strasbourg Court feel so generous and lenient in the protection of individuals outside the *espace juridique?*

3.5.2 *Pad: Without Territorial Control*

The *Pad* case albeit happening outside the *espace juridique* of the European Convention cannot give us an answer to the aforementioned question. In *Pad* Turkey had already acknowledged that 'the fire discharged from the helicopters had caused the killing of the applicants';[194] for that reason, the Strasbourg Court had to find the victims under Turkey's jurisdiction.[195] The *Pad* case concerned the alleged incursion of Turkish troops in Iran resulting in the killing of seven Iranians. According to the applicants' eye witness, soldiers descended from two helicopters in north-west Iran. After that the

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[192] '… [D]espite the presence of the Turkish armed forces and other "TNCR" police officers in the area, nothing was done to prevent or stop the attack or to help the victim.' *Isaak* Admissibility Decision (n 172) 21; '… [Article 2 ECHR] may also imply … positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk…' *Isaak* Merits (n 160), para 106; '… [T]he Contracting States have a duty to provide effective training to law-enforcement officials operating in border areas and to give them clear and precise instructions as to the manner and circumstances in which they should make use of firearms. *Kakouli v Turkey* App no 38595/97 (ECtHR, 22 November 2005), para 114.

[193] *Isaak* Merits (n 160), para 106; A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 40.

[194] *Pad and others v. Turkey* App no. 60167/00 (ECtHR, Admissibility Decision 28 June 2007).

[195] Ibid 55.

Turkish soldiers handcuffed, beaten, cut and shot dead the seven Iranian captured men.[196] The respondent Contracting Party dismissed those allegations, stating that they had information of a terrorist group entering Turkey with arms and were ready to prevent such incursion. Turkey was resolute that its troops had not crossed over to Iran or arrested and detained anybody.[197] Furthermore, Turkey claimed that the victims came 'within its jurisdiction' after illegally entering Turkish territory.[198] The Strasbourg Court in this case only considered one of the exceptions to territorial jurisdiction:

> … [A] State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the [*espace juridique]* of the Contracting States, but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State…[199]

The objection for failing to exhaust domestic remedies was upheld and the application declared inadmissible.[200]

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[196] Ibid 2-8.

[197] ibid 21-26.

[198] Ibid 51.

[199] Ibid 53.

[200] 'Regarding the failure to exhaust domestic remedies, and start any sort of proceedings in Turkey; clearly, the applicants could not compare themselves with the applicants in *Issa*, living in a remote north-Iraqi village were the Turkish judicial apparatus was 'physically and financially inaccessible'. *Pad* (n 194) 56; as the Strasbourg Court pointed out the applicants in *Pad* were able to instruct a lawyer in the UK. (they instructed Mr Philip Leach). *Pad* (n 194) 70.

3.5.3 Al-Skeini and Al-Jedda: A New Type of Control

On July 2011 the Strasbourg Court as a Grand Chamber delivered the long awaited cases of *Al-Skeini*[201] and *Al-Jedda*.[202] The first case relates to civilians killed by British forces and the second case relates to the internment of a dual Iraqi-British citizen for three years in a UK run facility.[203] In both cases the preliminary question of jurisdiction was joined to the merits of the cases. In *Al-Skeini,* the applicants argued that their relatives were within the jurisdiction of the Convention and that the UK had not complied with the procedural duty of investigating their death under Article 2 ECHR. [204] The UK argued, following *Bankovic,* that jurisdiction based on effective control of an area could only apply inside the *espace juridique*, not in Iraq.[205] The applicants on the other hand contended that jurisdiction is exercised through territorial as well as personal control.[206] The Grand Chamber accepted the applicants' plea and established that jurisdiction is triggered through the authority and control test and via control over an area. In *Al-Skeini* the Strasbourg Court found that the authority and control test, down to 'acts of authorities which produce effect outside its own territory', was a notion too broad. In order to narrow down the authority and control test, the Strasbourg Court introduced defining principles. Hence, the personal jurisdiction test is limited to three circumstances; firstly, acts of diplomatic and consular agents; secondly,

[201] *Al-Skeini and others v the UK* App no 55721/07 (GC, 7 July 2011) (*Al-Skeini GC).*

[202] *Al-Jedda v the UK* App no 27021/08 (GC, 7 July 2011) (*Al-Jedda* GC).

[203] Both cases will be dealt with in more detail in following chapters.

[204] *Al-Skeini GC* (n 201), para 95.

[205] Ibid, para 110.

[206] Ibid, paras 121-122.

the performance by Contracting Parties' agents of 'public powers normally to be exercised' by the territorial State; lastly, 'use of force' beyond their borders by officials of a Contracting Party, particularly by taking individuals into custody.[207] On the other hand, the Grand Chamber accepted that jurisdiction was also activated through effective control over an area as a result of lawful or unlawful military action or, when a Contracting Party occupies the territory of another Contracting Party.[208] In *Al-Skeini* the Strasbourg Court declared unanimously that the UK exercised jurisdiction based on the authority and control of the British soldiers over the victims.[209]

The second case the Grand Chamber examined was *Al-Jedda.* Mr Al-Jedda complained of a breach of Article 5.1 ECHR, challenging his long detention inside British premises. The UK denied jurisdiction based on the argument that the detention of Mr Al-Jedda was attributable to the UN instead of the UK.[210] Moreover, the respondent Contracting Party argued that in any case their conduct under the United Nations Security Council (UNSC) Resolution 1546, pursuant to Article 103 of the UN, would override obligations under Article 5 ECHR.[211] In contrast, the applicants claimed that Mr Al-Jedda was under the UK's jurisdiction since he was detained in a British-run military prison.[212] The Strasbourg Court declared that the conduct of the UK forces was not

[207] Ibid, paras 133-137.

[208] Ibid, paras 138-141.

[209] Ibid, para 149.

[210] *Al-Jedda* GC (n 202), para 18.

[211] Ibid, para 60.

[212] Ibid, paras 69-71.

attributable to the UN.[213] The internment of Mr. Al-Jedda was unanimously considered to be within the authority and control of the UK' forces, because the detention took place in a British premise controlled by the UK government.[214] In both cases, the Grand Chamber opted for finding jurisdiction based on the authority and control of Contracting Parties' agents. However, in *Al-Skeini* the authority and control test is mixed with conditions, such as the UK troops maintaining security, traditionally part of the territorial control test. [215] Why should the authority and control test application be limited to cases in which the officials of Contracting Parties actually exercise public powers in the area? In sum, there is yet a need for a clear indication by the Strasbourg Court of what jurisdiction means,[216] particularly when we talk about the exceptional extraterritorial jurisdiction. As Judge Pettiti stated:

> Admittedly, the concept of jurisdiction is not restricted to the territory of the High Contracting Parties, but it is still necessary to explain exactly why jurisdiction should be ascribed to a Contracting Party and in what form and manner it is exercised.[217]

I argue that the accepted territorial control test for jurisdiction should be a secondary one, limited to the *espace juridique* and to the instances when it is the only mechanism workable to protect human rights inside that area. Consequently, the primary test

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[213] Ibid, paras 80-81.

[214] Ibid, paras 85-86.

[215] The principle of exercising public powers by Contracting Parties' agents was used in *Bankovic* to base the existence of effective control over an area. *Bankovic* (n 4), para 71.

[216] '… [T]he definition of "jurisdiction" has been an issue of increasing concern in the case-law of the [Strasbourg] Court.' Area Report (n 15) para 19.

[217] (Dissenting opinion of Judge Pettiti) in *Loizidou* Merits (n 18) 33.

should be based on a personal link between the Contracting Parties' agents and the victims. A test more suited to cover the conduct of Contracting Parties' agents abroad, including troops.

3.6 Conclusion

When the European Convention was created, its main drive was to uphold individual human rights against Contracting Parties' violations. Undoubtedly, it was not envisaged then the changes that the world would experience outside and inside the Council of Europe. However, the core concept of human rights protection from Contracting Parties' violations should remain the same. Human rights protection in the European Convention is linked to the victims being under the jurisdiction of Contracting Parties; thus the importance of defining the criterion of jurisdiction. The Strasbourg Court has conventionally opted for two tests to find jurisdiction: on the one hand, a test based on territorial control over an area; and on the other hand, a test based on authority and control over individuals. Arguably, the territorial test has a role inside the *espace juridique* to promote stability in conflictive areas of the Council of Europe. However, the preferred test to declare jurisdiction extraterritorially should be one based on personal control. A test based on the control exercised by officials of Contracting Parties over individuals abroad. The latter test presents three main advantages: firstly, it is a test not limited to the *espace juridique*; secondly, this test is not requiring to guarantee the whole range of European Convention's rights; and lastly, this test is not aiming to fill any vacuum of human rights in other States' territory.

In fact, the Strasbourg Court is accepting changes to the authority and control test outside the *espace juridique*; on the one hand, authority and control is accepted without physical control when the Contracting Party has already acknowledge jurisdiction over the victims, like in the *Pad* case. On the other hand, authority and control is also recognized when the conduct of officials of the Contracting Parties affects individuals in an area where those officials exercise public powers, as in the *Al-Skeini* case. Furthermore, the Strasbourg Court is developing the authority and control test inside the *espace juridique* into a test that is not based on Contracting Parties' voluntarily keeping the individuals under their jurisdiction but a personal control test based on the conduct of the Contracting Parties' agents being the direct and immediate cause of the human right violation. This direct and immediate link test, I argue will be the right jurisdictional test to uncover jurisdiction and liability for the conduct of troops of Contracting Parties operating abroad; whether those Contracting Parties' troops operate unilaterally or as part of a coalition or as a multinational force under the UN auspices.

Chapter Four: Contracting Parties' Liability for Troops Contributed to UN Multinational Forces: The European Convention and International Organizations

4.1 Introduction

The concept of extraterritorial jurisdiction is a developing one in the European Convention. Admittedly, it is particularly when referring to the conduct of Contracting Parties' officials abroad that the criterion of jurisdiction needs further clarification and consistency.[1] The concept of jurisdiction needs to adapt to the reality of Contracting Parties increasingly performing activities outside their own territory.[2] The example for excellence of Contracting Parties' performances extraterritorially is the sending of troops out of their territory. National military contingents operate abroad on their own, in the context of multilateral forces or coalitions and under UN auspices.[3] Nowadays, troops are not solely out to 'fight the armed forces of an enemy state', but also to be serving in humanitarian and peace supporting operations outside their territory.[4] States should be responsible for the behavior of their troops abroad. In the context of the European Convention, it means that the conduct of their troops should be susceptible to

[1] M Gibney, K Tomasevski and J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harv Hum Rts J 267.

[2] 'States are increasingly willing to assume rights of extraterritorial action for broadly humanitarian reasons'. M Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) .

[3] This thesis will concentrate on Contracting Parties' forces, Private Military and Security Companies hired by international organizations are out of the scope of this paper. ND White and S MacLeod , 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19EJIL 965.

[4] P Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents. (2000) 5 JCSL 45 (Maintaining Discipline).

scrutiny in action before the Strasbourg Court for compliance with the requirements of the European Convention, even if the troops form part of a multinational force. Based on the *Bosphorus* case, the Strasbourg Court established that Contracting Parties still have liability towards the European Convention even after transferring some of their powers to an international organization. Nonetheless, this position arguably changed after the decision in the *Behrami and Saramati* case, in which the Strasbourg Court did not examine liability of Contracting Parties, for violations of the European Convention committed under the UN's flag.[5] Instead the Strasbourg Court insisted on fully attributing liability to the UN in an attempt to stay clear of conflicts with the UN's universal peace and security mission. The *Behrami and Saramati* decision affected indirectly the scope of 'extraterritorial jurisdiction', because the exclusive attribution of liability to the UN, in operations under Chapter VII, meant the exclusion of an important portion of troops from the possible Strasbourg Court's supervision: Troops Contributing Nations (TCN) to the UN.[6] However, after the recent *Al-Jedda* case, it seems the Strasbourg Court has opened a way to signal to Contracting Parties that the conduct of their troops under UN auspices is not tantamount to avoiding liability for violations under the European Convention. Finally, this chapter examines the advantages for the Strasbourg Court to recognise 'dual or multiple attribution' as a way

[5] S Skogly, *Beyond National Borders: State's Human Rights Obligations in International Cooperation* (Intersentia 2006) 203 (Beyond National Borders); 'There is no legal reason or moral justification why states should be free to violate the rights of others … when conducting operations abroad'. R Lawson, 'Life after Bankovic: on the Extraterritorial application of the European Convention on Human Rights' in Coomans and Kamminga (n 2) 94; T Thienel 'Cooperation in Iraq and the ECHR: An Awful Epilogue (Invisible College Blog, 21 January 2009) <http://invisiblecollege.weblog.leidenuniv.nl/2009/01/21> accessed 20 May 2010.

[6] According to Larsen is the most numerous group, he indicates that, 'few states occupy foreign territory or conduct military operations abroad without the host state's consent, or intervene to capture individuals abroad.' KM Larsen, "Attribution of Conduct in Peace Operations: 'The Ultimate Authority and Control' Test." (2008) 19EJIL 509, 531.

not only to avoid confrontation with the UN, but also a path to effectively ensure that Contracting Parties' troops are following their European Convention's obligations when operating abroad.

4.2 Contracting Parties, International Organizations and the *Bosphorus* Era

There is an accepted notion in international law that members of international organizations are not liable for acts or omissions performed by those organizations.[7] Hence, there is an attractive prospect for States to evade liabilities by transferring competences to an international organization, knowing it is more difficult to bring an international organization to account than it is to bring their Member States.[8] Because according to Wilde, 'international organizations are seen, unlike states, as somehow intrinsically humanitarian, selfless and even-handed, and not therefore requiring the kinds of accountability mechanisms that would be in order in the case of states.'[9] This perception of restrictive jurisdiction over international organizations' violations is detrimental for individuals looking for acknowledgement and redress of violations suffered at the hands of an international organization.[10] However, the Strasbourg Court challenged that established view by introducing Contracting Parties' liability for human

[7] R Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2005-2006) 12 ILSA J Intl Comp L 395, 401 (Enhancing Accountability); C Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60 ICLQ 997.

[8] Wilde, 'Enhancing Accountability' (n 7) 400.

[9] Ibid 411.

[10] K Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2003-2004) 25 Mich J Intl L 1159, 1163.

rights violations committed as members of an international organization.[11] The Strasbourg Court via its case law,[12] particularly *Bosphorus*[13] established that:

> … [A]bsolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer (of sovereignty from Contracting Parties to an international organization) would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards.[14]

The message to Contracting Parties was, in principal, one of retention of European Convention obligations despite joining and handing over competences to an international organization. Yet, it would be naïve to expect the Strasbourg Court to ignore completely the need of effective operation for international organizations. In fact, the Strasbourg Court needed to balance the competing principles of independence of international organizations and accountability of Contracting Parties.[15] A way to maintain that balance was through 'equivalent protection'. Thus the Strasbourg Court did not forbid Contracting Parties from transferring power to an international

[11] T Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 HRLR 529.

[12] *Matthews v United Kingdom* App no 24833/94 (GC, 18 February 1999), para 32; *Waite and Kennedy v Germany* App no 26083/94 (GC, 18 February 1999), para 67.

[13] *Bosphorus Hava Yollari Turizm Ve Tiracet Anonim Sirketi v. Ireland* App no 45036/98 (GC, 30 June 2005).

[14] Ibid, para 154.

[15] Wilde, 'Enhancing Accountability' (n 7) 404.

organization, provided that within that international organization European Convention' rights and freedoms obtain equivalent protection. The concept of 'equivalent protection' was examined pre-*Bosphorus*, in the cases of *Matthews* and *Waite.* In *Waite*, it was argued that Germany could not deny access to a court under Article 6 ECHR to two workers of the European Space Agency (ESA); since ESA to which Germany was a party had immunity from domestic jurisdiction. [16] Also: '…the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.'[17] Underlying that problem of proper functioning of an international organization was also the problem of national legislation interfering and possibly coercing an international organization.[18] The answer the Grand Chamber gave was to determine that if the applicants had available to them some alternative ways to protect their rights under the European Convention, it would keep ESA's immunity. An alternative protection existed in the way of administrative appeals boards;[19] thus, the Strasbourg Court unanimously found no violation of Article 6 ECHR.[20]

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[16] *Waite* (n 12), paras 43-46.

[17] Ibid, para 63.

[18] '…[T]he test of proportionality cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law…'. *Waite* (n 12), para 72; A Reinish, 'International Decisions: Right of Access to Courts-Labour Dispute with International Organisation-Immunity from Jurisdiction of Municipal Courts-Alternative Remedies for Employees of International Organizations' (1999) 93 AJIL 933, 938.

[19] *Waite* (n 12), paras 68 -73.

[20] *Waite* (n 12), para 74.

In the case of *Matthews*, the Strasbourg Court again as a Grand Chamber found that the UK was bound by the European Convention despite having signed the 1976 Act of the European Council, agreed by European Union (EU) members. As a consequence of the latter Act, the applicant was denied the right to vote for the European Parliament in Gibraltar, a breach of Article 3 of Protocol No.1.[21] The Strasbourg Court could not use the principle of 'equivalent protection' since the Act was an EU measure that could not be challenged before the European Court of Justice (ECJ);[22] hence the UK was liable under the European Convention by signing an Act conflicting with the European Convention and without comparable protection.[23] Thus, the Strasbourg Court held a Member State of the EU responsible for a violation of European Convention's rights.[24] But it is with the case of *Bosphorus* where the Strasbourg Court established a proper test for 'equivalent protection'. The facts of the case are as follows, the applicant was a Turkish airline charter company, which leased a plane from the Jugoslovenski Aerotransport an airline from the FRY. Whilst the plane landed in Ireland for repairs, it was seized by Irish authorities on the basis of EU Regulation 990/93 that implemented UNSC Resolution 820 (1993).[25] The applicant complained of a violation of Article 1 of

[21] *Matthews* (n 12), paras 17-23.

[22] Milanovic states that the ECJ could not review the 1976 Act on human rights ground. M Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke J Comp & Intl L 69, 71(Norm Conflict); Lock (n 11) 539.

[23] In contrast, in *Bosphours* the violation was found in secondary legislation and act adopted by the organization that could be challenged before the ECJ. According to Milanovic the Strasbourg Court did not hold the Act invalid or hierarchal inferior to the European Convention. Hence, the European Convention did not prevail over the 1976 Act, Milanovic. 'Norm Conflict' (n 22) 70.

[24] *Matthews* (n 12), para 65.

[25] *Bosphorus* (n 13), para 16.

Protocol No.1 to the ECHR, which in it protects the right to property.[26] Ireland stated that it was not only implementing its EU's obligations, but also providing equivalent protection of human rights to that of the European Convention. [27] The Strasbourg Court agreed with the respondent Contracting Party argument.[28] In fact, it was established that the protection of the Turkish airline was not 'manifestly deficient'; [29] thus, the impoundment of the aircraft did not amount to a violation of Article 1 Protocol 1 ECHR.[30] In sum, if a Contracting Party complying with an international organization' obligations offers 'equivalent protection' of human rights[31] to that provided by the European Convention, the Contracting Party will not violate its European Convention's obligations.[32] The *Bosphorus* case introduced a two steps analysis for finding liability under the European Convention for conduct as part of an international organization: firstly, the Strasbourg Court considers if the organization offers an 'equivalent protection' to that of the European Convention. Secondly, that presumption can be rebutted if in that particular case the protection of human rights is 'manifestly deficient'.[33]

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[26] Ibid, para 107.

[27] Ibid, paras 109-110.

[28] Ibid, paras 158, 165-166.

[29] *Bosphorus* (n 13), para 156; C Eckes, 'Does the European Court of Human Rights Provide Protection From the European Community?-The Case of Bosphorus Airways' (2007) 13 EPL 47, 61.

[30] *Bosphorus* (n 13), paras 166-167.

[31] *Bosphorus* (n 13), para 155.

[32] 'Equivalent protection, rather than blanket immunity … develops into an assessment of the protection available from time to time and from sector to sector.' C Costello 'Case Comment: The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 HRLR 87, 130.

[33] Lock (n 11) 531.

4.3 Contracting Parties Unaccountable for Conduct Attributable to the UN: *Behrami and Saramati*

Following *Bosphorus* it seemed Contracting Parties remained liable for European Convention's violations for their conduct as members of an international organization, if there was no equivalent protection of human rights offered by the international organization. That was precisely the argument the applicants resorted to in the *Behrami* and *Saramati* case in order to seek protection from the European Convention:[34]

> The applicants argued that the substantive and procedural protection of fundamental rights provided by NATO Kosovo Force (KFOR) was in any event not equivalent to that under the Convention within the meaning of the Court's *Bosphorus* judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.[35]

In *Behrami* and *Saramati* the Grand Chamber heard two complaints concerning the accountability for human rights violations of France and Norway with regard to the conduct of their military personnel engaged in operations in Kosovo. This UN presence was set up after the cease-fire of NATO airstrikes.[36] Kosovo was a territory controlled,

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[34] *Behrami v France* App no 71412/01 and *Saramati v France, Germany and Norway* App no78166/01 (GC, Admissibility Decision, 2 May 2007).

[35] Ibid, para 150.

[36] From September through March 1999 violent conflict broke in Kosovo, a region in Serbia with a majority ethnic Albanian population. During this period, a cease-fire was brokered in October 1998, but was frequently violated by both sides. In mid-January 1999, a massacre of ethnic Albanian civilians by Serbian police prompted renewed international attention to the Kosovo problem, and led to peace talks in February and March. NATO planned to deploy a peacekeeping force in Kosovo once an agreement was reached. Continued Serbian rejection of the agreement led NATO to launch an extended air strike campaign against Yugoslav targets on March 24. J Kim, 'Kosovo Conflict Chronology: September 1998

on the one hand, by the presence of an international security force following UNSC Resolution 1244, which provided KFOR; KFOR contingents were grouped into multinational brigades each responsible for a sector and with a lead country. On the other hand, the territory was also controlled by the UN Interim Administration for Kosovo (UNMIK).[37]

4.3.1 *The Behrami and Saramati Facts*

In March 2000 Gadaf Behrami (11) and his brother Bekir (9) and six other children were playing on the hills in an area in Mitrovica (Kosovo) where they found undetonated cluster bombs. One of the children threw a bomb into the air; the bomb detonated killing Gadaf and blinding and permanently disfiguring Bekim.[38] The French KFOR did not remove, detonate the bombs or mark the area, despite knowing their existence.[39] The French forces decided those actions were not a priority. The father of the children, Agim Behrami, complained to the Kosovo Claims Office (KCO), the KCO forwarded the claim to the French Troop Contributing Nation Claims Office (TCNCO) who rejected the complaint stating that it was responsibility of the UN.[40] Agim Behrami complained under Article 2 ECHR for the death of one of his sons and

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– March 1999' CRS Report for Congress (6 April 1999) <http://www.au.af.mil/au/awc/awcgate/crs/rl30127.pdf> accessed 22 October 2012.

[37] *Behrami and Saramati* (n 34), paras 2-4.

[38] Ibid, para 5

[39] Ibid, paras 6, 61

[40] Ibid, para 7

the serious injury of the other as result of the failure of French KFOR troops to mark and defuse the un-detonated cluster bombs they knew present on the site.[41]

In *Saramati*, the applicant Ruzdhi Samarati (a Kosovar) was arrested by UNMIK on suspicion of attempted murder and illegal possession of a weapon. Following the launch of an appeal, Mr Saramati was released. After a month UNMIK police informed him he had to report to the police station to collect his belongings; when he so reported Mr Saramati was arrested by UNMIK police by order of the Commander of KFOR (COMKFOR). The applicant's detention kept being extended by order of the COMFKOR, who found him a security threat to the international presence in Kosovo.[42] The trial court stated to Mr Saramati's representatives that while the Supreme Court had ordered his release, his detention was entirely the responsibility of KFOR. After eighteen months, he was released when the Supreme Court of Kosovo quashed his conviction and his case was sent for re-trial.[43] The applicant claimed to have been subjected to extra-judicial detention in a KFOR camp without having access to court. Ruzdhi Saramati based his complaint on Articles 5, 6 and 13 of the ECHR.[44]

4.3.2 *The Strasbourg Court Reasoning in Behrami and Saramati*

The applicants in *Behrami and Saramati* relied on the *Bosphorus* case, and its pledge of retention of European Convention's obligations own by Contracting Parties joining an international organization, to seek redress. However, the Strasbourg Court decided to

[41] Ibid, para 61.

[42] Ibid, paras 8-13.

[43] Ibid, paras 14-17.

[44] Ibid, para 62.

bypass the applicants' plea and proceeded to highlight the differences between the situations in both cases as follows:

> The Court … considers that the circumstances of the present cases [*Behrami and Saramati*] are essentially different from those with which the Court was concerned in the *Bosphorus* case … In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*…[45]

The respondent Contracting Parties argued against having any jurisdiction over the applicants. According to them it was the UN that had effective control over Kosovo's territory.[46] In contrast, the applicants declared that they were within the jurisdiction of the Contracting Parties' forces affecting their rights.[47] In *Behrami*, it was just the French KFOR who was aware of the undetonated cluster bombs and knew about the site. In *Saramati*, the detention orders were issued by French and Norwegian COMKFORs.[48] Furthermore, the applicants argued there was a link to KFOR and not to the UN as there was no 'unified chain of command' from the UNSC. The conduct of

[45] Ibid, para 151.

[46] Ibid, para 68.

[47] Ibid, para 66.

[48] Ibid, paras 6, 73.

KFOR troops was answerable to their national commander not to NATO or the UN.[49] There was no agreement between the TCNs and the UN and no Status of Forces Agreement (SOFA)[50] between the UN and the FRY.[51] The Venice Commission[52] also informed on the limited transference of power from TCNs to other organizations.[53] However, the Strasbourg Court did not look into jurisdiction of individual TCNs abroad; instead the Strasbourg Court found Kosovo's territory under 'effective control' of the UN international presence as a whole. The international presence was carrying out the public powers exercised normally by a Government:[54]

> The Court therefore considers that the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo.[55]

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[49] Ibid, paras 73-77.

[50] While it is assumed that a Status of forces agreement between the sending and receiving state will normally be concluded before deployment, it may not be possible if the UN takes action under chapter VII of the UN Charter and the action is considered as peace enforcement, or where there is not effective governmental authority. Rowe, 'Maintaining Discipline' (n 4) 50.

[51] *Behrami and Saramati* (n 34), para 77.

[52] The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. (Established in 1990) <http://www.venice.coe.int/site/main/Presentation_E.asp > accessed 10 June 2010.

[53] '… [TCNs] have therefore not transferred "full command" over their troops. When [TCNs] contribute troops to a NATO-led operation they usually transfer only the limited powers of "operational control" and/or "operational command". … NATO commanders, in principle, do not have the right to give orders to individual soldiers ...' *Behrami and Saramati* (n 34), para 50.

[54] *Behrami and Saramati* (n 34), para 70.

[55] Ibid, para 71.

In fact, there is no straight answer to the question of Contracting Parties liability for the conduct of their troops. There is only an implied negative response of non-attribution of conduct to the respondent Contracting Parties, as the Strasbourg Court was to attribute 'exclusive' liability to the UN.[56] How and why Contracting Parties were not liable is not explained by the Strasbourg Court. The only answer the Strasbourg Court is providing is an explanation as to how and why the UN was liable:

> The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its Draft Articles on the Responsibility of International Organizations (DARIO) … Thirdly, the Court has then examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN. [57]

[56] M Milanovic and T Papic, 'As Bad As It Gets: Tthe European Court of Human Right's *Behrami and Saramati* Decision and General International Law' (2009) 58 ICLQ 267.

[57] *Behrami and Saramati* (n 34), para 121.

In fact, the Strasbourg Court established the responsibility of KFOR (for the detention) and of UNMIK (for failure to de-mine), and attributed their conduct exclusively to the UN. That attribution was based on the UN retaining 'ultimate authority and control.'[58] Then, the Strasbourg Court concentrated on its competence *ratione personae.*[59] Since the UN is not party to the European Convention[60] the complaint was declared inadmissible for being incompatible *ratione personae* with European Convention's provisions.[61] Finally, the Strasbourg Court introduced another difference between *Bosphorus* and *Behrami and Saramati*, a distinction that reflected its position and worries concerning general international law.

> There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation … with which the Court was there concerned (Bosphorus case) and those in the present cases … their actions (KFOR and UNMIK) were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.[62]

The Strasbourg Court found circumstances were different in *Behrami* and *Saramati,* it was not about two European organisations like in *Bosphorus* anymore; it was about

[58] 'The Court considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated …' *Behrami and Saramati* (n 34), para 133.

[59] *Behrami and Saramati* (n 34), para 71.

[60] *Bosphorus* (n 13), para 152; 'The UN is not party to the ECHR and not subject to the Court's jurisdiction.' Larsen (n 6) 528.

[61] *Behrami and Saramati* (n 34), para 152.

[62] Ibid, para 151.

thorny issues like extraterritoriality and multinational forces under the UN's auspices. The Strasbourg Court opted to avoid any interference with the accomplishment of the UN's key mission of protection of international peace and security.[63] Yet, the applicants demanded from the Contracting Parties their fulfilment of European Convention obligations.[64] In contrast, Contracting Parties, as respondents and third parties, stated the primacy of the UN obligations for States over any other treaty obligations. [65] In its quest to avoid norm conflicts between the European Convention and the UN,[66] the Strasbourg Court did not enquire about the compliance of UN forces and their sending States with European Convention' obligations. The Strasbourg Court did not require equivalent protection from the conduct of UN forces. This stand was repeated by the Strasbourg Court in its immediate forthcoming jurisprudence.

[63] Ibid (n 34), para 149.

[64] 'Even if this Court were to consider that the relevant States were executing an international (UN/NATO) mandate, this would not absolve them from their Convention responsibility … [moreover] … there was no conflict between the demands of UNSC Resolution 1244 … and … neither NATO nor KFOR provided [protection "equivalent" to that of the Convention] …' *Behrami and Saramati* (n 34), para 80.

[65] Denmark: 'States had vested the UNSC (including all Convention Contracting States) with primary responsibility for the maintenance of international peace and security…' *Behrami and Saramati* (n 34), para 192; Estonia:' Even if there was a conflict between a State's UN and other treaty obligations, the former took precedent (Articles 25 and 103 of the UN Charter).' *Behrami and Saramati* (n 34), para 97; Germany: 'This Court could not review acts of the UN, not least since Article 103 of the UN Charter established the primacy of the UN legal order.' *Behrami and Saramati*(n 34), para 102; United Kingdom: '…[A]ccording to Article 103 of that Charter, the obligations of members states of the UN under that Resolution took priority over other international treaty obligations.' *Behrami and Saramati* (n 34), para 113; cf, '…[F]ew [States] would confidently use (Art 103 UN) to uphold the primacy of Security Council decisions over, for example, human rights treaties.' M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2007) 15 LJIL 553, 559.

[66] Milanovic, 'Norm Conflict' (n 22) 4.

4.4 Life after *Behrami and Saramati*

Subsequent to *Behrami and Saramati* Contracting Parties' conduct, as part of UN multinational forces or subsidiary organs of the UN, were exclusively attributed to the UN. Moreover, *Behrami* and *Saramati* was used also in cases not related to the UN, but other international organizations. The latter cases were found inadmissible by the Strasbourg Court, based on the absence of any conduct by the Contracting Parties that could create a jurisdictional link with the applicants.

4.4.1 *The Follow-Up Cases: Gajic , Kasumaj and Beric*

Following *Behrami and Saramati* the Strasbourg Court started to declare applications inadmissible based on the premise that:'… acts and omissions of an international security force and a subsidiary organ of the United Nations could not be attributed to the respondent States …'.[67] Accordingly, the Strasbourg Court dismissed cases regarding property occupied and used by UN's security forces for example the admissibility decisions of *Gajic*[68] *and Kasumaj;*[69] as well as dismissing cases regarding activities of UN's international civil administration like in the case of *Beric.*

The case of *Kasumaj* concerns an Albanian living in Kosovo, who owned two plots of land occupied by Greek KFOR.[70] In the case of *Gajic,* Slavisa Gajic citizen of Serbia lived in an apartment in Prizren; one day after fleeing Kosovo with his family the apartment was used by the German contingent of KFOR. While in principal the

[67] *Rambus Inc. v Germany* App no 40382/04 (ECtHR, Admissibility Decision, 16 June 2009) 7.

[68] *Gajic v Germany* App no .31446/02 (ECtHR, Admissibility Decision, 28 August 2007).

[69] *Kasumaj v Greece* App no 6974/05 (ECtHR, Admissibility Decision, 5 July 2007).

[70] In fact it is the main national base in Kosovo for Greek KFOR.

Strasbourg Court was sidestepping over any examination into respondent Contracting Parties' jurisdiction in relation to UN's operations,[71] in *Gajic* the Strasbourg Court left open the possibility of Contracting Parties' liability when it states that 'even assuming that the requisition of the apartment in question *might engage the responsibility of the respondent State* … the applicant's complaint is in any event premature…'[72] Furthermore, in the more recent case of *Stephens,*[73] another case in this line of UN multinational forces property requisitions, the Strasbourg Court seems to go a bit further in considering the subject of jurisdiction. Mrs Stephens owned a house located in the Buffer zone, in Nicosia (Cyprus).[74] In this case the Strasbourg Court actually examines whether or not the respondent Contracting Parties have jurisdiction over the conduct complained about instead of going straight into UN attribution. The Strasbourg Court declares that the applicant 'has not challenged a particular action or inaction by [Cyprus and Turkey] or otherwise substantiated any breach by the said States…'[75] Away from property complaints we have the decision in *Beric.*[76] The UNSC appointed a High Representative (HR) to coordinate civilian aspects of the peace settlement in Bosnia and Herzegovina. The HR removed the applicants from their public and

[71] The main issue being 'whether this Court is competent to examine under the Convention that State's contribution to the civil and security presences which exercised the relevant control of Kosovo.' *Gajic* (n 85) 5; *Behrami and Saramati* (n 34), para 71.

[72] *Gajic* (n 68) 6 (emphasis added).

[73] *Stephens v Cyprus, Turkey and the UN* App no 45267/06 (ECtHR, Admissibility Decision, 11 December 2008).

[74] Ibid 2-3.

[75] Ibid 7.

[76] *Beric and Others v Bosnia and Herzegovina* Apps nos 36357/04, 36360/04,41205/04, 45190/04,45578/04,45579/04,91/05,97/05,100/05,101/05,1121/05,1121/05… (ECtHR, Admissibility Decision , 16 October 2005).

political party positions with immediate effect, for 'failure to purge … the political landscape of individuals indicted by the [ICTY].'[77] Later the HR lifted the ban, but the six applicants where not restored to their offices or entitled to compensation.[78] The government of Bosnia and Herzegovina maintained that the activities of the HR were attributable to the UN, thus no Contracting Party would be liable.[79] The Strasbourg Court established that the UNSC delegating its powers through Resolution 1031 retained 'effective overall control'[80] as in Article 5 (present Article 7) of DARIO.[81] The complaint was found inadmissible, based on the acceptance of an international civil administration in its territory by a respondent Contracting Party, and was declared incompatible *ratione personae*.[82]

[77] Ibid, para 2.

[78] Ibid, para 3.

[79] Ibid, para 21.

[80] A different test from that used in *Behrami and Saramati* : the 'ultimate authority and control'.

[81] '… The key question, therefore, is whether the UNSC, in delegating its powers by UNSC Resolution 1031, retained effective overall control (see draft article 5 of the Draft Articles on the Responsibility of International Organisations and *Behrami and Behrami and Saramati*…) .' *Beric* (n 102), para 27;
Article 7 (formerly 5) DARIO refers to 'effective control' not to 'effective overall control':
Article 7 *Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization*
The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct, (emphasis added).
These are the Articles as finally adopted by the ILC on second readings on the sixty third session, and included in Chapter V: 'Responsibility of International Organizations' (Geneva, 26 April-3 June and 4 July-12 August 2011) UN Doc. A/66/10) para 87: Text of the draft Articles (DARIO Articles 2011).

[82] *Beric* (n 76), para 30.

4.4.2 *Behrami and Saramati and Cases of 'Exclusive' Obligations of the International Organization: Rambus and Boivin*

The *Behrami and Saramati* case was being used in cases involving other international organizations, not just the UN.[83] Applicants were bringing actions before the Strasbourg Court, against Contracting Parties that did not exercise any conduct able to link them with the applicants. In those cases complaints are to be directed to the international organization exclusively. An example of this notion can be found in the two recent inadmissibility decisions of *Boivin*[84] and *Rambus.*[85] In *Boivin,* the applicant was not appointed to the post of head accountant of 'Eurocontrol' (The European Organisation for the Safety of Air Navigation), a post he was offered and had already accepted.[86] Philip Boivin then brought the case to the competent International Labour Organization Administrative Tribunal (ILOAT).[87] No action or omission of France or Belgium was involved in removing the applicant from his post. Furthermore, the complaint was not directed against the Contracting Parties but versus Eurocontrol and

[83] The *Behrami and Saramati* case has also being used in two nearly identical inadmissible decisions: *Galic* and *Blagojevic.* In both cases the applicants complained before the Strasbourg Court of violations of Article 6 ECHR by the ICTY and the aim was to find the Netherlands liable. In both decisions the Strasbourg Court found that the sole fact of the ICTY presence in the Hague is not enough 'to attribute the matters complained of to the Kingdom of the Netherlands'. *Galic v the Netherlands* App no 22617/07 (ECtHR, Admissibility Decision, 9 June 2009), para 46; *Blagojevic v the Netherlands* App no 49032/07(ECtHR, Admissibility Decision, 9 June 2009), para 46;W A Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights' (2011) 9 JICJ 609.

[84] *Boivin v 34 State Members of the Council of Europe* App no 73250/01 (ECtHR, Admissibility Decision, 9 September 2008).

[85] *Rambus* (n 67).

[86] *Boivin* (n 84) 1-2.

[87] ILOAT is the organ designated by Eurocontrol to settle its disputes with staff. *Boivin* (n 84) 6.

ILOAT.[88] In *Rambus*, the applicant using Article 6 ECHR complained of unfair trial with regard to his patent rights.[89] This was a complaint against 'serious structural deficiencies' in the European Patent Office (EPO) appeal procedure.[90] The Strasbourg Court established that the applicant freely joined EPO and that Germany did not get involved at any time in the proceedings before EPO.[91]

Ultimately, it was the complete lack of involvement of the Contracting Parties on the facts complained about which brought about the Strasbourg Court decisions of inadmissibility. On those circumstances, the applicants could not be under the Contracting Parties' jurisdiction for the purpose of Article 1 ECHR.[92] It is difficult to associate *Boivin* and *Rambus*, two European labour and organization's deficiency disputes, with *Behrami* and *Saramati* concerning liability of TCN of multinational UN forces abroad. One may suspect, the Strasbourg Court wanted to equate non-attribution with non-conduct. In *Boivin* and *Rambus* there was no conduct to link the respondent Contracting Parties and the applicants. In *Behrami* and *Saramati* undisputedly there were conducts by the respondent Contracting Parties that linked them with the applicants and which could have made them fall within the Contracting Parties' jurisdiction. Whether those conducts were attributable or not to the Contracting Parties is another matter.

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[88] *Boivin* (n 84) 3.

[89] T Jaeger, 'Case Comment ECHR: Article.6 – "Rambus"' (2010) 41 IIC 96.

[90] *Rambus* (n 84) 5.

[91] Ibid 7.

[92] *Boivin* (n 84) 7; *Rambus* (n 67) 8.

By joining *Boivin* and *Rambus* with *Behrami* and *Saramati* in the same category, of international organizations that hold exclusive obligations towards individuals, the Strasbourg Court could justify avoiding enquiries about equivalent protection offered by the UN or rebutting an inadequate protection by that international organization. Nonetheless, the 'double test' of *Bosphorus* is still in use, as it is confirmed in the recent case of *Kokkelvisserij*.[93] In *Kokkelvisserij* the applicant was granted a licence for fishing cockle by the Dutch authorities; the licence was objected to by an environmental group. The Dutch court made a reference to the ECJ[94] to clarify the interpretation of the European Community's Habitat Directive.[95] The applicant complained under Article 6.1 ECHR, alleging that 'its right to adversarial proceedings' had been violated as a result of the refusal of the ECJ to allow a response to the Opinion of the Advocate General. The Strasbourg Court examined if the Netherlands as a Contracting Party of the European Convention was liable, since it was involved in the reference to the ECJ.[96] The Strasbourg Court applied the *Bosphorus* test and decided: firstly, that the EU is an organization that offers equivalent protection. Secondly, it needed to see if the protection of human rights in this particular case was 'manifestly deficient'.[97] The Strasbourg Court found that the protection afforded was not manifestly deficient[98] and the application was considered ill-founded.[99]

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[93] *Kokkelvisserij v Netherlands* App no 13645/05 (ECtHR, Admissibility Decision, 20 January 2009).

[94] There is a possibility of making a reference to seek the ECJ's assistance, when the domestic court finds itself faced with a question of EU law to which it requires an answer in order to decide a case pending before it, under Article 267 of the Treaty of the Functioning of the European Union (TFEU).

[95] *Kokkelvisserij* (n 93) 1-8.

[96] Ibid 17-18.

[97] Ibid 19.

However, the classification of cases concerning the liability of Contracting Parties as member of international organizations seems to be inconsistent. The latter statement has an exponent in the case of *Gasparini*[100] another labour conflict 'between international civil servants and the employing international organization', which the Strasbourg Court found similar to *Boivin*.[101] The facts in the case are as follows, Emilio Gasparini an employee of NATO complained against an increase in the pension levy to the NATO Appeals Board (NAB). The sessions of NAB are not held in public, thus Emilio claimed a violation of Article 6 ECHR.[102] If there was no involvement of the respondent Contracting Parties, Italy and Belgium, this case should be included in the category of exclusive liability of the international organizations. Besides, since NATO is not a Contracting Party of the European Convention, the Strasbourg Court could declare itself incompatible *ratione personae*. However, even though the Strasbourg Court did not examine the equivalent protection offered by NATO,[103] it did apply the second part of the *Bosphorus* test when it stated that no evidence was brought before the Strasbourg Court to sustain that the protection was manifestly deficient. As a result, the respondent Contracting Parties had not joined a system contrary to the European

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[98] The applicant could have had a licence by the respondent government if it had shown beyond reasonable scientific doubt that such fishing would not adversely affect natural habitat in the Wadden Sea.

[99] *Kokkelvisserij* (n 93) 21.

[100] *Gasparini v Italy and Belgium* App no 10750/03 (ECtHR, Admissibility Decision, 12 May 2009).

[101] Ibid 6.

[102] Ibid 1-2.

[103] According to Lock *Gasparini* has extended the *Bosphorus* presumption to an organisation which is not the EU, furthermore NATO includes the United States and Canada, none of which are bound by the European Convention. Lock (n 11) 541.

Convention and the complaint was declared ill-founded.[104] In sum, the Strasbourg Court's stand concerning liability of Contracting Parties as members of an international organization is not as clear as it would be desired. [105] The interest of this chapter lies in the Strasbourg Court's position concerning liability for the conduct of Contracting Parties' troops abroad under the UN auspices. Notwithstanding the fact that the *Behrami* and *Saramati* case has also been used in cases no related to troops deployed as UN-authorized forces.[106] However and more importantly in *Behrami* and *Saramati*, the Strasbourg Court ignored demands of the applicants affected by the conduct of Contracting Parties' troops as part of UN contingents. This accountability gap is explored in the next section. This is because, although in the recent *Al-Jedda* case, the Strasbourg Court seemed to be closing the accountability gap, in reality *Behrami and Saramati* and its consequences still stand, as the Strasbourg Court distinguished both cases declaring that ' the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999.'[107] The international

[104] *Gasparini* (n 135) 9-10; according to Ryngaert the Strasbourg Court went too far in *Gasparini*, abandoning the requirement of Contracting Party involvement in the dispute between the international organization and the individual. Ryngaert (n 7) 1005.

[105] In the case of the EU, Article 6 (2) of the Treaty on European Union and Protocol 14 ECHR (that modifies Article 59 (2) ECHR), stipulate the EU accession to the ECHR, we do not know how that accession will affect *Bosphorus*- type cases. '…[T]his accession should signify a shift from the application of a standard of equivalent protection to a standard of identical rights protection, or, put differently, the closing of any remaining accountability gap in respect of the activities of the EU as an [international organization].' Ryngaert (n 7) 1016.

[106] "… [T]he application of an ill-conceived 'UN control' standard in these cases should not be seen as decisive.' Ryngaert (n 7) 1009.

[107] *Al-Jedda v the UK* App no 27021/08 (GC, 7 July 2011), para 83 (*Al-Jedda* GC).

security and civil presence in Kosovo was established under the UN's Chapter VII before the first element of KFOR and UNMIK entered Kosovo.[108]

4.5 Unravelling *Behrami and Saramati* and its Consequences

The Strasbourg Court in *Behrami* and *Saramati* avoided considering Article1 ECHR and with it jurisdiction of the TCNs. The Strasbourg Court instead used a *sui generis* delegation-means-attribution[109] mechanism, illustrating extreme caution towards interfering with the UN's universal mission. In a more dramatic statement for some commentators it meant 'total squashing of the rights enshrined in the Convention, sacrificed on the altar of the imperative nature of the principal aim of the UN.'[110] The Strasbourg Court overlooked the submission of the parties, this disregard is particularly damaging for the applicants. Agim Behrami and Ruzdhin Saramati were concerned with France and Norway violations of the European Convention, and pleaded for the Strasbourg Court to supervise the compliance of the Contracting Parties' troops with human rights. The applicants were not interested in UN's liabilities.[111]

[108] The Strasbourg Court established that the detention at the hands of KFOR was exercised through lawfully delegated powers from Chapter VII of the UNSC, *Behrami and Saramati* (n 34), para 141. The UNSC was delegating its civil administration powers to UNMIK a UN subsidiary organ within the framework of Chapter VII of the UNSC. *Behrami and Saramati* (n 34), paras 128-131.

[109] Expression used by Milanovic & Papic, text to note 56.

[110] P De Sena and MC Vitucci 'The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values' (2009) 20 EJIL 193, 212.

[111] Milanovic and Papic (n 56) 275.

The Strasbourg Court had a precedent in *Bankovic*,[112] where it also overlooked liability of Contracting Parties for their conduct while participating in an international force (NATO);[113] yet in the latter case the Strasbourg Court looked at the jurisdictional link. In *Behrami* and *Saramati*, the Strasbourg Court avoided examining jurisdiction of the respondent Contracting Parties based on two premises: on the one hand, that the action and omission happened outside the territory of the respondents' Contracting Parties. On the other hand, that the conduct impugned was not decided by the Contracting Parties' authorities.[114] Firstly, the indication in the ruling that the acts and omissions did not take place on the Contracting Parties' territory is surprising, since the Strasbourg Court has accepted in its own case-law that conduct outside the territory of a Contracting Party brings individuals under its jurisdiction.[115] Secondly, it is possible to find conduct authorized and 'formally attributable to the States' linked to the European Convention's

[112] J Cerone 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation and Peace Operations' (2006) 39 Vand J Transntl L 1447, 1508.

[113] 'The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States …'(para 82). '… [T]he Court considers that it is not necessary to examine the remaining submissions of the parties … (including) … several liability of the respondent States for an act carried out by an international organization of which they are members …'.(para 83), *Bankovic and Others v. Belgium and 16 Other Contracting States* App no 52207/99 (GC Admissibility Decision, 12 December 2001), paras 82-83.

[114] *Behrami and Saramati* (n 34), para 151; in contrast, in *Bosphorus* the Strasbourg Court stated: 'In the present case it is not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.'. *Bosphorus* (n 13), para 137 .

[115] '… [T]he concept of "jurisdiction" under this provision (Art 1 ECHR) is not restricted to the national territory of the High Contracting Parties.' *Loizidou v Turkey* App no 15318/89 (Preliminary Objections, 23 March 1995), para 62; *Issa and others v Turkey* App no 31821/96 (ECtHR, Admissibility Decision 16 November 2004), para 74; *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 of June 1992) 29; A Sari 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami and Saramati* Cases' (2008) 8 HRLR 151, 168 ; G Verdirame 'Breaches of the European Convention on Human Rights Resulting from the Conduct of International Organisations' (2008) 2 EHRLR 209, 213.

obligations, starting with the voluntary contribution of troops.[116] Troops as part of State military forces are undeniably part of State organs and authorities. Moreover, from a factual point of view a detention needs great control. The final decision in Mr Saramati's detention was down to COMKFOR and since the orders were issued by French and Norwegian Commanders, their respective sending Contracting Parties could be liable. In *Behrami*, it was France the Contracting Party controlling the Multinational Brigade (MNB) in the area. It was also within the power of French KFOR to properly organize the removal of the bombs and it was them that decided it was not a priority.[117] Additionally, the Strasbourg Court attributed the conduct of troops of Contracting Parties to the UN via delegation; a way contested by Milanovic and Papic as the incorrect method to attach liability to any conduct.[118] The Strasbourg Court referred to attribution grounded on the concept held on Article 3 DARIO (present Article 3 and 4)[119] and Article 5 DARIO (present Article 7)[120] in which attribution is based on

[116] In *Beric* Bosnia and Herzegovian accepted the High Representative. *Beric* (76); De Sena and Vitucci (n 110) 218.

[117] The AIRE Centre, Press release (London, 7 November 2006) <www.aire.wordpress.com/2006/11/07/behrami-and-saramati/> accessed 20 May 2010; the same press release referred to an article on the Guardian 27 July 2005, in which it was described that in a park in (Lille) France, WWII unexploded bombs were found and the park was closed and teams of expert mine clearers moved in immediately. (AIRE Press Release).

[118] 'Why is the Court's reliance on the notion of delegation so inappropriate in the context of attribution? The answer to this question is quite simple. The rules of attribution and the rules of international responsibility in general, are secondary rules, which continue to apply in an identical fashion across multiple fields of primary rules unless a *lex specialis* is shown to exist. The delegation model, on the other hand, is a part of the institutional law of international organizations and has nothing to do with the law of responsibility. Its purpose is to determine whether an organ of an international organization can lawfully empower some other entity, according to the rules of its own internal law. It does not and conceptually cannot, establish whether a state, or an international organization, or both, are responsible for a given act or not. An authorization by the Security Council may preclude the wrongfulness of an act by a state, but it cannot have an impact on attribution.' Milanovic and Papic (n 56) 281

[119] Article 3 *Responsibility of an international organization for its internationally wrongful acts*
Every internationally wrongful act of an international organization entails the international responsibility of that organization.

'effective control'. Nonetheless, there are valid doubts about the UN really having 'effective control' over the TCNs:[121]

> … [L]ately the Security Council is not creating UN peace-keeping forces but adopting resolutions 'mandating' multinational forces typically created with 'willing' MS [Member States]. They are forces that act under UN's mandate, not organs of the UN, more like organs of Participating states.[122]

It is known that TCNs prefer 'maximum flexibility and minimum Security Council involvement'.[123] If as a matter of fact the TCN had part of the control over the troops,[124] could the UN still have 'effective control'? Furthermore, the Strasbourg Court changed the 'effective control' required by Article 5 (present Article 7)

Article 4 *Elements of an internationally wrongful act of an international organization*
There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
(a) is attributable to that organization under international law; and
(b) constitutes a breach of an international obligation of that organization.
DARIO Articles 2011 (n 81) para 87.

[120] See note 81.

[121] '… [T]he authorization model is generally accepted, but there is concern about the lack of control by the Security Council.' N Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11 EJIL 541, 568.

[122] K Starmer, 'Responsibility For Troops Abroad: UN Mandated Forces and Issues of Human Rights Accountability' (2008) 13 EHRLR 318, 319; E De Wet, 'The Relationship Between the Security Council and Regional Organizations During Enforcement Action Under Chapter VII of the United Nations Charter' (2002) 71 Nord J Intl L 1, 37; C Leck ' International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melb J Intl L 346, 357.

[123] '… [T]he precise reason why the model of authorizations has become so popular is the lack of full UN control and the avoidance of micro-management by the Security Council.' Blokker (n 121) 565.

[124] 'Kosovo: Contracting States Acting Under UN Mandate – Inadmissibility Ratione Personae' (2007) 6 EHRLR 698, 701(note).

DARIO[125] for a tailor-made 'ultimate authority and control' on which to base attribution in the *Behrami* and *Saramati* case.[126] While there is a reference to 'effective control' in *Behrami* and *Saramati*, it was referring to the effective control of the 'international presence' as a whole.[127] Besides, 'effective control' as the ILC made apparent on its DARIOs and comments, is not about overall conduct of an organ but a specific conduct. The specific conduct is the base to verify if the act or omission is performed by the international organization or the sending State.[128] The Strasbourg Court maintained that 'ultimate authority and control' was substantiated: on the one hand, by 'limited delegation',[129] a requirement not established in the UN Charter or followed by the Security Council in practice.[130] On the other hand, this novel test was based on the reporting requisite, from TCNs to the UN.[131] Yet:

> [Reporting] in itself is not an instrument to obtain greater control, but a precondition for effective supervision … One inherent feature of reporting by coalition states is that

[125] See note 81.

[126] *Behrami and Saramati* (n 34), para 133; P Bodeau-Livinec, GP Buzzini and S Villalpando, 'International Decisions, *Behrami and Saramati*' (2008) 102 AJIL 322, 323(note); according to Buchan, a more suitable approach to determining attribution to the UN, in peacekeeping operations, is the overall control test as outlined by the ICTY in the *Tadic* case. R Buchan, 'UN Peacekeeping Operations: When Can Unlawful Acts Committed by Peacekeeping Forces Be Attributed to the UN?' (2012) 32 LS 282.

[127] '… Kosovo was, therefore, on those dates under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY.' *Behrami and Saramati* (n 34), para 70.

[128] Leck (n 122) 348.

[129] *Behrami and Saramati* (n 34), para 134

[130] '…[H]ow and why that is so, the Court does not explain', Milanovic and Papic (n 56) 280; Bodeau-Livinec, Buzzini and Villalpando (n 126) 328.

[131] *Behrami and Saramati* (n 34), para 134; 'The only control over KFOR the Security Council had was requirement of KFOR leadership to submit periodic reports.' Sari (n 115) 165.

> it is not likely that these states will report to having acted outside the mandate. It is therefore important that authorization resolutions also request the Secretary-General to report.[132]

Admittedly, reporting cannot convert a 'coalition force into a UN force'.[133] According to Larsen, the discussion on attribution and delegation was merely a pretext of the Strasbourg Court to reach its preconceived intention to consider it had no competence *ratione personae*.[134] For other commentators it also meant the Strasbourg Court 'in fact *declining* its jurisdiction rather than an instance of the Court's lack of jurisdiction.'[135] The Strasbourg Court needed to attribute the UN with exclusive obligations, which meant the Strasbourg Court did not have competence *ratione personae* to look into conduct of Contracting Parties acting on behalf of the UN. Yet more importantly, the Strasbourg Court wanted to avoid any conflict within the European Convention and the UN. The Strasbourg Court highlighted the importance not only of international cooperation but the UN's key mission of peace and security. Furthermore, since *Behrami* and *Saramati* avoided the question of applicability of the 'equivalent protection' doctrine to the UN's conduct, it has left unanswered questions relating to Articles 25 and 103 of the UN Charter overriding European Convention's obligations. Article 25 of the UN reads: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the

[132] Blokker (n 121) 563-564; Milanovic and Papic (n 56) 285.

[133] Blokker (n 121) 567.

[134] Larsen (n 6) 528.

[135] SC Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer 2010) 162.

present Charter'; Article 103 of the UN Charter establishes that: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. In *Behrami and Saramati*, there was not a reference to Article 103 UN as part of a hierarchy order that would find it superior to the European Convention.[136] The Strasbourg Court did not have to decide if a Resolution from the UN under Article 103 UN[137] would prevail over Articles of the European Convention.[138] To date, the Strasbourg Court has avoided having to make a stand either way, between human rights and international peace and security.[139]

4.5.1 *Repercussions of Excluding Liability from Troops Contributing Nations*

It is clear that the Strasbourg Court is concerned about the international repercussions of reviewing military operations abroad: on the one hand, it faces the prospect of deterring Contracting Parties from joining multinational forces; as stated by the UK, 'it would be obviously undesirable and inappropriate for the European Convention to be

[136] The Strasbourg Court only mentions Art 103 of the UN incidentally in *Behram and Saramati*: firstly in the 'Relevant Law and Practice' heading under the Charter of the UN. *Behrami and Saramati* (n 34), para 26; and secondly the Strasbourg Court establishes that : '… the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice.' *Behrami and Saramati* (n 34), para 147.

[137] In reality armed forces instead of being as it was predicted under UN command, are being 'controlled' through authorizations ; Art 103 of the UN Charter, is extending to Council authorizations not only commands. Blokker (n 121) 566.

[138] According to Milanovic, if the Strasbourg Court had used 'equivalent protection' in *Behrami and Saramati* it could have marked the start of fragmentation of the European Convention from general international law. Milanovic, 'Norm Conflict' (n 22) 73.

[139] Not even in *Al-Jeeda,* text to note 199.

interpreted in a way that discouraged or even put at risk participation in such peacekeeping by States that are signatories of the Convention.'[140] On the other hand, the Strasbourg Court confronts the international community pressure to back the deployment of international forces and their activities.[141] Additionally, the Strasbourg Court is mindful of its backlog and the floodgate of cases that could result from conduct attributable to Contracting Parties' troops in multinational operations abroad.[142]

Nonetheless, the Strasbourg Court should be equally concerned about the repercussions of excluding the responsibility of TCNs;[143] those repercussions are: the 'impunity' message sent to TCNs, removing victims' redress and reducing the extraterritorial scope of the European Convention. Firstly, the Strasbourg Court sends out a message of impunity for contingents under UN auspices and their sending Contracting Parties, which 'retain actual control over their forces and at the same time have absolutely no

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[140] UK observations submitted to the Court in the *Behrami*/*Saramati* case, 'K-For cases test human rights law', *BBC News* (15 November 2006) <http://www.news.bbc.co.uk/1/hi/world/europe/K-Forcasestesthumanrightslaw> accessed 22 May 2009 (K-For in BBC); '… [T]o review the participation of Contracting States in military missions all over the world … would risk undermining significantly the States participation in such missions…' *Bankovic* (n 113), para 43; Lawson (n 5) 172.

[141] International lawyers are finding military interventions and operations 'formally illegal but morally necessary'. M Koskenniemi, "'The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law' (2002) 65 MLR 159.

[142] In some cases it entails bypassing the Contracting Parties domestic courts, ie: ' …[In] *Issa* where the Court in its admissibility decision had considered that the judicial mechanism in Turkey was physically and financially inaccessible to the applicants, who lived in a village in northern Iraq.' *Pad and others v. Turkey* App no. 60167/00 (ECtHR, Admissibility Decision 28 June 2007), para 63;L Caflisch, 'The reform of the Europe an Court of Human Rights: Protocol No.14 and beyond' (2006) 6 HRLR 403, 405.

[143] '… [*Behrami* and *Saramati*] make *challenging* law: challenging for scholars in their efforts to construct a coherent framework for extraterritorial effect or for attribution of conduct; challenging for human rights advocates in their efforts to establish accountability for international organizations; and – most importantly – challenging for the civilian population in territories under UN administration, which is excluded from the ECHR's scope of application.' Larsen (n 6) 530.

liability for anything those forces do.'[144] 'The resulting lacuna in accountability would be anathema to the effective protection of individuals that is the very purpose of human rights and humanitarian law.'[145] Hence, sending an almost discriminating message of who is under the scrutiny of the European Convention, in the words of Mole: 'We encountered first-hand the bitterness in Kosovo at being told they [Kosovo judges and lawyers] had to implement the [European] Convention when the United Nations mission and KFOR troops could disregard it with impunity.'[146] The exclusive attribution of obligations to the UN has been criticized in this context of impunity, according to Leck:

> 'Attributing responsibility to the UN alone … may encourage more reckless and negligent behavior on the part of the (Troop Contributing Countries) TCCs, since they may not bear responsibility for the wrongful conduct of their peacekeepers.'[147]

If TCNs were held liable, army contingents would feel bound by the human rights' obligations of their sending Contracting Parties[148] as they are obliged by their

[144] Milanovic and Papic (n 56) 289.

[145] J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 EJIL 469, 487 (Minding the Gap).

[146] Nuala Mole, director of AIRE. AIRE's staff were sent by the council of Europe to train new Kosovo judges and lawyers on the European Convention.' 'K-For in BBC' (n 140).

[147] Leck (n 122) 363.

[148] 'National Contingents remained under the authority of sending state and bound to the obligations their governments are committed to.' R Wolfrum 'International Administration in Post-Conflict Situations by the United Nations and Other International Actors'(2005) 9 Max Planck UNYB 649, 690; 'KFOR contingents may also be bound by the human rights obligations of their sending states, it can provide for individual state accountability.' Cerone, 'Minding the Gap' (n 145) 475.

humanitarian law obligations.[149] It would be a fair consequence since, in reality, the military structure of the soldiers within their national contingent does not change; it operates as it would normally when the force is not under UN mandate.[150] According to Rowe, 'it should not be thought therefore that the separate national contingents in a multinational force somehow meld seamlessly into a single armed force comparable to the army of a single nation'[151] If the Strasbourg Court admitted the possibility of liability under the European Convention for conduct of troops contributed to the UN, the prospect of liability may encourage and improve the behavior of the TCNs. The troops should care for the consequences of their actions and omissions towards civilians, even outside their national territory. Unfortunately, this requirement seems alien to multinational contingents, since 'the human rights of foreign nationals with whom the soldier comes into contact have not been so well bedded into the military ethos of armed forces.'[152] A statement which is paradoxical in itself because 'the ostensible purpose of deploying armed forces to a multinational force is not to engage in military operations but to protect the lives of civilians.'[153]

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[149] 'The instructions for UN forces are applicable to UN operations conducted under UN command and control. They are not, as such, applicable to UN-authorized operations conducted under national or regional command and control; the responsibility "to respect and ensure the respect" for international humanitarian law in the latter case rests with the states or regional organizations conducting the operation.'. D Shraga 'Current Developments: UN Peacekeeping Operations, Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 AJIL 406, 408; 'UN Secretary-General promulgated a code of "principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control' the Secretary-General's Bulletin, ST/SGB/1999/13 (6 August 1999) <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ7L> accessed 20 May 2010.

[150] P Rowe *The Impact of Human Rights Law on Armed Forces, (*CUP 2006) 226 (*Impact of Human Rights*).

[151] Ibid 226.

[152] Ibid 115.

[153] Ibid 224.

The second consequence of excluding liability from Contracting Parties' sending troops is that the victims will be left without a remedy from the UN or the territorial State, because of the immunity of the forces. In the case of Kosovo, UNMIK Regulation 2000/47 deprives Kosovo's courts of any type of jurisdiction over KFOR and its soldiers.[154] Victims of violations by Contracting Parties' troops participating in UN multinational forces, should have as much right to redress as any other victim of European Convention's violations:

> There is no justification for the lack of internal accountability which seems to be typical for international administration. As a matter of principle in cases of international administration, internal accountability should be strengthened and made transparent for the population concerned to somehow compensate for the lack of democratic accountability. [155]

Alternative mechanisms offered in Kosovo for individual complaints did not seem effective. Firstly, the Ombudsperson for Kosovo established through Regulation 2000/38 could not receive complaints of abuses committed by KFOR and he was not

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[154] '[KFOR and its Personnel]… shall be immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States; and immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States…' UNMIK Regulation 2000/47 'On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo' (18 August 2000) s 2 (4) <http://www.unmikonline.org/regulations/2000/reg47-00.htm> accessed 22 May 2010.

[155] Wolfrum (n 148) 698.

considered independent;[156]and additionally, he could only make recommendations and give advice.[157] Secondly, the Human Rights Advisory Panel[158] was deemed a late initiative of 'forgiven chances and of wasted efforts'.[159] Thirdly, even though the UN envisaged a 'Standing Claims Commission' in the 1946 Convention on the Privileges and Immunities of States, nowadays there are only UN Claims Review Boards that operate on a mission by mission basis and are not without criticisms.[160] Lastly, monitoring agreements with the Council of Europe do not provide a system in which individuals' complaints can be heard.[161] Furthermore, the UN does not take disciplinary action against its peacekeepers.[162] The chief punishment would be to 'name and shame' the TCN. However, this will be an unlikely action since the UN needs the man power

[156] The ombudsman is appointed and removed by the Special Representative of the Secretary-General, UNMIK Regulation 2000/38 'On the establishment of the Ombdusperson institution in Kosovo' (30 June 2000) ss 6 (2) and 8 (2) <http://www.unmikonline.org/regulations/2000/reg38-00.htm> accessed 22 May 2010, (UNMIK Regulation 2000/38).

[157] UNMIK Regulation 2000/38 (n 156) s 4.

[158] In March of 2006 the Special Representative of the Secretary-General (SRSG) provided for a Human Rights Advisory Panel to hear complaints from individuals claiming human rights abuses at the hands of UNMIK, UNMIK Regulation 2006/12 'On the Establishment of the Human Rights Advisory Panel' (16 October 2006) <http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_50.pdf > accessed 22 May 2010; According to Waters this panel 's power of investigation is much weaker than those of the ombudsperson, and in addition the SRSG kept control over the process and ultimate outcomes, CPM Waters, 'Nationalising Kosovo's Ombudsperson' (2007) 12 JCSL 139, 144.

[159] B Knoll and RJ Uhl, 'Too Little, Too Late: The Human Rights Advisory Panel in Kosovo' (2007) 5 EHRLR 534, 548-549.

[160] 'In the case of Kosovo, KFOR did set a "non-binding voluntary claims system" (Claims Commission) to examine claims for property, personal injury, illness or death. However, it was criticized by the resident OSCE mission, since the procedure set out for claims has no legally binding force on the TCNs. Knoll and Uhl (n 159) note 14; Shraga (n 149) 406, 409.

[161] J Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty' (2005) 9 Max Planck UNYB 225, 280.

[162] Rowe, *Impact of Human Rights* (n 150) 225, 233.

on the ground.[163] In sum, if victims of European Convention's violations by TCNs in multinational operations have no redress, it would make sense for them to be able to access the remedies offered by the Strasbourg Court.

The last consequence of exclusively attributing liability to the UN is the reduction of the scope of the European Convention, since exclusive attribution to the UN removes multinational security operations under the UN as a group accountable for human rights violations. The case of *Behrami and Saramati*, according to Verdirami had put a barrier to the 'purposive and expansive' approach to the concept of jurisdiction under Article 1 ECHR.[164] In fact, the Strasbourg Court ignored any impact the troops had over the applicants, regardless of under which 'real' command they were, the UN or their sending Contracting Party.[165] However, many of the criticized outcomes of the *Behrami and Saramati* case are not to be found in the recent *Al-Jedda* judgment.

4.6 *Al-Jedda:* On the Right Path

Al-Jedda posed challenging questions about the applicability of the European Convention to UK troops as part of a multinational force with UN authorization and about the troops' liabilities for their conduct abroad. In contrast with *Behrami and Saramati*, in the *Al-Jedda* case, the UK forces, together with the US and other coalition partners, entered Iraq without a UNSC Resolution.[166]

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[163] Leck (n 122) 356.

[164] Verdirame (n 113) 213.

[165] Larsen (n 6) 520.

[166] *Al-Jedda* GC (n 107), para 77.

4.6.1 *Al-Jedda: Background and National Courts*

The facts of the case are as follows, Mr Al-Jedda was an Iraqi who was granted asylum in the UK and obtained dual British-Iraqi nationality. He was arrested in Baghdad in October 2004 while visiting his sister and then taken to a British detention centre in Basra. He was accused of terrorist activities including recruiting terrorists and conspiring in explosive attacks against coalition forces in Iraq. The UK government did not have enough evidence to bring charges, but his internment continued for imperative reasons of security in Iraq.[167] In June 2005, the applicant brought a judicial review claim in the UK challenging the lawfulness of his detention and the refusal by the Secretary of State for Defence to return him to the United Kingdom. The Secretary of State accepted that Mr Al-Jedda was within the jurisdiction of the European Convention, but contended the applicability of Article 5 ECHR because, the detention was authorised by the UNSC Resolution 1546 that displaced the later Article 5 ECHR. The Divisional Court agreed with the UK government and decided that in light of Article 25 of the UN Charter, Resolution 1546 imposed obligations that by virtue of Article 103 of the UN Charter prevailed over other obligations such as those contained on Article 5 ECHR. [168] The Court of Appeal upheld the Divisional Court's judgement.[169] Yet before the House of Lords,[170] the UK raised a new argument based on the *Behrami and Saramati* case; accordingly the British government argued that the detention of Mr Al-Jedda was to be attributable exclusively to the UN and not to the

[167] *Al-Jedda* GC (n 107), paras 9-14.

[168] *Al-Jedda v Secretary of State for Defence* [2005] EWHC 1809 (Admin) (12 August 2005).

[169] *Al-Jedda v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621.

[170] *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 (*Al-Jedda* HL).

UK.[171] This claim was rejected by the House of Lords that found the applicants' detention was attributable to the UK. This is because, not only had the UK previously accepted liability, before its domestic court, for its troops conduct inside a British prison centre in the *Al-Skeini* case,[172] but also there was no analogy between the *Al-Jedda* case and the *Behrami and Saramati* case.[173] Finally, the House of Lords unanimously upheld the judgment of the Court of Appeal and Article 103 UN gave primacy to the UNSC Resolution over human rights agreements. The House of Lords' considerations about jurisdiction and the applicability of the European Convention were bypassed in *Al-Jedda* by the need to explain why the conduct of the troops was attributable to the UK and not the UN.[174] Still, Lord Bingham and Baroness Hale stressed that, the European Convention would apply to troops conduct when that conduct was not down to obligations arising out of a Security Council Resolution or the Resolution did not provide protection for the detainee.[175] It reflects a fear of neglecting

[171] '[Contracting Parties] are hiding behind UNSC Resolutions to avoid being held to account under the ECHR.' ND White, *Democracy Goes toWar: British Military Deployments underInternational Law* (OUP 2009) 288.

[172] *Al- Skeini and others v Secretary of State for Defence* [2007] UKHL 26, [2007] 3 WLR 33, [2007] 3 All ER 685.

[173] ' . . . [C]oalition forces were not dispatched to Iraq by the UN.' *Al-Jedda* HL (n 170), para 24.

[174] K Smyth, 'R. (On the Application of Al-Jedda) v Secretary of State for Defence: Human Rights and Accountability in International Military Operations' (2008) 5 EHRLR 607.

[175] *Al-Jedda* HL (n 170), [39] (Lord Bingham), [126-129] (Baroness Hale); P Nevill, 'Case Comment: Reconciling the Clash Between UK Obligations under the UN Charter and the ECHR in Domestic Law: Towards Systemic Integration? (2008) 67 CLJ 447, 450; UN Resolution 1546 that provided the legal basis for the Multinational Force (MNF) to hold people in Iraq has no references to legal safeguards tor arrests, detentions or internment. The UK states that the interments were also governed by the Coalition Provisional Authority (CPA) Memorandum No.3 revised on June 2004; the Memorandum sets the process of arrests and detentions after 28 June 2004; .it establishes that 'operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourths' Geneva Convention'.(Unfortunately the CPA memorandum does not mention the right to legal counsel or to challenge the lawfulness of the detention before a Court.), Criminal Procedure, CPA

human rights obligations towards civilians in conflict situations. Particularly, in the existing scenario where the military interventions in Iraq were carried out prior to UN authorizations[176] and humanitarian law was struggling to offer individuals protection fitting with new war practices.[177] The United Nations Assistance Mission for Iraq (UNAMI) did also express a concern about the internment of people considered threats to security by the MNF without being tried.[178]

4.6.2 *Al-Jedda: Before the Grand Chamber*

After the judgment of the House of Lords an application was made by Mr Al-Jedda to the Strasbourg Court. The case was assigned to the Grand Chamber, which examined the merits and the admissibility of the application at the same time.[179] The domestic proceedings in the UK, accepted that Mr Al-Jedda was under the jurisdiction of the British government and considered that the obligations of Article 5 ECHR, were displaced in favor of the obligations under UNSC Resolution 1546 that authorized Mr Al-Jedda's detention.[180] Nonetheless, before the Strasbourg Court, the British

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Memorandum No.3 of 2003 (Iraq) s 7, Criminal Procedural Code <www.ictj.org/statc/MENA/Iraq/iraq.cpamemo3.062704.eng.pdf .> accessed 10 August 2011.

[176] Smyth (n 173) 620.

[177] '…[I]n the detention in the *Al-Jedda* case … there are gaps in the law of occupation which must be filled by reference to human right law standards' 'Expert Meeting on the Right to Life in Armed Conflict and Situation of Occupation (University Centre for International Humanitarian Law, Geneva, 1-2 September 2005) 21 <http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf> accessed 29 April 2011 (Expert Meeting on the Right to Life).

[178] *Al-Jedda* GC (n 107), paras 40-41; United Nations Assistance Mission for Iraq (UNAMI) (Human Rights Report 1 July – 31 August 2005, September 2005) <http://www.uniraq.org/aboutus/HR.asp> accessed 28 April 2011.

[179] *Al-Jedda* GC (n 107), paras 4, 61.

[180] Ibid para 16.

government denied jurisdiction and introduced the *Behrami and Saramati* precedent,[181] arguing that the detention of Mr Al-Jedda was attributable exclusively to the UN instead of the UK.[182] In addition, the UK argued, following the House of Lords judgment, that Resolution 1546 overrides obligations under Article 5 ECHR because of Article 103 of the UN Charter.[183] In contrast, the applicants argued that the UK during the domestic proceedings had acknowledged that Mr Al-Jedda was under their jurisdiction and that the majority of the House of Lords found the detention attributable to the UK because the invasion of Iraq was not considered a UN operation.[184] The Strasbourg Court described jurisdiction as a 'threshold criterion' indispensable to find a Contracting Party liable for any alleged violation of the European Convention.[185] The internment of Mr Al-Jedda was considered by the Grand Chamber to be within the UK's jurisdiction, as the detention took place in a British facility controlled by the UK government.[186] It is noteworthy that the Strasbourg Court based jurisdiction exclusively and unambiguously on authority and control of the British forces over Mr Al-Jedda,[187] not on control over the premises. Furthermore, the Strasbourg Court declared that the conduct of the UK soldiers was not attributable to the UN based on the

[181] *Al-Jedda* GC (n 107), paras 64-68; M Milanovic 'Grand Chamber Hearings and Preview of *Al-Skeini* and *Al-Jedda'* EJIL talk < http://www.ejiltalk.org/grand-chamber-hearing-and-preview-of-al-skeini-and-al-jedda/> accessed 29 April 2011.

[182] *Al-Jedda* GC (n 107), para 18.

[183] Ibid, para 60.

[184] Ibid, paras 69-71.

[185] Ibid, para 74.

[186] Ibid, para 85.

[187] Ibid, para 86.

authorization contained in a UNSC Resolution, but to the TCN. Moreover, the final UNSC Resolution 1546 produced twenty days before transferring power from the CPA[188] to the Iraqi Interim Government did not include any new terms to indicate any more control by the UN.[189] Also, the fact that UNAMI and the Secretary General of the UN had protested in numerous occasions about the indefinite internments without trial by UK forces[190] could not sit well with the idea of the UN being liable for the detention of Mr Al-Jedda.[191] The practice of indefinite internment without trial is not supported by humanitarian law either and is considered in that discipline a measure of last resort for an occupying power.[192]

Regarding the violation or Article 5.1 ECHR the Strasbourg Court determined that UNSC Resolution 1546 did not compell the UK to intern the applicant.[193] Also, this UNSC Resolution was not explicit and clear in its language as to require the internment.[194] The Grand Chamber found a violation of Article 5.1 ECHR and no conflict between UK obligations arising from the UN and from the European Convention.[195] The violation of Article 5.1 ECHR was held by sixteen votes to one.

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[188] In order to ensure the complete disarmament of Iraq's weapons of mass destruction and means of delivery in the post-conflict period in Iraq; the USA, the UK and coalition partners created the CPA.

[189] *Al-Jedda* GC (n 107), paras 80-81.

[190] Ibid, paras 40-41.

[191] Ibid, para 82

[192] *Al-Jedda* GC (n 107), para 107; A Roberts 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 612.

[193] *Al-Jedda* GC (n 107), para 101.

[194] Ibid, para 105.

[195] Ibid, paras109-110.

Judge Poalelungi held a partially dissenting opinion that recognized jurisdiction of the UK but not a violation of Art. 5.1 ECHR.[196]

4.6.3 *Al-Jedda and Accountability of Contracting Parties' Forces*

In *Al-Jedda* there was no conduct attributable to the UN, the Strasbourg Court distinguished this case from *Behrami and Saramati,* based on the fact that the UNSC Resolution came after the international forces were already in Iraq.[197] Some commentators argue that there was no real difference between the role of the UN in Iraq or Kosovo.[198] Nonetheless, the fact is that the Strasbourg Court in *Al-Jedda* considered the demands of applicants affected by Contracting Parties' troops' conduct as part of a multinational force with UN authorization. In addition, the Strasbourg Court reflected upon the equivalent protection an international organization, the UN in this case, offered compared to that of the European Convention. The presumption of equivalent protection as established in the *Bosphorus* test could be easily rebutted in *Al-Jedda.* How could the Strasbourg Court bypass the concerns stated in reports by the Secretary General of the UN and UNAMI, of detention of thousands of persons without due process?[199]

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[196] Judge Poalelungi stated his agreement with the House of Lords' ruling that the UK's obligation to intern the applicant was based on a UNSC Resolution that took precedent over Article 5.1 ECHR. (Partially Dissenting opinion of Judge Poalelungi) *Al-Jedda* GC (n 107) 67.

[197] *Al-Jedda* GC (n 107), paras 77-78.

[198] According to Messineo the difference between the operations in Iraq and Kosovo were irrelevant. F Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights.' (2009) NILR 35, 38.

[199] *Al-Jedda* GC (n 107), para 106.

Additionally, this judgment also brings a formula to keep harmony between the UN's policies and the requirements of the European Convention. The formula comes in three steps: firstly, there must be a presumption that the Security Council does not intend to impose any obligation to breech fundamental rights. Secondly, if there is any ambiguity, the solution should rest on an interpretation that respects human rights. Thirdly, based on the UN's commitment to human rights, explicit and clear language is expected from a UNSC Resolution that intends States to take measures which conflict with their human rights obligations.[200] It is expected that after *Al-Jedda* it will be more difficult for Contracting Parties to shake their human rights obligations off, when they are part of military operations with UN authorization. Albeit, those forces, of Contracting Parties under the UN's auspices, will not be able to rely on derogations to overrule their human rights obligations either. Normally, Contracting Parties' troops abroad mainly participate in peace support operations or intervene to aid inhabitants in foreign States.[201] For example, in post-conflict Iraq, when was the UK threatened or what public emergency could the British government allege to use a derogation of human rights under Article 15 ECHR?[202] Also, post-*Al-Jedda* Contracting Parties cannot easily escape liability through exclusive attribution to the UN. [203] This is because the Strasbourg Court held that the UNSC had not effective control or ultimate

[200] Ibid, para 102.

[201] N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 188, footnote 119.

[202] Article 15 ECHR: *Derogation in time of emergency* (1) In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation…'.

[203] The UK claimed that by virtue of UNSC Resolution 1511 and 1546 the detention of Mr Al-Jedda was attributable to the UN and was outside of scope of the European Convention. *Al-Jedda* GC (n 107), para 18.

authority or control over the troops in Iraq[204] and the possibility of dual or multiple attribution was introduced:

> The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case - ceased to be attributable to the troop-contributing nations …[205]

While in this particular case the Strasbourg Court believed that the conduct was attributable only to the UK troops and could not be attributed to the UN, the door is open to cases in which attribution can be allocated to both the UN and the Contracting Parties involved in a particular conduct. In general, the welcoming fact is that dual attribution will mean: firstly, that the Strasbourg Court can look into cases regarding Contracting Parties' troops as part of multinational forces. Those forces will now be aware that the European Convention can bite and will increase their awareness of 'human rights of foreign nationals'.[206] Secondly, dual attribution guarantees to victims of European Convention's violations wherever they are, the best protection offered currently in any human right system.[207] Lastly, moving away from exclusive attribution to the UN enhances the scope of the European Convention's jurisdiction extraterritorially. This jurisdiction can now include in its reach troops from Contracting

[204] *Al-Jedda* GC (n 107), para 84.

[205] Ibid, para 80.

[206] Rowe, *Impact of Human* Rights (n 150) 115.

[207] Lawson (n 5) 120.

Parties that operate under the UN flag. Admittedly, after the *Al-Jedda* case, the Strasbourg Court and applicants can rely on another precedent for decisions regarding jurisdiction and liability of Contracting Parties contributing troops to multinational forces with UN authorizations. Moreover, the Strasbourg Court has embraced the benefits of dual and multiple attribution, which will be explained in the next section.

4.7 Benefits of Dual and Multiple Attribution

It makes sense that the Strasbourg Court accepted dual or multiple attribution since there was no reason to the contrary. [208] In fact, the Strasbourg Court would only benefit from considering dual or multiple attribution to the UN and to the Contracting Parties contributing troops. Adopting this approach would mean: firstly, that the Strasbourg Court appears more in tune with previous case-law. Secondly, following this perspective will improve its moral standing. Thirdly, it will seem more compatible with the latest DARIO by the ILC (2011). Lastly, this angle on attribution will not conflict with the UN's objectives or the effectiveness of its operations. One of the critiques of *Beharami* and *Saramati* was that the Strasbourg Court turned from its jurisprudence concerning the scrutiny of human rights' obligations of Contracting Parties as part of international organizations. However, via dual or multiple attribution, the Strasbourg Court can continue to take a proactive role and supervise the compliance with European Convention's obligations. This can occur after the transfers of power from Contracting

[208] 'The Court's decision in [*Behrami and Saramati*] … assumes that responsibility can only be attributed to a single party, in reality is difficult to see why there cannot be dual attribution of responsibility: that is, both to the international organization and to the individual participating States.' R White and C Ovey, *The European Convention on Human Rights* (OUP 2010) 97; Bodeau-Livinec, Buzzini and Villalpando (n 126) 328.

Parties to international organizations;[209] particularly by Contracting Parties' troops participating in multinational forces.[210] Nonetheless, accepting dual or multiple attribution, does not mean that all contributing Contracting Parties which exercise jurisdiction through conduct of their troops abroad will be found liable.[211]

Another advantage of dual or multiple attribution would be helping the moral standing of the European Convention, which undoubtedly suffered after the *Behrami and Saramati* case.[212] As Tzevelekos stated, 'the green light it appears to have given the Security Council, and the promise for everlasting immunity, constitute a costly surrender of is own power, detrimental to its very *raison d'être* (the effective protection of human rights).'[213] The perception for some commentators of the Strasbourg Court's reasoning in *Behrami and Saramati*, was one of avoidance of its main task as a judicial instrument: the pursuit of justice following the facts presented by the parties.[214] Moreover, it appeared as if it was not supervising the conduct of troops of Contracting Parties extraterritorially, which were left free to act as they wanted, when 'the least one may expect from states who intervene abroad in the name of the great ideals of

[209] Wellens (n 10) 1179.

[210] C Stahn 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead' (2001) 61 ZaoRV 107, 151-152; Friedrich (n 161) 275.

[211] M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 418, 447 (From Compromise to Principle).

[212] O Korhonen, 'International Governance in Post-Conflict Situations'. LJIL 14 (2001) 495, 501; J Nilsson, 'UNMIK and the Ombudsperson Institution in Kosovo: Human Rights Protection in a United Nations 'Surrogate State'" NQHR 22 (2004) 389, 411.

[213] V P Tzevelekos, 'The Use of Article 31 (3) (c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systematic Integration.' (2010) 31 Mich.J. Intl L. 621, 679.

[214] Ibid 677.

freedom, democracy and the rule of law, is that they continue to abide by the same universal human rights standards whether they act at home or abroad.'[215]

Additionally, the Strasbourg Court will be the only organ supervising these particular TCNs to UN operations, like peacekeeping ones. In fact, humanitarian law is not applicable because there is no hostile relation between UN peacekeeping and civilian population and they are not parties to a conflict.[216] So, how are peacekeepers supervised?[217] For some, the inapplicability of humanitarian law is based on the consent peacekeeping forces have from the host State. [218] Nevertheless, in many UN led operations there are no SOFAs to regulate everything, as was the case in Kosovo.[219]

The next benefit for the Strasbourg Court of moving away from exclusive attribution to the UN is an improved compatibility with the DARIO of the ILC (2011). [220] In fact, the possibility of multiple attribution is recognized now and in previous versions of the DARIO:

> The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of

[215] Lawson (n 5) 120.

[216] Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff 2009) 558.

[217] S Wills, 'Occupation Law and Multi-national Operations: Problems and Perspectives' (2006) 77 BYIL 256, 313.

[218] G van Hegelsom, 'The Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcing Operations' (1993) 6 Hague YB Intl L 47, 57; cf, according to Arai-Takahashi this was not the case in ONUC in Congo and UNOSOM II in Somalia, where the UN did not obtain consent from host States, Arai-Takahashi (n 215) 596, see note 61.

[219] TH Irmscher, 'The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation (2001) GYIL 353, 383.

[220] DARIO Articles 2011 (n 81).

> international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both. Another example may be that of conduct which is simultaneously attributed to an international organization and a State and which entails the international responsibility of both the organization and the State. [221]

The ILC Commentaries to DARIO include observations of non-attribution to the UN when there is no link between the UN and the TCNs' conduct,[222] and comments on difficult attributions of specific conducts between the receiving international organization and the lending State.[223] The point to remember is that the criterion clearly established for attribution is 'factual control over the specific conduct' performed by

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[221] ILC Commentary to Article 3 DARIO, s 6, in the Commentaries to DARIO 2011(n 81) para 88: Text of the Draft Articles with Commentaries thereto (ILC Commentaries to DARIO Articles 2011) 81.

[222] This point was made by the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the United Nations in a letter to the Permanent Representative of Belgium to the United Nations, concerning a claim resulting from a car accident in Somalia, the letter unpublished and dated 25 June 1998, reads: 'UNITAF troops were not under the command of the United Nations and the Organization has constantly declined liability for any claims made in respect of incidents involving those troops.' ILC Commentaries to Article 4 DARIO. These commentaries are included in the Second Report on responsibility of international organizations by G Gaja, Special Rapporteur (Geneva, 2 April 2004) on the Drafts Articles adopted on the fifty-fifth session on 'Responsibility of International Organizations' (Geneva, 3 May- 4 June and 5 July-6August 2004) UN Doc A/ CN.4/541.

[223] '… The UN is liable towards third parties but has a right of recovery from the contributing state under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the government." It is clear that this is about distribution of responsibility no attribution of conduct, and is an agreement between state and organization, so the third party has the right to go towards the state or the Organization…' Commentaries (3) to Article 7 DARIO, 'ILC Commentaries to DARIO Articles 2011' (n 221) 87.

the troops placed at the international organization's disposal.[224] Hence:

> '…[W]hile it is understandable that, for the sake of efficiency of military operations, the United Nations insist on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a 'factual criterion'.[225]

The ILC criticized in its commentaries on the DARIO, the Strasbourg Court's choice of the 'ultimate authority and control' test for attribution in the *Behrami and Saramati* case, a concept that 'hardly implies a role in the act in question'. The ILC favours the concept of 'operational control' a stronger and more adequate control.[226] Conversely, the ILC comments were more approving towards the British interpretation on the *Al-Jedda* case where, the domestic courts 'realistically' recognised that the US and UK forces were not under effective control of the UN.[227] Later, when referring to the *Al-Jedda* case before the Strasbourg Court, the ILC limits itself to stating that in the latter case the UNSC had according to the Strasbourg Court, no effective control or ultimate authority and control over the troops' conduct.[228] Indeed, the ILC may be disappointed that the Strasbourg Court still keeps the ultimate authority and control concept for attribution. On the other hand, the Dutch Court of Appeal of The Hague recently used

[224] Commentaries (4) to Article 7 DARIO, 'ILC Commentaries to DARIO Articles 2011' (n 221) 87; Larsen (n 6) 518.

[225] Commentaries (4) to Article 7 DARIO, ILC Commentaries to DARIO Articles 2011 (n 221) 87.

[226] Commentary (10) to Article 7 DARIO, ILC Commentaries to DARIO Articles 2011 (n 221) 90-91.

[227] Commentary (12) to Article 7 DARIO, ILC Commentaries to DARIO Articles 2011 (n 221) 92.

[228] Commentary (13) to Article 7 DARIO, ILC Commentaries to DARIO Articles 2011 (n 221) 92.

effective control to declare that the Netherlands was liable for expelling three Bosnian nationals from the protective compound of Dutchbat (a Dutch regiment peacekeeping force under UNPROFOR). The applicants were then killed by Bosnian Serbs.[229] Thus, the departure from the *Behrami and Saramati's* test started already in The Hague two days before the *Al-Jedda* case was decided in Strasbourg.[230] The test of attribution used by the Dutch Court of Appeal is set as effective control[231] and is different from the one laid out in the European Convention. The Dutch Appeal Court follows the position of Dannenbaum, which states that effective control is not only determined by the instruction of the UN or the relevant State, but whether the UN or the State 'had been able to prevent the conduct concerned.'[232] If the decision is not overturned by the Dutch Supreme Court it will be a good precedent for dual attribution.[233] Hopefully, these facts will encourage the Strasbourg Court to abandon the use of the 'ultimate

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[229] A Nollkaemper, 'Case Comment: Dual attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 JICJ 1143, 1144.

[230] Also previously referring to the decision on the case of *Behrami and Saramati* , the representative of Denmark issued a statement on behalf of all Nordic countries: 'This does and must not mean that the UN should always be responsible for all acts performed during UN peacekeeping operation.' on 'Responsibility of International Organizations' (New York, October 29, 2007) UN General Assembly, 6th Committee ' <http://www.missionfnnewyork.um.dk/en/menu/statements/UNGA626thCommitteeJointNordicStatement.htm > accessed 10 June 2010.

[231] Previously, the District Court of The Hague rejected the claim and hold that the conduct of Dutchbat was attributable to the UN. Commentary (14) to Article 7 DARIO, ILC Commentaries to DARIO Articles 2011 (n 221) 92-93; '… [E]ffective control … is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question …e nsuring that the actor held responsible is the actor most capable of preventing the human rights abuse.' KT Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harv Intl L J 113, 158; cf, According to Nollkaemper the Dutch Appeal Court 'emphasizes that effective control should be assessed in the concrete circumstances of the case, not (only) in terms of and abstract possibility to exercise control …'. Nolkaemper (n 229) 1149.

[232] Dannenbaum (n 231) 158

[233] Nolkaemper (n 229) 1149.

authority and control' test and not to ignore the DARIO. Otherwise, the Strasbourg Court would either disregard international law being codified, or it would indicate that the DARIO are not truly reflecting current international law.[234]

Lastly, is the advantage dual or multiple attribution would bring to the relationship between the European Convention and the UN. With dual or multiple attribution, the Strasbourg Court will not have to decide about the primacy of Contracting Parties' obligations under the UN Charter over obligations under the European Convention. Both obligations would subsist without a conflict between them. It will help bypass Giegerich's concern, 'the [Strasbourg Court] will find itself at a fork in the road, and I am not sure which path it will follow – the *Bosphorus* path favouring human rights (liberty) or the *Behrami and Saramati* path favouring the war on terror (security).'[235] Also, secondary or concurrent liabilities will not undermine the personality of an international organization;[236] therefore concerns for independence of the UN are not a reason for denying such liability. The Contracting Parties will only be liable depending on their contribution to a wrongful conduct.[237] More importantly, the functional interest of an international organization and its immunity can be backed if, without it, the

[234] CA Bell, 'Reassesing Multiple Attribution: The International Law Commission and the *Behrami and Saramati* Decision' (2010) 42 NYUJ Intl L & Pol 501, 532.

[235] T Giegerich, 'The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?'(2009) 1 Germ L J 31, 57.

[236] 'The notions of secondary and concurrent liability both presuppose the international organization is itself responsible for these acts. Liability of the Member State would arise either alongside the liability of the organization (concurrent liability) or as a fall-back when the organization is unable to meet its obligations (secondary liability).

[237] A Stumer 'Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections. (2007) 48, 2 Harv Intl L J 553, 579.

mission of that international organization would not be fulfilled.[238] Thus, it is hard to see how not de-mining an area or keeping an individual in confinement without judicial review is helping the UN's peace and security mission. The UN goals would not be consistent with leaving individuals in indefinite internments, or not removing cluster bombs that can kill and blind children.[239] In any case, the Strasbourg Court would not interfere with the UN mission or its critiques.[240] It will only exercise its own objective and purpose, one of supervising, protecting and promoting human rights for individuals under the jurisdiction of its Contracting Parties.

4.8 Conclusion

The Strasbourg Court needs to send the message through its case law that the conduct of Contracting Parties outside their national territory will be monitored. That message particularly needs to reach Contracting Parties' troops, even those forming part of coalitions or multinational forces under international organizations, such as the UN. In the *Bosphorus* case the Strasbourg Court established that Contracting Parties retained obligations arising from the European Convention even after joining an international organization. Yet, after the *Behrami and Saramati* case, the Strasbourg Court introduced the idea of 'exclusive' attribution of obligations to the UN with emphasis on

[238] Friedrich (n 161) 279.

[239] Grover (n 135) 160.

[240] '…[T]here is …[an] urgent need to review United Nations mechanisms – to limit collective action within the Security Council so that states do not escape constraints on unilateral action by hiding behind the corporate veil, to provide for some form of accountability, to ensure a more equitable representation within that body, and above all to have the General assembly reassert its residual role in the field of international peace and security…for in order to have meaningful debate on the issue of the role and limits of unilateralism in international law, one must seek to transcend the current *huis clos* of a "US-European" conversation.' V Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 EJIL 361, 383.

non-interference with the security and peace mission of the UN. Hence, the Strasbourg Court in *Behrami and Saramati* released itself from looking into jurisdiction or liability of troops of Contracting Parties acting extraterritoriality as part of a multinational operation sanction by the UN. The alleged victims of the Contracting Parties' troops in *Behrami and Saramati* were not considered to be within the jurisdiction of those Contracting Parties. However, recently in the *Al-Jedda* case, the Strasbourg Court did not find the UN to have exclusive attribution. This time the Contracting Parties' troops, part of a multinational force, got the authorization of the UN after invading Iraq.[241] In *Al-Jedda*, the Strasbourg Court found that the UK had jurisdiction based on the authority and control of the British troops over the applicants on the case. *Al-Jedda* meant that the Strasbourg Court accepts a new way to supervise the conduct of TCNs; to prompt governmental institutions to be more proactive outside their boundaries; to extend its protection of human rights to victims within the jurisdiction of Contracting Parties' troops; and to help delineate a clearer concept of extraterritorial jurisdiction. These consequences will also help the Strasbourg Court's effectiveness and legitimacy. Furthermore, post-*Al-Jedda*, it is felt that Contracting Parties will find it more difficult to seek UN exclusive liability when participating in multinational operations that fall outside *Behrami and Saramati*-type situations. Since the application of humanitarian law tends to be uncertain and incomplete in the modern military context, the Strasbourg Court is, in many cases, the only real instrument to supervise troops of Contracting Parties abroad with regards to their jurisdiction and liability. Not only to assess the extraterritorial applicability of human rights to Contracting Parties' troops as part of

[241] A Mowbray *European Convention on Human Rights* (3rd edn, OUP 2012) 80.

multinational UN authorized forces, but to the troops conduct in the context of any military operations abroad. This will be explored in the next chapter.

Chapter Five: Contracting Parties' Liabilities in the Context of Military Operations Abroad

5.1 Introduction

The Strasbourg Court has experience of addressing human rights violations in relation to Contracting Parties' participation in military operations. After dealing with the Strasbourg Court's scrutiny of the conduct of Contracting Parties' troops contributing to UN missions under Chapter VII of the UN Charter; this chapter is concentrating more on unilateral and multilateral military operations falling outside the *Behrami* and *Saramati*-type situations. The Strasbourg Court is dealing with actions brought against the conduct of officials of Contracting Parties in the context of military operations inside the *espace juridique,* from the long on-going occupation in northern Cyprus to the more recent armed conflicts in Chechnya.[1] However, new cases of allegations of violations by Contracting Parties' troops are emerging rapidly from outside the *espace juridique* as a consequence of military interventions conducted by Contracting Parties all over the world. These are non-conventional wars without battlefields or frontlines; these are operations directed to help government forces against internal enemies, or to assist the civilian population, for humanitarian reasons, against their governments. As an example of such military campaigns we have the well-publicized multinational interventions in Afghanistan, Iraq[2] or Libya. Either way, the interventions are

[1] See chs 2 and 3.

[2], '… [T]he last strand of the British military's presence in the country under Operation Telic was severed. That said, UK forces will still be involved in the wider NATO's Training Mission programme.' 'Operation Telic End – UK Forces Leave Iraq' *Armed forces international News* (May 2011) <http://www.armedforces-int.com/news/operation-telic-ends-uk-forces-leave-iraq.html> accessed 22 May 2011.

characterized by soaring violence[3] and injuries to, or the death of many innocent victims. The question raised in this chapter is, to what extent is the Strasbourg Court willing to find jurisdiction and liability on the actions and omission of Contracting Parties' troops abroad? The experience until recently has been one of the Strasbourg Court avoiding clear statements about jurisdiction and liability of Contracting Parties' troops involved in military operations abroad. However, the Strasbourg Court seems to have turned a corner and has dealt recently with cases regarding the conduct of British troops in Iraq. For the first time, victims of European Convention's violations have been declared under the jurisdiction of Contracting Parties' troops; moreover, the cases have reached merits stage. One of these cases is *Al-Saadoon*, in which the Strasbourg Court recognized jurisdiction in the limited form of control of the troops over individuals inside 'military premises'. The *Al-Saadoon* test is considered in this chapter as narrow, unclear, redundant and inconsistent with the principle of universality.

Yet, the latest case of *Al-Skeini* is significant because it uncovers the new European Convention position towards extraterritorial jurisdiction. This case was decided at a time when pressure was mounting from the media, NGOs and Parliamentary interest in incidents with civilian casualties at the hand of UK forces in Iraq.[4] Sympathy for the Strasbourg Court's problems trying to deal with army operations abroad, runs thin when the conduct of Contracting Parties' troops abroad involves killings, torture, indefinite detentions or unfair trials.

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[3] 'Roadside bomb attacks rose by 94% compared with the same period in 2009, the UN report noted the rise in violence was attributable to an increase in military operations in the region during the first quarter of 2010.' 'Alarming rise in Afghan violence, says UN' *BBC News* (11:00 GMT 19 June 2010) <http://news.bbc.co.uk/1/hi/world/asia_pacific/10356741.stm> accessed 19 June 2010.

[4] *Al-Skeini and others v the UK* App no 55721/07 (GC, 7 July 2011), para 27 (*Al-Skeini* GC).

Post-*Al-Skeini*, Contracting Parties cannot argue any more that human rights law does not apply to the conduct of their forces abroad.[5] The Strasbourg Court is using now, as its preferred test for jurisdiction of troops abroad, the 'authority and control' test attached to some control over the territory. The preferred test bypasses the territorial control test. No doubt with the 'authority and control' test the concept of jurisdiction is expanding and with it liability and accountability of Contracting Parties. However, it will be argued that the new 'authority and control' test as devised in *Al-Skeini* is not inclusive enough. This is because it leaves out some types of military operations that will still bring impunity to their sending Contracting Parties. The solution would be relying on a more inclusive, contemporary, practical and effective test to find jurisdiction on Contracting Parties sending troops abroad. The answer to finding the right jurisdictional test lies in basing jurisdiction on the 'direct and immediate cause' of the violation.[6]

5.2 The European Convention's Application to Armed Forces beyond Borders: *Al-Saadoon* and the 'Military Premises' Test

It is clear, that the European Convention was not created to regulate armed conflicts or occupations, notwithstanding the fact that the European Convention was adopted as a reaction against the Nazi human rights atrocities carried out across Europe within occupied territories. Nor was the European Convention established to ensure that

[5] C Baldwin, 'Military justice is not enough' *The Guardian* (7 July 2011) <http://www.guardian.co.uk/commentisfree/libertycentral/2011/jul/07/iraq-european-court-of-human-rights?CMP=twt_iph. >accessed 20 June 2010.

[6] *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009), para 25 (*Andreou* Merits).

Contracting Parties' forces impose the whole range of European Convention's rights onto other States' when abroad. Conversely, it was not started to ignore human rights abuses that those troops had allegedly committed in foreign land, particularly outside the *espace juridique*. The European Convention application to troops conduct abroad has faced strong opposition by Contracting Parties, really reticent to accept that their forces' behaviour abroad can violate human rights, or make them liable under the European Convention. Even though it is widely accepted that human rights still apply in time of war.[7] The reluctance of States to invoke human rights is not compatible with the idea of humanitarian law and human rights law being complementary.[8] Contracting Parties use the argument that when cases involve military operations, the conduct of the troops is already regulated by humanitarian law, national regulations and other agreements between the State/s and the host countries. Yet in reality, humanitarian law is not that far reaching and applies only in the context of armed conflicts or occupations; both circumstances are difficult to fit neatly into today's warfare settings.[9] Regarding occupations for example, in Iraq there were doubts about when exactly the Anglo-American forces were under the legal status of occupation during their presence on that country.[10] On the other hand, nowadays the majority of armed conflicts

[7] See ch 2.

[8] A Bianchi, 'Terrorism and Armed Conflict: Insights From a Law and Literature Perspective' (2011) 24 (1) LJIL 1,8.

[9] T D Gill and D Fleck, *The Handbook of the International Law of Military Operations* (OUP 2010) 2.

[10] 'The occupation by the Anglo-American coalition forces was confronted with insurgents displaying disorganized and unpredictable fighting patterns; however they were still under a legal status of occupation.' A Roberts, 'The End of Occupation: Iraq 2004' (2005) ICLQ 27, 34; A Roberts 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 617; cf, 'Outbreak of hostilities may deny the legal status of occupation.' S Wills 'Occupation Law and Multi-National Operations: Problems and Perspectives' (2006) 77 BYIL 256, 259.

between States do not correspond with the prototype of war between equals, not only based on the devices at their disposal but, on the international community opinion on them.[11] The wars being fought in Iraq or Afghanistan are not 'symmetric wars', in most cases there is no defined battlefield, the troops are attacking in villages and towns. For civilians these wars are fought on their doorstep. Indeed, this new type of war is creating an increasingly worrying number of civilian casualties.[12] Casualties are mounting in numerous situations where there is no apparent threat to Contracting Parties' forces or others, such as the deaths of Tanik Mahmud allegedly kicked to death aboard a Royal Air Force (RAF) helicopter, or 19 year old Said Shabram drowned after being pushed with another man from a four-metre-high jetty into a waterway near Basra.[13] Consequently, more and more press releases and public condemnations are emerging.[14] It is harder and harder to displace the application of the European Convention under excuses of war and emergencies that are clearly not there.

[11] M Sassoli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

[12] 'At the outset of the twentieth century, the number of civilians killed in war was low relative to the number of soldiers killed: one civilian per every eight soldiers. When now, by the end of the twentieth century eight civilians get killed for every soldier lost in battle.' I Primoratz, 'Introduction' in I Primoratz (ed), *Civilian Immunity in War* (OUP 2007).

[13] 'The court heard that British troops had a policy of 'wetting' suspected looters by forcing them into canals and rivers' I Cobain, 'British servicemen suspected of murdering Iraqi civilians' *The Guardian* (12 September 2010) < http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen> accessed 5 June 2011.

[14] 'Getting away with murder? The impunity of international forces in Afghanistan' (Amnesty International, February 2009, Index: ASA 11/001/2009) 14; '… [I]n Afghanistan where troops are shooting unarmed drivers or motorcyclists for fears of suicide bombers.' N Davies and D Leigh, 'Afghanistan war logs: Massive leak of secret files exposes truths of occupation' *The Guardian* (25July 2010) <http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-military-leaks/print> accessed 25 May 2011; 'UK soldiers face war crimes trials' *BBC* (20 July 2005) <http://news.bbc.co.uk/1/hi/uk/4698251.stm.> 'British trio charged with war crimes' *CNN* (19 July 2005) <http://www.cnn.com/2005/WORLD/europe/07/19/britain.iraq/> both accessed 20 May 2011.

Admittedly, in places like Iraq and Afghanistan, the borders are blurred between international conflict and belligerent occupation, from calm occupation to violence outbrakes, from occupant force to supporting force.[15] Today's army operations are less about the heat of the battle and more about planning and intelligence gathering.[16] While the Strasbourg Court may feel uneasy about analysing military ground actions, alternatively it will be able to comment on the planning of missions as it has done in cases inside the *espace juridique*.[17] Albeit, there is no doubt that the circumstances around the deployed Contracting Parties' troops are not equal to those of their national countries,[18] most of their everyday conduct abroad are more in tune with governmental activities than combat operations: for instance home raids, manning check points and street patrols.[19] Thus, while the occupation in northern Cyprus appears different and less violent than say in Iraq; isolated disorder and sporadic attacks in foreign countries are not hostilities. So if the role of the forces in those countries is one of maintenance of security and stability more than winning in battle, human rights law must apply.[20] The

[15] F Hampson and I Salama, 'Working Paper on the Relationship Between Human Rights Law and Humanitarian Law' (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd session, 21 June 2005, UN Doc E/CN.4/Sub.2/2005/) para 74.

[16] FF Martin, 'Using International Human Rights Law for Establishing a Unified Use of Force rule in the Law of Armed Conflict' (2001) 66 Sask L Rev 347.

[17] *McCann v United Kingdom* App no 19009/04 (ECtHR, 13 May 2008); *Isayeva v Russia* App no 57950/00 (ECtHR, 25 February 2005).

[18] Notwithstanding that 'even in the member states' territory military responses tend to be reactive, they are usually the last resort and cannot be seen to fail.' A Hills, 'The Inherent Limits of Military Forces in Policing Peace Operations' (2001) 8 (3) Intl Peacekeeping 79, 80.

[19] H. Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 JCSL 274.

[20] 'Expert Meeting on the Right to Life in Armed Conflict and Situation of Occupation (University Centre for International Humanitarian Law, Geneva, 1-2 September 2005) <http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf> accessed 29 April 2011 (Expert Meeting on the Right to Life).

European Convention has been accused of having a limited role in ensuring compliance with human rights in situations of military operations, especially abroad.[21] Despite the Strasbourg Court having a strong case for supervising the conduct of Contracting Parties' troops based on its main purpose of protecting individual human rights. There have been calls from commentators for the Strasbourg Court to be firmer in prioritizing concern for individuals instead of succumbing to Contracting Parties' interests and to political and security concerns.[22] This is especially when the welfare of civilians is not as strongly monitored by other instruments that regulate military conduct.[23] There is not a case anymore to rely on rules offered by humanitarian law or SOFAs to help victims of troop violations; the latter regulations are very State orientated and toothless. Humanitarian law is failing to keep up with new types of conflicts[24] and even when applicable it is favouring the objectives of sovereign States over people's concerns and redress.[25] Individuals cannot enforce humanitarian law directly, only States can bring

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[21] R Hofmann, 'Human Rights Treaty Bodies and Their Potential Role in Monitoring' in WH von Heinegg and V Epping (eds), *International Humanitarian Law Facing New Challenges: Symposium in honour of Knut Ipsen* (Springer 2010).

[22] S Issacharoff, 'Political Safeguards in Democracies at War' (2009) 29 (2) OJLS 189, 190.

[23] K Dormann, 'Dissemination and Monitoring Compliance of International Humanitarian Law' in von Heinegg and Epping (n 21).

[24] L Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers? (2006) 88 IRRC 881, 902; N Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 JCSL 225.

[25] '… [W]hile there is a trend in favor of allowing victims to seek reparations directly from the state responsible for the violation of international humanitarian law, in fact they are hindered to the point of exclusion by 'procedural and substantial problems from submitting claims.'. P Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation? in Ben-Naftali (n 11); '… [C]ontemporary international law does not offer rights to individuals corresponding to the duties of states to comply with international humanitarian law and make full reparations for any violations of its norms. To expect a shift of attitude and even a general regulation of this complex issue within foreseeable time would be less than realistic.' D Fleck, 'Individual and State Responsibility for Violations of the Ius in Bello: An imperfect Balance' in von Heinegg and Epping (n 21); 'States are

proceedings against other States for their violations of international humanitarian law before the ICJ.[26] On the other hand, military operations can be regulated by SOFAs, which should clarify the terms under which troops from foreign countries are allowed to operate in a host country.[27] In reality, SOFAs tend to be seen as arrangements establishing the rights and privileges of the troops so victims cannot prosecute them using their national instruments. Securing immunity from the foreign States' criminal and civil prosecutions is not helping in a climate of rising worries about accountability of forces abroad.[28] In the case of Iraq, it was not untill the end of 2008 that a SOFA was ratified with the USA[29] replacing UNSC Resolution 1546 that was being regularly renewed. In Afghanistan the SOFA was signed in May 2012. [30]

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reluctant to accept victims of violations of humanitarian law claims for compensation.' A Zimmermann, 'Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy and Conflict? in von Heinegg and Epping (n 21).

[26] J Ross, 'Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror' in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); G Verdirame, 'Human Rights in wartime: a framework for analysis' (2008) 6 EHRLR 689.

[27] cf, '… [T]he wording in these instruments [SOFAs] on detention…is not always clear, if the issue is addressed at all …' *Al-Jedda v the UK* App no 27021/08 (GC, 7 July 2011), para 58 (*Al-Jedda* GC); The starting point should be that the host country exercises authority over its territory and any person on that territory unless an agreement to the contrary. RC Mason, 'Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized? (Congressional Research Service, CRS Report for Congress,1 December 2008) <www.crs.gov> accessed 16 April 2011.

[28] A Sari, 'Status of Forces and Status of Mission Agreement Under ESDP: The EU's Evolving Practice' (2008) 19 EJIL 67.

[29] The U.S.-Iraq Status of Forces Agreement (official name: "Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq") is a status of forces agreement between Iraq and the United States <http://en.wikipedia.org/wiki/U.S.-Iraq_Status_of_Forces_Agreement> accessed 16 April 2011; G Bruno, 'U.S. Security agreements and Iraq' (Council of Foreign Relations, 23 December 2008) <http://www.cfr.org/iraq/us-security-agreements-iraq/p16448> accessed 16 April 2011.

[30] On 1 May 2012, President Obama and President Karzai signed the 'Enduring Strategic Partnership Agreement between the Islamic Republic of Afghanistan and the United States of America; the Strategic Partnership Agreement (SPA) calls for the ending of the war in Afghanistan in 2014. The SPA provides for the possibility of US forces in Afghanistan after 2012 only for the purpose of training Afghan Forces.

Based on the fact that the European Convention provides the highest level of human rights protection at regional and world level,[31] the Strasbourg Court was under pressure to tackle Contracting Parties' reluctance to prosecute members of their forces for violations of human rights abroad, since that enforcement deficiency translated into impunity for Contracting Parties' troops violating civilians' rights.[32] One way to counter that deficiency is through a process of individual complaints with the possibility of starting an investigation and getting redress.[33] This mechanism is already available to individuals protected by the European Convention. However, to be protected, victims need to establish the jurisdiction of a Contracting Party, and here lies the importance of jurisdiction in the context of military operations abroad. In fact, the hesitancy of Contracting Parties to admit extraterritorial jurisdiction for their troops has been helped by the Strasbourg Court's own failure to tackle the question of jurisdiction in a consistent and clear manner in its case-law. Following the latest cases from the Strasbourg Court relating to conducts of troops abroad, there seems to be a progressive movement towards recognizing jurisdiction and liability on those Contracting Parties

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The SPA is considered a SOFA since it regulates how US militaries operate in a host country (Afghanistan). 'Fact Sheet: The US-Afghanistan Strategic Partnership Agreement' White House Press Release (Washington, 1 May 2012) <http://www.whitehouse.gov/the-press-office/2012/05/01/fact-sheet-us-afghanistan-strategic-partnership-agreement > accessed 2 June 2012

[31] C Greenwood, 'Remarks' in Cerna C, Greenwood C, Hannum H and Farer T, 'Bombing for Peace: Collateral Damage and Human Rights' (2002) 96 ASIL PROC 95, 99 (Bombing for Peace); A Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in Ben-Naftali (n 11).

[32] D Kretzmer, 'Civilian Immunity in War: Legal Aspects' in Primoratz (n 12).

[33] The UN has recognized this and on 19 April 2005 the UN Commission on Human Rights adopted the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human rights Law and Serious Violations of International Humanitarian Law' Annex to Human Rights Resolution 2005/35 this document includes obligations to prevent violations, investigate violations effectively, promptly and impartially, access to justice and the provisions of remedies to victims including reparations (Resolution Annex 3-4) <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-35.doc> accessed 20 June 2011.

troops' actions and omissions. The real extent of that change will be explored in the following sections.

5.2.1 *Al-Saadoon: Before the Strasbourg Court*

In the case of *Al-Saadoon*,[34] the Strasbourg Court was faced with UK troops' conduct in Iraq, concerning the handover of prisoners held in a British detention facility to Iraqi authorities. The applicants Faisal Attiyah Nassar Al-Saadoon and Khalaf Hussain Mufdhi are both Iraqi citizens; they were senior members of the Ba'ath party under Sadam Hussein's regime.[35] British forces arrested both men on grounds of security, allegedly for their participation in the capture and murder of two British servicemen.[36] The Basra Criminal Court was informed and authorised their continued detention in the British facility; afterwards this Court decided that the case fell within the jurisdiction of the Iraqi High Tribunal (IHT), which requested the transfer of Mr Al-Saadoon and Mr Mufdhi into its custody.[37] The applicants argued before the High Court and the Court of Appeal[38] that, they were under the jurisdiction of the UK, for the purpose of the European Convention. As a result, their transfer to the IHT would violate their rights under the European Convention, because of the risk of unfair trial, exposure to torture,

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[34] *Al-Saadoon and Mufdhi v the UK* App no 61498/08 (Admissibility Decision, 30 June 2009) (*Al-Saadoon* Admissibility Decision).

[35] Ibid, para 23.

[36] Ibid, paras 24-26.

[37] Ibid, paras 27-30.

[38] Ibid, para 45; The Court of Appeal refused the applicants permission to appeal to the House of Lords, UK Parliament Minutes of Proceedings (16 February 2009), <http://www.publications.parliament.uk/pa/Id200809/minutes/090216/Idordpap.htm> accessed 28 May 2011.

and the application of the death penalty by hanging.[39] The High Court found the applicants were under the jurisdiction of British troops because they were under their physical custody in a military prison.[40] In contrast, the Court of Appeal did not consider the applicant to be under the jurisdiction of British troops because UK soldiers were considered merely agents of Iraq.[41] Yet, would British soldiers really answer to anyone out of their chain of command?[42] When the case reached the Strasbourg Court in the admissibility stage, it was established that the applicants were within the UK's jurisdiction. In *Al-Saadoon*, for the first time the Strasbourg Court decided that a Contracting Party was liable for the conduct of its troops abroad: namely, the activities of the UK military in Iraq. While the Strasbourg Court has dealt previously with military operations outside the *espace juridique* in the cases of *Bankovic,*[43] *Issa*[44] *and*

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[39] *Al-Saadoon* Admissibility Decision (n 34), paras 34-54.

[40] '… [T]he British forces had physical custody and control of the applicants and had it in their power to refuse to transfer them to the custody of the IHT, even if to act in such a way would be contrary to the United Kingdom's international law obligations. The applicants therefore fell within United Kingdom's jurisdiction for the purposes of Article 1 of the Convention…' *Al-Saadoon* Admissibility Decision (n 34), para 34; 'The High Court per Lord Justice Richards stated on para 59 that they were within the jurisdiction of the UK since they were in the physical custody and under the control of British forces…, para 82, however later it stated that it was following the House of Lord's analysis in *Al-Skeini* and the analogy of treating a military prison as an embassy.' *Al-Saadoon* Admissibility Decision (n 34), para 62.

[41] According to the UK Court of Appeal: '… [T]he United Kingdom is not exercising jurisdiction over the appellants within the meaning of Article 1 ECHR … the United Kingdom detains the appellants only at the request and to the order of the IHT, and is obliged to return them to the custody of the IHT by force of agreements made between the United Kingdom and Iraq … they are acting purely as agents of the IHT.' *Al-Saadoon* Admissibility Decision (n 34), para 44.

[42] UNSC Resolution 1546 declares that the multinational force operate in Iraq as an 'invited force' but with considerable independence from the Interim government. A Carcano, 'End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government' (2006) 11 JCSL 41, 66.

[43] *Bankovic and Others v. Belgium and 16 Other Contracting States* App no 52207/99 (GC Admissibility Decision, 12 December 2001).

[44] *Issa and others v Turkey* App no 31821/96 (ECtHR, Admissibility Decision, 16 November 2004).

Pad,[45] those decisions were all declared inadmissible.[46] Albeit, in *Issa* and *Pad*, the Strasbourg Court recognized the possibility that the conduct of troops abroad could trigger jurisdiction and further liability of the Contracting Parties.

In addition, *Al-Saadoon* includes a novel extraterritorial element to the Strasbourg Court's extradition cases: the applicants are located outside the *espace juridique*, in the territory of a non-Contracting Party. Previously, in extradition cases such as *Soering*[47] and expulsion cases,[48] the extraterritoriality element was a pending one linked to the possibility of transferring the applicant to a State outside the *espace juridique*, where death or torture may occur.[49] Nonetheless, in cases like *Al-Saadoon* we can discuss proper extraterritorial application of the European Convention. The Strasbourg Courts's 'restrictive' account of exceptional circumstances that constitute extraterritorial jurisdiction are almost identical to the ones advanced in the *Bankovic* case. Firstly,

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[45] *Pad and others v. Turkey* App no. 60167/00 (ECtHR, Admissibility Decision, 28 June 2007).

[46] See ch 3.

[47] In the *Soering* case a young German national, that allegedly killed his girlfriend parents in the US, ended up in British territory. When the US requested his extradition to the state of Virginia the applicant claimed he could face the death penalty. *Soering* (n 47), paras 11-26; the Strasbourg Court established that extraditing Mr Soering would breach the European Convention since the death row phenomenon amounted to inhuman treatment. *Soering* (n 47), para 111. *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989); according to Mole this case was not about extraterritorial conduct but extraterritorial effects. N Mole, 'Case Comment - *Issa v Turkey*: Delineating the Extra- Territorial Effect of the European Convention on Human Rights' (2005) EHRLR 86.

[48] *Cruz Varas v Sweden* App no 15576/89 (ECtHR, 20 March 1991); the Court has widened its reach to include cases of expulsion: *Ismoilov and others v Russia* App no 2947/06 (ECtHR, 24 April 2008) and *Kaboulov v Ukraine* App no 41015/04 (ECtHR, 19 September 2009). 'The Court has further expanded the Soering-principle to claims of ill treatment not only at the hands of public authorities, but also by private groups and individual: *H.L.R. v. France* App no 24573/94 (GC, 29 April 1997) (ill treatment by private drug traffickers); cf, '… [T]he [Strasbourg Court] takes no account of the specific character of extradition, as the product of a bilateral treaty between two states, and simply places it, together with deportation and exclusion, in a broader category …' P Langford, 'Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights' (2009) 13 IJHR 512, 526.

[49] ME Cross and S Williams, 'Case Comment: Between the Devil and the Deep Blue Sea: Conflicted Thinking in the *Al-Saadoon* Affair' (2009) 58 ICLQ 689, 696.

activities of Contracting Parties' authorities that produce effects outside their own territory, the example used is the case of *Drozd and Janousek*. [50] Secondly, there are military operations that involve effective control over an area. Thirdly, activities of diplomatic and consular agents abroad and on board craft and vessels registered on a Contracting Parties' name.[51] The Strasbourg Court defines jurisdiction as follows:

> … The United Kingdom exercised control and authority over the individuals detained in them [British-run detention facilities] initially solely as a result of the use or threat of military force. Subsequently, the United Kingdom's *de facto* control over these premises was reflected in law. In particular … CPA Order No. 17 … provided that all premises currently used by the MNF should be inviolable and subject to the exclusive control and authority of the MNF …[52]
>
> The Court considers that, given the total and exclusive *de facto,* and subsequently also *de jure,* control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction …[53]

The description of the jurisdictional link between the UK and the applicants is a fluctuating one, from control over individuals through 'threat of military force' to control over an area first *de facto* and then *de jure* based on the CPA order.

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[50] *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 of June 1992).

[51] *Al-Saadoon* Admissibility Decision (n 34), para 85.

[52] Ibid, para 87.

[53] Ibid, para 88.

The Strasbourg Court decided that the matter of whether the UK was under a legal obligation to transfer the applicants to Iraqi custody was to be considered at the merits stage.[54] At the merits stage,[55] the Strasbourg Court considered the issue of Iraq's sovereignty raised by the UK, since Iraq was requesting the transfer of the applicants retained in a British outpost on its national territory.[56] The UK's argument was that, in *Soering*, they had the choice to retain the applicant in their territory. The UK declared that 'in a case such as *Soering* the Contracting State commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another State.'[57] The Strasbourg Court did not accept the argument that the UK had no option but to release the applicants under an international law obligation arising from Iraq's sovereignty. Furthermore, the UK's argument of diplomatic asylum, based upon which they had to release the applicants unless the territorial State's treatment of the applicants was going to constitute a crime against humanity, was dismissed:[58]

> … [I]n the present case, the applicants did not choose to seek refuge with the authorities of the United Kingdom; instead, the respondent State's armed forces, having

[54] Ibid, para 89.

[55] *Al-Saadoon and Mufdhi v the UK* App no 61498/08 (ECtHR, 2 March 2010) (*Al-Saadoon* Merits).

[56] *Al-Saadoon* Merits (n 55), paras 139-140; C Janik and T Kleinlein, 'When Soering Went to Iraq … : Problems of Jurisdiction, Extraterritorial Effect and Norm Conflict in Light of the European Court of Human Rights's *Al-Saadoon* Case*'* (2009) 1 Goettingen J Intl L 459.

[57] *Al-Saadoon* Merits (n 55), para 112.

[58] Ibid, para 139.

> entered Iraq, took active steps to bring the applicants within the United Kingdom's jurisdiction, by arresting them and holding them in British-run detention facilities …[59]

The issue of jurisdiction was touched on in the merits stage. The UK established that a Contracting Party needs to have the 'legal power to fulfil substantial governmental functions as a sovereign state'[60] in order to have jurisdiction over the applicants. Yet it recognised that in cases of embassies, consulates, military bases and prisons this scope of 'legal power' is quite narrow.[61] In contrast, the Strasbourg Court determined that under Article 1ECHR the Contracting Party is liable for all conduct of its organs, whether that conduct originated in a domestic or international obligation or in any other type of power and control not necessarily legal.[62] The Strasbourg Court refers to jurisdiction as a 'real and certain power' the applicants were under. [63] Following the *Soering* case, in which Article 3 ECHR 'overrides' obligations coming from an extradition treaty with the US,[64] the Strasbourg Court favoured obligations under the European Convention over agreements with other States, in this case Iraq. [65] The British government did not follow its obligations under the European Convention when it did

[59] Ibid, para 140.

[60] Ibid, para 71.

[61] Ibid, para 71.

[62] Ibid, para 72.

[63] Ibid, para 164.

[64] Ibid, para 128.

[65] '…[I]s not open to a Contracting [Party] to enter into an agreement with another State which conflict with its obligations under the Convention. This principle carries all the more force in the present case given the absolute and fundamental nature of the right not to be subjected to the death penalty and the grave and irreversible harm risked by the applicants.' *Al-Saadoon* Merits (n 55), para 138.

not press for any assurance by the Iraqi government concerning the risk of the death penalty being applied to the applicants.[66] The Strasbourg Court found that the British government failed to take into account their obligations under Article 1 of protocol 13 ECHR (abolition of death penalty), Article 2 ECHR (right to life) and Article 3 ECHR (right not to be subjected to torture).[67] Finally, the Strasbourg Court only established a violation of Article 3 ECHR and did not deem necessary to decide on the other Articles considered.[68] Regarding the applicants' allegation of violation of Articles 13 and 34 ECHR for ignoring an interim measure under rule 39,[69] the Strasbourg Court found a violation of the European Convention[70] because not complying with those measures affects the effectiveness of European Convention's rights under Article 1 ECHR.[71] Besides, there are still positive obligations linked to Article 3 ECHR for the British government after the transfer of the applicants, which requires the UK to take 'steps to obtain an assurance from the Iraqi authorities that the applicants will not be subjected to the death penalty'.[72] The Grand Chamber has refused the UK's application for referral.[73]

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[66] '… [T]he Court considers that the respondent state was under a paramount obligation to ensure that the arrest and detention did not end in a manner which would breach the applicant's rights under Articles 2 and 3 of the Convention and Article 1 of Protocol No.13.' *Al-Saadoon* Merits (n 55), para 140.

[67] *Al-Saadoon* Merits (n 55), paras 141-143.

[68] Ibid, paras 144-145.

[69] Request for its application usually concerns Articles 2 and 3 ECHR.

[70] *Al-Saadoon* Merits (n 55), paras 164-166.

[71] Ibid, para 160.

[72] Ibid, para 171.

[73] T Thienel '*Al-Saadoon* case not going to the Grand Chamber' in Invisible College Blog <http://invisiblecollege.weblog.leidenuniv.nl/2010/10/18/al-saadoon-case-not-going-to-the-grand-c> accessed 25 May 2011.

5.2.2 *Al-Saadoon's Jurisdiction Test*

The Strasbourg Court and the UK in *Al-Saadoon* recognized that jurisdiction of military forces abroad was limited to their control over military premises. It was an attractive formula for Contracting Parties because this test offered a narrow jurisdictional scope and meant a slimmer chance of being liable for their armies' violations committed outside the *espace juridique*. Besides, it reflected an approach towards exceptions accepted by international law.[74] The control over a military facility abroad as a test for jurisdiction was adopted by the UK domestic courts, even when the victim of the alleged violation was a British soldier, as in the case *of Smith*.[75] Private Jason Smith was serving in Iraq when he died of heatstroke. He had voiced his struggle with the scorching temperatures but nothing was done. Yet it was decided that Private Smith was not entitled to the protection of the European Convention because he died outside the base.[76] The English courts stated that they were following the Strasbourg Court's jurisprudence and it was not up to them to decide what the extraterritorial jurisdiction of the European Convention should be.[77] It would be interesting to see how the latest judgments by the Strasbourg Court in the cases of *Al-Skeini and Al-Jedda*, with a

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[74] In *Hess* it was accepted that agents of Contracting Parties controlling a prison outside their national territory could affect individuals held in that prison. That prison could also be considered a quasi-territorial location of a Contracting Party. *Ilsa Hess v United Kingdom* App no 6231/73 (Commission Decision, 28 May 1975).

[75] *Smith v Secretary of Defence* [2010] UKSC 29, [2010] 3 WLR 223.

[76] 'Jason Smith died from hyperthermia in an old athletics stadium where he was quartered in spite of his numerous complaints about the heat. The UK Supreme Court decided that is up to the [European Convention] to decide if military personnel should be covered by the Convention when they step away from their military base.' B Silverstone, 'Case Comment: R. (On the Application of Smith) v Oxfordshire Assistant Deputy Coroner: Human Rights and the Armed Forces' (2009) 4 EHRLR 566.

[77] '… [A] decision that the extra-territorial jurisdiction should be extended that far … is best left to Strasbourg.' *Smith* (n 75), para 92.

different outlook on extraterritorial jurisdiction of troops, will affect forthcoming domestic court judgments dealing with similar issues.[78] In fact, the premises test set down in the *Al-Saadoon* case presents many shortcomings: firstly, it is a test that should not be included into the quasi-territorial head of jurisdiction; secondly, it is redundant when there is ground to apply the authority and control test based on physical control and lastly, it is discriminatory regarding victims located outside the *espace juridique.* Regarding the problem of fitting the *Al-Saadoon's* premises test with existing Strasbourg Court's cases, the reality is that there is no analogy between a case based on control over army premises and the older cases of consulates and embassies such as: *X v Germany,*[79] *X v UK,*[80] *Gentilhomme v France* [81] or *WM v Denmark.*[82] The latter cases featured applicants that voluntarily entered the premises[83] or asked for the Contracting Parties' agents to perform a particular conduct.[84] Also the Contracting Parties' agents'

[78] *Al-Skeini* and *Al-Jedda* differ from *Al-Saadoon* in that they recognised jurisdiction on the basis of the authority and control test over individuals, not just control over a quasi-territorial location as in the *Smith* case*;* on the 20 December 2010 an application was lodged with the Strasbourg Court by the father of Anthony Pritchard, a Territorial Army soldier serving in Iraq that was shoot and killed. The UK has been asked to submit observations on whether Mr Pritchard's son was within the jurisdiction of the UK under Article 1 ECHR, and if so, whether the UK was obliged to carry out an investigation under Article 2 ECHR. The case of Mr Pritchard was adjourned at its Appeal stage, pending the *Smith* case (n 75), Application lodged: *Pritchard v UK* (App no 1573/11).

[79] *X v the Federal Republic of Germany* App no 1611/62 (Commission Decision, 25 September of 1965).

[80] *X v United Kingdom* App no 7547/76 (Commission Decision, 15 December 1977).

[81] *Gentilhomme Schazff-Benhadji and Zerouki v France* App nos 48205/99, 48207/99 and 48209/99 (ECtHR, 14 May 2002).

[82] *W.M v Denmark* App no 17392/90 (Commission Decision, 14 October 1992).

[83] The applicant together with 17 other citizens of the then German Democratic Republic entered the Danish Embassy; they requested negotiations with German authorities to get permits to leave for the Federal Republic of Germany. *W.M v Denmark* (n 82).

[84] X complained of a German consular agent that was requesting the Moroccan authorities to deport him, allegedly to avoid a duel with the applicant. *X v the Federal Republic of Germany* (n 79);
A British mother criticized the British consulate in Jordan, for not doing enough to recover her child. Her daughter was taken to Jordan by her husband. *X v United Kingdom* (n 80).

conduct did not create a link or a direct cause of human rights violations.[85] Conversely, in the cases arriving at the Strasbourg Court concerning military conduct abroad, the applicants did not voluntarily get apprehended and/or go inside military facilities to be detained indefinitely, get tortured or killed. Moreover, the alleged violations of fundamental human rights[86] create a very real link between the Contracting Parties' forces and the victims. Admittedly, in the embassy cases the now-defunct European Commission[87] and the Strasbourg Court found the applications inadmissible or it declared that the conduct of the Contracting Parties' agents did not interfere with the rights allegedly violated. The agents did all they could in a territory where their obligations were restricted by the 'host State'.[88] Undoubtedly, this outcome was appealing for Contracting Parties' troops abroad, who would find applications against them deemed inapplicable because their conduct was restricted by the prevailing circumstances in the host State. Thus there is a good reason to find an affinity with these early cases. In reality the cases in which the applicants are physically forced to go with the troops are more in line with cases of detentions and arrests abroad, cases such as: *Freda v Italy*,[89] *Sanchez Ramirez v France* [90] and *Ocalan v Turkey*.[91] In the latter

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[85] The Commission did not find the Danish diplomatic authorities interfered with the rights WM alleged, and the application was found inadmissible. *W.M v Denmark* (n 82).

[86] These rights will be named in this thesis as 'conflict relevant rights' and will include: Articles 2, 3, 5 and 6 ECHR; text to note 164.

[87] The European Commission of Human Rights was the body examining application before those were sent to the Strasbourg Court, up until 1998.

[88] Three French mothers married to Algerian nationals and living in Algeria, objected to their children no longer attending French school. The Strasbourg Court decided it was clearly Algeria's decision and out of France power. *Gentilhomme* (n 81), para 20.

[89] *Freda v Italy* App no 8916/80 (Commission Decision, 7 October 1980).

cases jurisdiction applies through the 'authority and control' test.[92] However, in those cases the Strasbourg Court did not state clearly if the trigger of jurisdiction was the conduct of apprehending the individual or the fact that the applicant was located in the quasi-territorial location, mainly on board a registered plane[93] or in the case of prisons abroad.[94] This ambiguity as to when jurisdiction is initiated is observed too in the cases of jurisdiction based on control over military premises.[95] In the older detention cases, the Contracting Parties' agents seized the alleged felons abroad and brought them back onto their national territory. In cases of detentions by troops abroad, the applicants are brought back to a military outpost. In both categories of cases the Contracting Parties do not contest jurisdiction.

The second shortcoming the *Al-Saadoon* test presents is that if we can find grounds for applying the authority and control test based on personal control, showing control over military premises becomes unnecessary. The control and authority the UK exercised

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[90] *Illich Sanchez Ramirez v France* App no 28780/95 (Commission Decision, 24 June 1996).
[91] *Ocalan v. Turkey*, Application No. 46221/99 (GC, 12 May 2005).

[92] P Leach, 'The British Military in Iraq – The Applicability of the *EspaceJjuridique* Doctrine under the European Convention on Human Rights' (2005) PL 448, 452.

[93] 'The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport. It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey…' *Ocalan* (n 91), para 91.

[94] 'There is in principle … no reason why the acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.' *Ilsa Hess v United Kingdom* App no 6231/73 (Commission Decision, 28 May 1975) 73.

[95] However, in the recent *Al-Jedda* case the Strasbourg Court based jurisdiction exclusively and unambiguously on authority and control of the British forces over Mr Al-Jedda and not on control over the premises. *Al-Jedda* GC (n 27), para 86.

over the applicants in *Al-Saadoon* initially had not changed or disappeared just because the Strasbourg Court found another way to adjudicate jurisdiction. The UK troops never lost that link even after the applicants were transported and kept inside the British premises. What was the need to consider the control over the premises?[96]

Lastly, the *Al-Saadoon* test presents another disadvantage by limiting the jurisdictional link to control over those individuals being kept within the walls of military premises in foreign territory. Hence, Contracting Parties do not offer the same protection to civilians outside the military premises as they offer to individuals under the same circumstances inside the *espace juridique;*[97] that is the case for example in the context of northern Cyprus or in Eastern Europe where civilians outside military sites still protected by the European Convention. The implications are that the principle of universality is being neglected and victims of Contracting Parties' troops located outside the Council of Europe's realm are getting the worrying message that their lives are less valuable.[98] Contracting Parties should not be able to decide that their European Convention's obligations are different depending on where their troops conduct is

[96] This question is answered in *Al-Skeini*, 'what is decisive in such cases [where Contracting States exercise control over buildings, aircraft or ship] is the exercise of physical power and control over the person in question.' *Al-Skeini* GC (n 4), para 136.

[97] '[Contracting Parties should]: continue to abide by the same universal human rights standards whether they act at home or abroad.' R Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (n 26) 94; M Hapold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3(1) HRLR 77, 88; G Simpson 'Duelling Agendas: International Relations and International Law (Again)' (2005) 1 JILIR 61; AT Williams 'Human rights and Law: Between Sufferance and Insufferability' (2007) 123 LQR 132.

[98] Baha Musa's father … said that the behavior of the government in the five years since his son was killed had convinced him that the MoD viewed Iraqi lives as 'cheap'. M Townsend, "Iraqi torture victims slam UK 'contempt'" *The Observer* (6 July 2008) <http://www.guardian.co.uk/uk/2008/jul/06/military.iraq/print> accessed 15 June 2011.

engaged.[99] The Contracting Parties' hesitancy to accept jurisdiction for the conduct of their forces abroad can be shaped by the way the Strasbourg Court deals with cases affecting military operations outside the *espace juridique.* Pressure from the mass media, NGOs and parliamentary question seem to indicate that it was the right time for the Strasbourg Court to show a clear message, through the *Al-Skeini and Al-Jedda* cases, of when extraterritorial jurisdiction is triggered by the Contracting Parties' troops' conduct outside the *espace juridique*.[100] This chapter is concentrating on the *Al-Skeini* case, since *Al-Jedda* fitted better in the context of the previous chapter. Admittedly, discussions about jurisdiction in *Al-Jedda* are scarce and the judgment of the Strasbourg Court concentrates on probing attribution to the UK as opposed to the UN.

5.3 A New Era for Contracting Parties' Troops' Obligations Abroad?

In sum, till the arrival of the *Al-Skeini* case, the trigger for jurisdiction and possible liability for troops outside the *espace jurdique* was the recognition of control over victims that are removed physically by the forces of a Contracting Party and then held in a quasi-territorial location commanded by that Contracting Party.[101] This section will

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[99] S Skogly, 'Extraterritoriality – Universal Human Rights Without Universal Obligations? in Joseph, Sarah and Adam McBeth (eds), *International Human Rights: A Research Handbook* (Edward Elgar 2010) .

[100] S Edwards, 'Current Commentary: The European Court of Human Rights – Universalist Aspirations of Protection in the Middle of the Edge of Occupation' (2010) 22 Denning LJ 145, 163.

[101] N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 IRRC 737, 741; cf, '… [I]nternational human rights treaties apply in the context of armed conflict only with respect to acts of a state's armed forces executed within its own territory.'. MJ Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict' (2007) 40 Isr L Rev 453.

analyze to what extent the *Al-Skeini* case has transformed the human rights obligations owed by Contracting Parties' troops to individuals anywhere in the world.

5.3.1 *Al-Skeini and National Courts*

In March 2003 a MNF led by the US and the UK invaded Iraq and overthrew Saddam Hussein's government.[102] Major combat operations were completed on May of that year and the MNF was considered the power in occupation in Iraq.[103] The UNSC Resolution 1511 authorized the MNF to take 'all necessary measures' to promote the security in Iraq.[104] The MNF became the CPA comprising the US, UK and their coalition partners. Afterwards, in June 2004 UNSC Resolution 1546[105] had a similar purpose of promoting stability and security in the area untill the handover from the CPA to the Interim Government of Iraq. With this backdrop the UK domestic courts were faced with the *Al-Skeini* case involving alleged human rights violations by UK military personnel in Iraq while the UK was considered an occupying power.
The British troops were accused of the killings of six Iraqis:[106] five while in their homes or in public areas and the sixth, Baha Mousa, in an UK's detention facility in Iraq. Mr Al-Skeini was attending a funeral when he was shot dead by a British

[102] 'The move of invading Iraq without the backup of the UN has been seen for some as downgrading of the Security Council authorization from legal requirement to a matter of political opportunity.' T Gazzini, 'NATO's Role in the Collective Security System' (2003) 8 JCSL 231, 263.

[103] It was not until May 22nd of 2003 that the Security Council considered the US and the UK occupying powers through Resolution 1483 [UN Doc. S/RES/1483 (2003) 22 May 2003].

[104] [UN Doc. S/RES/1511 (2003) 16 October 2003] para 13.

[105] [UN Doc. S/RES/1546 (2004) 8 June 2004] para 10.

[106] In the national courts the fifth applicant was not Mr Ali but Mr Al-Musawai (aged 29) fatally wounded in the street while taking a box of 'suggestions and complains' to a judge's office as part of his duty as a policemen. He was shot by a British corporal during a military patrol.

soldier.[107] Mr Salim was shot inside a property during a house-raid.[108] Mrs Shmailiawi was with her family inside the Institute of Education when she was fired at.[109] Mr Muzban was fired from behind when driving home.[110] Mr Ali was pushed by British army personnel into a canal in Basrah and drowned.[111] Finally, Mr Mousa was detained at the hotel reception where he worked and later tortured and killed inside a British military premise in Basrah.[112] The families of the victims disputed the refusal of the British government to conduct an inquiry into the death of their relatives.[113] They asked for an independent and effective investigation compliant with the UK's European Convention's obligations. The families got a full hearing before the High Court, then the Court of Appeal and finally the House of Lords. The questions the national courts were confronted with were: firstly, if the victims were under the jurisdiction of the European Convention following Article 1 ECHR, and consequently if an effective and independent investigation was due under Article 2 ECHR.[114]

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[107] *Al-Skeini* GC (n 4), paras 34-38.

[108] Ibid, paras 39-42.

[109] Ibid, paras 43-45.

[110] Ibid, paras 47-54.

[111] Ibid, paras 55-62; Mr Ali was pushed in the canal because he was suspected of looting and this was allegedly a practice used by British troops, see note 13; cf, in the Aitken Report this case was reported and described as part of 'two isolated incidents', Aitken Report (n 180) para 69.

[112] *Al-Skeini* GC (n 4), paras 63-71.

[113] *Al-Skeini* GC (n 4), para 95; T Abdel-Monem 'How Far do the Lawless Areas of Europe Extend? Extraterritorial Application of the ECHR' (2005) 14 J Transna'l & Poly 159, 200.

[114] M Gondek 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization' (2005) 52 NILR 349, 383.

The issue of jurisdiction in *Al-Skeini* was interpreted differently by the various UK courts. The High Court[115] followed a narrow interpretation of jurisdiction, based on the *Bankovic* case[116] and its limited regional scope enclosed in the *espace juridique.* Out of the six cases the High Court ruled that only Baha Mousa was within the jurisdiction of the UK. This is because Mr Mousa died in a British military prison. Hence his case fell into the accepted quasi-territorial head of jurisdiction. The jurisdictional link was based on control over an area. Later, the Court of Appeal[117] offered a wider interpretation of jurisdiction and Baha Mousa came within the control of the UK when he was arrested by British troops in the hotel reception where he worked. Lastly, the House of Lords[118] overruled the Court of Appeal decision and adopted the Divisional Court's restricted concept of jurisdiction based on control over a military detention centre.[119] The House of Lords decided that, with the exception of Mr Mousa, the rest of the appellants did not fall within Article 1 ECHR because there was no link between the UK and the other victims.[120] Consequently a jurisdictional link based on control over a quasi-territorial

[115] *Al- Skeini and others v Secretary of State for Defense* [2004] EWHC 2911 (Admin), [2005] 2 WLR 1401 (*Al-Skeini* DC).

[116] *Bankovic* (n 43).

[117] *Al- Skeini and others v Secretary of State for Defense* [2005] EWCA Civ 1609, [2006] 3 WLR 508, [2007] QB 140 (*Al- Skeini* CA).

[118] *Al- Skeini and others v Secretary of State for Defense* [2007] UKHL 26, [2007] 3 WLR 33, [2007] 3 All ER 685 (*Al- Skeini* HL).

[119] Ibid, para 132.

[120] 'It is important therefore to recognise that, when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting state … [besides] however contrary to any common understanding of respect for "human rights", the alleged conduct of the British forces might have been, it has no legal consequences under the Convention, unless there was that link…For, only then would the United Kingdom have owed them any obligation in international law to secure their rights under article 2 of the Convention …' *Al-Skeini* HL (n 117), para 64.

location left unanswered questions as to what would have happened if Mr Mousa was tortured and killed in the hotel instead of in the British prison or what if something had happened to Mr Mousa on the transit from the hotel to the British barracks. The House of Lords followed the *Bankovic* case, with its emphasis on territorial jurisdiction and on the regional nature of the European Convention,[121] stressing that the Strasbourg Court did not advance the protection of human rights any further[122]and that it was not the job of the House of Lords to define jurisdiction and its exceptions or to move from the general rule.[123] National courts should not rule on matters that will affect other Contracting Parties.[124] Nonetheless, the House of Lords dismissed the *Issa* case in which the Strasbourg Court hinted at a less restrictive jurisdiction test.[125] In fact, now it will be more difficult for national courts and Contracting Parties to cling to a jurisdictional test based on control over military premises after the *Al-Skeini* judgment in the Strasbourg Court.

5.3.2 *Al-Skeini and the Strasbourg Court*

In July 2011, the Strasbourg Court as a Grand Chamber delivered the long awaited case of *Al-Skeini*.[126] In the Strasbourg Court, the applicants alleged that their relatives were

[121] '… [I]f they follow *Bankovic* is carte blanche for doing 'abroad' what they cannot do at home.' M Happold (n 97) 88.

[122] *Al-Skeini* HL (n 118), paras 76-77.

[123] Ibid, paras 27-30.

[124] Ibid, para 28.

[125] See ch 3; *Issa* (n 44).

[126] The case of *Al-Skeini* was relinquished, on the 10th of January 2010, by a Chamber to the Grand Chamber under Article 30 ECHR.

killed by British troops and were within their jurisdiction and also that the UK did not hold an effective investigation into their death under Article 2 ECHR.[127] The United Kingdom conceded that Baha Mousa was within their jurisdiction following the '*Al-Saadoon* premises test'. In addition, the UK introduced an argument which had not been raised in the domestic courts,[128] after UNSC Resolution 1511 the conduct of the UK troops that caused the death of the second and third applicants were to be regarded as attributable to the UN.[129] The Strasbourg Court joined the preliminary question of jurisdiction with the merits of the case.[130] The UK argued that the decision in the *Bankovic* case remained good law and that jurisdiction based on control of an area can only apply within the *espace juridique.*[131] If this were not the case, Article 56 ECHR, which requires a declaration from a Contracting Party to extend jurisdiction to overseas territory would be redundant.[132] The applicants, on the other hand, contended that jurisdiction is exercised through territorial as well as personal control.[133] The applicants used both tests arguing that jurisdiction was based on the authority and control of the

[127] *Al-Skeini* GC (n 4), para 95.

[128] Ibid, para 100.

[129] Ibid, paras 96-97.

[130] Ibid, para 102.

[131] Ibid, para 110.

[132] Ibid, para 111.

[133] Ibid, paras 121-122.

troops over the victims[134] but also referring to control over the area, establishing that the UK had effective control of the South East of Iraq [135] as the occupying power.[136] The Strasbourg Court appeared to conclude, after building on earlier case law, that extraterritorial jurisdiction is triggered in three exceptional situations. Firstly, jurisdiction is down to agents of a Contracting Party exercising authority and control and producing effects outside their territory. This exception includes three situations delimited as 'defining principles': acts of diplomatic and consular agents, Contracting Parties' agents' exercise of public powers normally to be exercised by the territorial State and use of force by officials of Contracting Parties acting beyond their national territory (particularly by taking individuals into custody).[137] Secondly, extraterritorial jurisdiction is initiated when a Contracting Party exercises effective control of an area through 'lawful or unlawful military action'. Whether there is effective control is a question of fact.[138] Lastly, another exception to jurisdiction being limited to the territory of the Contracting Party is where territory of one Contracting Party is occupied by the forces of another Contracting Party. This avoids a vacuum in human rights protection within the *espace juridique.*[139]

[134] Ibid, paras 123-124.

[135] Ibid, para 125.

[136] According to the applicants, as the occupying power, the UK owed human rights obligations to Iraqi civilians. *Al-Skeini* GC (n 4), paras 126-127.

[137] *Al-Skeini* GC (n 4), paras 133-137.

[138] Ibid, paras 138-139.

[139] Ibid, para 142.

In *Al-Skeini* the Strasbourg Court declared that:

> … [T]he United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[140]

So, the British government was found to exercise jurisdiction through the authority and control test. British soldiers exercised jurisdiction over the victims because they carried out 'some of the public powers normally to be exercised by a sovereign government' in south East Iraq.[141] The Strasbourg Court found a violation of the procedural duty under Article 2 ECHR in respect of all the applicants at exception of Mr Baha Mousa.[142] However, there are still queries as to what extent jurisdiction, post-*Al-Skeini*, is finally a clear and inclusive concept.

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[140] Ibid, para 149.

[141] Ibid, para 149.

[142] Ibid, para 177; '… [T]he Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2. The Court therefore accepts the Government's objection in respect of the sixth applicant.' *Al-Skeini* GC (n 4), para 176.

5.3.3 *Al-Skeini and the Preferred Authority and Control Test*

In *Al-Skeini*, the Strasbourg Court reiterated the idea that jurisdiction is still territorial. Only in exceptional circumstances is it extraterritorial.[143] However, *Al-Skeini* also introduced new exceptions for extraterritorial jurisdiction. Presumably, from now on alleged victims of Contracting Parties' troops abroad who are beaten, drowned or killed outside military premises, can aspire to be declared within the jurisdiction of a Contracting Party and enforce their human rights securing an investigation and hopefully leading to compensation. While the expansion of extraterritorial jurisdiction over premises walls in *Al-Saadoon* type situations is welcome, there are still unanswered issues with the concept of jurisdiction set down in the *Al-Skeini* case.

The Strasbourg Court ascertains that jurisdiction is exercised in two ways: via authority and control of Contracting Parties' agents over individuals and via control over an area.[144] Nonetheless, in the *Al-Skeini* case jurisdiction is based on the authority and control test as the preferred test of the Strasbourg Court for supervising the Contracting Parties' troops conduct abroad. What does this test entail? The authority and control test is not new. As early as 1975 in the application of *Cyprus v Turkey*, the European Commission decided that 'armed forces when abroad' were able to bring people under the jurisdiction of a Contracting Party through applying the authority and control test.[145] This test has also been used in recent cases involving troops conduct inside and

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[143] *Al-Skeini* GC (n 4), para 131; A Mowbray *European Convention on Human Rights* (3rd edn, OUP 2012) 81.

[144] The applicants established that after the *Loizidou* case in which the 'control over an area' test was set, the Strasbourg Court's case-law had included both test in cases like *Issa*, *Andreou and Solomou*. *Al-Skeini* GC (n 4), para 122.

[145] '… [A]uthorised agents of a State, including diplomatic or consular agents and armed forces … when abroad … bring any other persons …"within the jurisdiction" of that State, to the extent that they

outside the *espace juridique*, such as in the cases of *Solomou*[146] and *Pad*,[147] respectively. Admittedly Contracting Parties have always found that basing jurisdiction on authority and control or in 'effects' of the conduct of agents of Contracting Parties is too much; as this test does not offer a strong link between Contracting Parties and the individuals abroad and moves away from the traditional territorial control base for jurisdiction. Likewise, Lord Brown stated in the House of Lords while deciding the *Al-Skeini* case that the authority and control test:

> … [W]ould, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of 'authority and control' irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe [*espace juridique*]?[148]

Undeniably, the authority and control test expands jurisdiction in the context of military operations abroad, operations which are 'not' normally conducted in 'effectively controlled' areas or 'within the Council of Europe [*espace juridique*]'. However, there

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exercise authority over such persons … Insofar as, by their acts or omissions, they affect such persons … the responsibility of the State is engaged.' *Cyprus v Turkey* App no 6780/74 & 6950/75 (Commission Decision, 26 May 1975), para 8.

[146] 'In the present case, the Court must therefore ascertain whether Mr Solomou came under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the acts of the Turkish and "TRNC" soldiers and/or officials.' *Solomou and others v Turkey* App no 36832/97 (ECtHR, 24 June 2008) , para 49 (*Solomou* Merits).

[147] '… [A] State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States (*espace juridique)*, but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State …' *Pad* (n 45) 53.

[148] *Al-Skeini* HL (n 118) [127] (Lord Brown).

was not an 'a priori' good reason against this expansion.[149] It was not only Contracting Parties but also the applicants and the Strasbourg Court that were worried about the broadness of the authority and control test. The applicants in *Al-Skeini* opted for moving from an 'impact-based' approach to a jurisdiction concept that required a stronger link between the British forces and Iraqi civilians. The applicants chose to base jurisdiction on the idea that the UK troops owed safety and security to Iraqis located in some areas where the UK was in charge of maintaining 'public order'.[150] The Strasbourg Court followed this line of thought, admitting that the authority and control test is 'very broad'.[151] Hence the need for 'defining principles' to limit the scope of this personal control test.[152] One of the defining principles used in the *Al-Skeini* case limits the exercise of authority and control by Contracting Parties' agent to the exercise of public powers in a foreign State that allows that conduct. Since the exercise of public powers is attached to some control over the area, in this instance the Strasbourg Court presents an authority and control test that is not strong enough to walk away from any reminiscence of territorial control.[153] The Strasbourg Court has introduced a new test of jurisdiction for Contracting Parties' troops abroad; it is an authority and control test 'on

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[149] '… [There is] 'no *a priori* reason to limit a state's obligation to respect human rights to its national territory'. T Meron, 'Agora: The 1994 US Action in Haiti: Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 81.

[150] *Al-Skeini* GC (n 4), para 124.

[151] Ibid, para 133.

[152] Ibid, paras 133-137.

[153] Even in the *Al-Jedda* case, there is a mention to the UK together with the US displacing the Iraqi government and creating the CPA to 'exercise powers of government temporarily.' *Al-Jedda* GC (n 27), paras 77, 80.

condition that' the soldiers should be engaged in security operations in the area and should exercise some public powers during a period of time.[154] Is this concept of jurisdiction fit to meet the challenges of human rights violations caused by contemporary military undertakings abroad? Where can we include the cases of aerial attacks or those cases where quick military incursions do not include physical apprehension or where the forces have not exercised any governmental functions in that area? The Strasbourg Court has missed a very good opportunity to firmly bypass the territorial control test when dealing with military operations abroad. According to Judge Rozakis's concurring opinion in the *Al-Skeini* case, the Strasbourg Court's reference to 'effective control over an area' was unnecessary because all the different aspects of the territorial control test can fit into the Contracting Parties' agent authority and control test.[155] To what point does this move by the Strasbourg Court in the *Al-Skeini* case mean a step away from *Bankovic*, which is the 'archetypal' case for finding jurisdiction through effective control over an area?

5.3.4 *Farewell to Bankovic?*

In the *Al-Skeini* case the Grand Chamber established primacy of the 'authority and control' test over the 'effective control' over an area test. Conversely, in the *Bankovic*

[154] *Al-Skeini* GC (n 4), para 149; the problem is that this authority and control test based on boots on the ground still can be too broad. For instance the death of the third applicant's wife in *Al-Skeini* is considered under British troops' jurisdiction, based exclusively on the UK forces conducting a security operation at the time on that particular area. Even though it was not proven that the fatal bullet that killed Mrs Shmailiawi was fired by British soldiers. *Al-Skeini* GC (n 4), para 150.

[155] For Judge Rozakis particular aspects of control over an area are: the large scale use of force, the occupation of a territory for a long time, and in occupation the exercise of force by a subordinated local administration, are all aspects that in isolation or together can be part of an authority and control test. (Concurring opinion of Judge Rozakis) *Al-Skeini* GC (n 4) 77.

case the territorial control test was the chosen one. But how far is the Strasbourg Court really moving away from the territorial test? Admittedly, the idea of jurisdiction being territorial is backed by the fact that normally the territorial State is the most likely one to violate the rights of its inhabitants. Yet, a territorial test is not very compatible with military operations abroad. Control over an area is a concept difficult to sustain even in the case of occupations and even more problematic in a conflict zone. It was nonetheless a perfect excuse to avoid obligations for Contracting Parties' troops faced constantly with difficult circumstances preventing them from holding 'effective control' over foreign territory. It also excluded any liability for aerial attacks.[156] Despite those facts, the chosen test by the Strasbourg Court in *Bankovic* to trigger jurisdiction was 'effective control over a territory', limited to the *espace juridique*. The Strasbourg Court also stated the impossible task of guaranteeing the whole range of European Convention rights abroad and the unfeasible undertaking of filling human rights vacuums in other countries, without being accused of human rights imperialism. Conversely, in *Al-Skeini* the Strasbourg Court has established that extraterritorial jurisdiction is not limited by the *espace juridique*, that the European Convention's rights can be tailored and divided in some cases and that there is no need to fill human rights vacuums in third States. With this in mind, to what extent is the Strasbourg Court ready to find the *Bankovic* case obsolete? Firstly, against *Bankovic's* principles the Strasbourg Court in *Al-Skeini* has established that extraterritorial jurisdiction should not

[156] States justify this resort to aerial targeted killings on military necessity basis, minimising the loss of its own soldiers' lives as against a ground invasion. M Ramsden 'Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki' (2011) 16 JCSL 2011 (16) 385.

be affected or limited by the concept of *espace juridique*,[157] stating that 'jurisdiction under Article 1 of the Convention can … exist outside the territory covered by the Council of Europe Member States …'[158]

The second departure of the Strasbourg Court from the *Bankovic* case is the admission that rights can be divided and tailored.

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković,* cited above).[159]

However, the parting from *Bankovic* is limited to cases in which the Strasbourg Court choses the authority and control test to find jurisdiction. So, in the *Al-Skeini* case it is accepted that when using the effective control over an area test, the 'controlling [Contracting Party] has responsibility for the entire range of Convention rights on that area'.[160] This fact leaves open a door, in cases of jurisdiction based on territorial control, to still ask Contracting Parties' troops to secure the 'whole package' of

[157] The territorial control test does not really work outside the *espace juridique* and is more a policy instrument to keep stability in the Council of Europe zone than a triggering mechanism for jurisdiction. See ch 3; cf, The UK did not see the differences between the occupations in Iraq and those in northern Cyprus and in Moldova, based on being located in or outside the *espace jurdique,* but because the latter occupations are long-term and not internationally recognized. *Al-Skeini* GC (n 4), para 113.

[158] *Al-Skeini* GC (n 4), para 142.

[159] Ibid, para 137.

[160] Ibid, para 138.

European Conventions' right in a foreign territory.[161] The latter requirement is clearly a nearly impossible task,[162] difficult to achieve even inside military premises. How can Contracting Parties' troops be liable for securing the right to marry or freedom of expression to individuals in a foreign territory, in which they are conducting military operations? The next question would be, 'what rights are relevant' to the situation of individuals affected by troops' conduct abroad? [163] Or following Judge Bonello's concurring opinion in *Al-Skeini*, which human rights are the troops 'in a position to ensure'?[164] I would argue that the rights relevant and influenced normally by the military in foreign territory are: Articles 2 ECHR (right to life), 3 ECHR (right to not being tortured), 5 ECHR (right to liberty) and 6 ECHR (right to a fair trial), as the minimum benchmarks[165] to be held by Contracting Parties' troops abroad.[166] The right to life and the right not be tortured are not alien to humanitarian law. They are both

[161] *Al-Skeini* HL (n 118), para 79.

[162] '… [N]ot an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing …' *Al- Skeini* CA (n 117), [197] (Lord Sedley).

[163] 'It will be impracticable to expect soldiers to guarantee the right to association to residents of third countries…' *Al- Skeini* CA (n 117) paras 195-197; H Nasu 'Operationalizing the "Responsibility to Protect" and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 JCSL 209, 229.

[164] (Concurring opinion of Judge Bonello) *Al-Skeini* GC (n 4), para 32 (Judge Bonello's Concurring opinion).

[165] 'Fundamental principles as the prohibition of the arbitrary taking of life, the duty of humane treatment of persons in detention, the prohibition of inhuman or degrading treatment or punishment, and essential due process must *always* be respected.' Meron (n 149) 81 (emphasis added).

[166] Janik and Kleinlein include Articles 2 and 3 ECHR as being rights of 'fundamental importance' and Articles 5 and 6 ECHR must be with the probability of a violation that is 'sufficiently flagrant.' Janik and Kleinlein (n 56) 490; In *Al-Saadoon* the Court did not consider Article 6 ECHR was in danger of a sufficiently flagrant violation stating that: 'However, in the present case the Court accepts the national courts' finding that, at the date of transfer, it was not established that the applicants would risk a flagrantly unfair trial before the IHT … It follows that the Court finds no violation of Article 6 of the Convention…' *Al-Saadoon* Merits (n 55), para 150.

reflected in Common Article 3 provision of the Geneva Convention.[167] They are non-derogable rights[168] and peremptory norms.[169] The rights to liberty[170] and to a fair trial are recognized to those held by troops since the European Convention accepts, Contracting Parties have jurisdiction over those under their physical control.[171] Furthermore, the Strasbourg Court has underlined the link between detentions and lapses on judicial supervision, with disappearances and even torture of arrested civilians, declaring that 'prompt judicial intervention may lead to the detection and prevention of serious ill-treatment prohibited by the Convention in absolute and non-

[167] Under Common Article 3 '…the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to persons taking no active part in the hostilities … (a) violence to life and person in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognizes as indispensable by civilized peoples' Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, (Common Article 3).

[168] 'The inherent ethical value contained in some human rights determines their non-derogable status.' K Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective on Non-Derogable Rights' (2001) 12 EJIL 917, 921; the European Convention permits derogation from Article 2 ECHR (right to life) in Article 15 ECHR in 'respect of deaths resulting from lawful acts of war'; however according to Droege to date no Contracting Parties have derogated from Article 2 ECHR in the context of internal conflicts or conflicts occurring outside their own territory. C Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Isr L Rev 310, 313.

[169]'… [F]undamental human right that have *jus cogens* status are: … the prohibition of torture, the right to life…'. S Sivakumaran, 'Impact on the Structure of International Obligations' in MT Kamminga and M Sheinin (eds) *The Impact of Human Rights Law on General International Law* (OUP 2009).

[170] 'The Court emphasizes at the outset that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone"…' *Al-Jedda* GC (n 27), para 99.

[171] *Al-Jedda* GC (n 27) and *Al-Saadoon* Admissibility Decision (n 34).

derogable terms.'[172] These rights will be referred to as 'conflict relevant rights', denoting those rights most affected by troops conduct abroad.

Lastly, the Strasbourg Court introduced another difference in the *Al-Skeini* case when compared with the *Bankovic* case. In *Bankovic* there is concern about a 'vacuum' of human rights protection when the Contracting Party has control over the territory. The vacuum is limited to the *espace juridique.* One could assume then that both concepts, that of a vacuum and that of *espace juridique*, will be incompatible with the authority and control test. Hence owing some 'conflict relevant' rights to individuals under the authority and control test is not akin to human rights imperialism or imposing views abroad by filling human rights vacuums.[173]

Nonetheless, after pointing out the departures from *Bankovic*, there is still a link to the latter case. The Strasbourg Court in *Al-Skeini* applies a 'defining principle' which bases authority and control on the exercise of public powers by the forces of Contracting Parties. That principle is very similar to the one used in the *Bankovic* case to prove

[172] *Aksoy* (n 172) para 76, '…[T]he applicant, who was detained over a long period of time … [without] access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was completely at the mercy of those holding him …' *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996), para 83; '… [T]he Court finds that Muhsin Tas must be presumed dead following his detention by the security forces … the authorities have not accounted for what happened during Mushin Tas's detention … it follows that liability for his death is attributable to the respondent Government …' *Tas v Turkey* App no 24396/94 9 ECtHR, 14 November 2000) para 67; '… [O]nly prompt judicial intervention can lead to the detection and prevention of serious forms of ill-treatment … to which detainees are in danger of being subjected particularly as a means of extracting confessions from them …' *Dikme v Turkey* App no 20869/92 (ECtHR, 11 July 2000) para 66; 'There is strong evidence that many of the persons tortured and subjected to inhumane conditions in both Afghanistan and Iraq were initially detained by international forces and handed over to the host state authorities in the full knowledge that they would almost certainly be tortured.' S Wills, 'The Legal Characterization of the Armed Conflict in Afghanistan and Iraq: Implications for Protection' (2011) 57 NILR 173, 190; G L Neuman 'Comment, Counter-Terrorist Operations and the Rule of Law' (2004) 15 EJIL 1019, 1025.

[173] 'The Convention is a constitutional instrument of European public order … It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States …' *Al-Skeini* GC (n 4), para 141.

effective control over an area, which may result from military occupation or from the 'acquiescence or consent' of the territorial State:

> … [E]xercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. [174]

Effectively, the Strasbourg Court adopted one of *Bankovic's* territorial jurisdictional triggers under the authority and control test in *Al-Skeini*. How would this 'new' test of authority and control apply to the factual situation in *Bankovic*? The Strasbourg Court could have abandoned this reminiscence of territorial control and make sure Contracting Parties' troops abroad are not linking jurisdiction to the need to exercise public powers in an area.[175] However, it is clear that the Strasbourg Court is still holding on to the *Bankovic*-law of considering jurisdiction territorial and only exceptionally extraterritorial, even in the *Al-Skeini* case.[176] Furthermore, the Strasbourg Court's new preferred authority and control test is leaving unanswered questions about liability of Contracting Parties' troops for aerial attacks or quick military incursions

[174] *Bankovic* (n 43), para 71.

[175] In any case, even the applicants backed the idea of linking jurisdiction to officials of Contracting Parties exercising public powers, *Al-Skeini* GC (n 4), para 149; according to King not even as an occupying power will a State need to act as the 'Sovereign State'. H King, 'Unravelling the Extraterritorial Riddle: An Analysis of R (Hassan) v. Secretary of State for Defence (2009) 7 JICJ 633, 636.

[176] 'A State's jurisdictional competence under Article 1 is primarily territorial … Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases …' *Al-Skeini* GC (n 4), para 131.

without detentions. Albeit, the fact that in *Al-Skeini* the Strasbourg Court is advancing on the rights direction towards a more contemporary and effective concept of jurisdiction.

5.4. A Definite Test for Troops Conduct Abroad? *Al-Skeini :* Right Results, Wrong Means

The judgment of *Al-Skeini* has brought many welcome changes to the concept of jurisdiction and with it the possibility of increasing the liability of Contracting Parties for their conduct in the context of military operations abroad. Contracting Parties will find it difficult now to justify their reluctance to accept jurisdiction for their forces on military operations in foreign land. Classic arguments against the European Convention application, such as leaving army issues to humanitarian law or national rules, will not stand anymore. For example, in *Al-Skeini* the UK tried to establish that British troops were regulated by international humanitarian law and therefore subjected to the UK's criminal domestic law and civil claims.[177] The Strasbourg Court in response declared that civil proceedings initiated by next-of-kin and the award of damages cannot be considered as part of Contracting Parties' compliance with their human rights obligations.[178] More specifically, in the case of the fifth applicant's son who died of drowning, the Strasbourg Court considered that although Mr Ali received a substantial settlement on his civil claim and an admission of liability from the British Army, the UK's procedural duty under Article 2 ECHR was never complied with. This is because

[177] *Al-Skeini* GC (n 4), para 119.

[178] Ibid, para 165.

there was never a 'full and independent investigation into the circumstances of his son's death.'[179]

The extension of jurisdiction will have another major effect on Contracting Parties' conduct abroad post- *Al-Skeini* and its dismissal of the concept *espace juridique*, which is that Contracting Parties will have more incentives for making sure troops adhere to the same standards inside and outside their territory. Up until now there was no motivation for Contracting Parties' troops to bring with them abroad the standards that the European Convention has represented and achieved over the years inside the *espace juridique*. Benchmarks on demanding assessment before using lethal force, prohibiting torture techniques and the requirement of an effective investigation, all of which were set for Contracting Parties' forces conduct[180] seem to have been forgotten by the troops abroad.[181] Not only was the Strasbourg Court seen as overlooking these problems by neglecting jurisdiction of the troops abroad, but was also being perceived as more willing to find a violation against some Contracting Parties than others, namely more

[179] Ibid, para 175.

[180] 'The lessons of … *Ireland v United Kingdom* …that techniques of sensory deprivation had no place in the arsenal of the British Military …' C Gearty, 'Doing Human Rights' in G Gilbert, F Hampson and C Sandoval (eds) *Strategic visions for Human Rights : Essays in Honour of Professor Kevin Boyle* (Routledge 2011); T Hadden 'War and Peace in Northern Ireland' in Gilbert, Hampson and Sandoval (n 179); The five practices formally banned by the UK government in 1972 after their use by the British army in Northern Ireland are: hooding, stress positions, subjection to noise, sleep deprivation and denial of food and drink.

[181] '… [U]se of torture techniques by British soldier … even at the start of 2008 an official army investigation had found that the prohibition on their use was still not "clearly being articulated" to ordinary soldiers.' M Townsend, 'MP's cast doubt on Iraq torture denials' *The Observer* (27 July 2008) <http://www.guardian.co.uk/politics/2008/jul/27/Iraq.military/print> accessed 20 June 2011;
The Aitken Report was commissioned by General Sir Mike Jackson, the then Chief of the General Staff in February 2005. He was asked to consider what measures need to be taken in order to safeguard and improve the army's operational effectiveness in the light of allegations of abuse in Iraq.
'The Aitken Report: An investigation into cases of deliberate abuse and unlawful killings in Iraq in 2003 and 2004' (25 January 2008) < http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf> accessed 25 June 2011. Worryingly in the Aitken Report there is no explanation as to why the banned techniques were used and in the end no-one is to blame.

powerful European Contracting Parties or group of Contracting Parties linked to NATO or UN missions.[182] These worries can now be put to rest for the time being.

In addition, the Strasbourg Convention can be seen to complement Contracting Parties' troops mandates and at the forefront of forces changing strategies. Recently, coalition forces in Afghanistan struggling with civilian casualties recognized that one way to win people away from the Taliban is to protect the population.[183] In sum, while *Al-Skeini* is a step in the right direction, there is still the need for a more inclusive, contemporary and effective jurisdictional test for Contracting Parties conduct abroad. Because the question of jurisdiction, in situations involving Contracting Parties military conduct, is still uncertain and still affects the gap in protection of human rights of individuals trapped in conflicts.

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[182] '… [P]erception throughout Europe that NATO's actions in Kosovo were principled and justifiable … in contrast to what are perceived as self-serving actions of Turks … or Russians…'. H Hanum, 'Remarks, Bombing for peace' n (31); inside the *espace juridique* the Strasbourg Court seems to be harder on 'official impunity' and shifts the burden of proof to the Contracting Parties to explain what happened to the victims when there is failures to investigate death or in cases of enforces disappearances like in Russia. Report of the Committee of Ministers of the Council of Europe 'Actions of the security forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights ' (11 September 2008) <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1149205> accessed 24 April 2011; F. Hampson, 'The Future of the European Court of Human Rights' in Gilbert, Hampson and Sandoval (n 179); cf, in *Issa* outside the *espace juridique* the burden of proof failed on the applicants. The Strasbourg Court criticized the fact that the applicants did not provide the 'identity of the commander' along with **'**detailed description of the soldiers' uniforms or presented 'independent eye-witness account.' *Issa* (n 44), para 77.

[183] 'As a key summit on the future of Afghanistan starts in London, a shift in emphasis towards protecting civilians has seen British troops employ a new strategy dubbed "courageous restraint.". C Wyatt, 'BBC News: Restraint the new tactic for UK troops in Afghanistan' *BBC News Blog* (28 January 2010) < http://news.bbc.co.uk/1/hi/uk/8484205.stm> accessed 23 June 2011; 'NATO commanders are weighing a new way to reduce civilian casualties in Afghanistan: recognizing troops for "courageous restraint" if they avoid using force that could endanger innocent lives.', Associated Press "NATO pushes 'Courageous Restraint' for Troops." (4 May 2010) <http://www.military.com/news/article/nato-pushes-courageous-restraint-for-troops.html> accessed 23 June 2011.

5.5 Conclusion

Human rights apply to everyone independently of their culture or location. [184] If the European Convention seemed distracted for some time by security and military concerns in cases involving Contracting Parties' troops abroad, the result of the *Al-Skeini* case has brought a different outlook. In the latter case, the Strasbourg Court has informed Contracting Parties that the application of human rights does not affect military efficiency, overregulates battlefields or introduces too many complex rules for soldiers.[185] More importantly, the Strasbourg Court declared in *Al-Skeini* that beyond the *espace juridique*, Contracting Parties' troops still hold human rights obligations towards individuals. In the context of armed operations, those entitlements are mainly the protection of 'conflict relevant' rights including Articles 2, 3, 5 and 6 ECHR.

The advances in protection of human rights are down to extending jurisdiction as a 'threshold criterion'. *Al-Skeini* has done this through the 'authority and control' test and its defining principles. Yet, the Strasbourg Court's new test for finding jurisdiction on troops' conduct abroad is not involving military operations such as aerial attacks or quick incursions without detentions. This test is designed to solve problems when Contracting Parties intervene with 'boots on the ground', as was the case in Iraq and Afghanistan. The question is: what will happen when Contracting Parties decide more cautious interventions, as in the recent case in Libya? Intervention through aerial attacks is cheaper and safer for the troops and seems to be winning points in the

[184] C Meredith and T Christou, *Not in my Front Yard: Security and Resistance to Responsibility for Extraterritorial State Conduct* (WLP 2009) 151; cf '…the Convention was design for a defined group of people' in C Greenwood, 'Remarks, Bombing for peace' (n 31) 103.

[185] M Hansen, 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 Mil L Rev 1, 4.

international world, as reports unfold in Libya. The Strasbourg Court should consider a test it has already used inside the *espace juridique*, the 'direct and immediate link' test. The latter test offers a more coherent approach to determining questions of jurisdiction in situations involving Contracting Parties' military conduct extraterritorially. The alternative will mean putting into question the European Convention's supervisory effect to face the challenges ahead in the context of Contracting Parties participating in military operations abroad.

Chapter Six: Towards a New Approach to Defining Jurisdiction under Article 1 ECHR

6.1 Introduction

Asking about the reach of the European Convention in the context of Contracting Parties' participation in military operations abroad is a topical question. This thesis has clarified the reach of the European Convention by looking into the criterion of jurisdiction in general and the adequacy of the tests accepted by the Strasbourg Court, to declare individuals under the protection of the European Convention. Humanitarian law and its interplay with human rights law has also been discussed, particularly since both disciplines can address the protection of civilians caught in military operations abroad. The Strasbourg Court definitely has a role to play in extraterritorial conflicts, in a context in which humanitarian law is struggling to cope with modern warfare and human rights law has traditionally been shy of filling the gap in civilian protection. In fact, the Strasbourg Court is developing a jurisprudence that is beginning to address new and complex situations arising out of the military conduct of Contracting Parties abroad. Some of the conduct the European Convention had to deal with included the conduct of Contracting Parties forces displayed in the framework of international multinational forces, particularly under the UN's auspices. This fact led to enquiries into the interaction between the European Convention and other international organizations. While in the context of multinational forces authorized by the UN the Strasbourg Court started by attributing exclusive liability to the UN, the latest case-law has moved away from that path. The European Convention has made it clear that

through dual or multiple attribution the conduct of troops sent by Contracting Parties under the UN flag can still be supervised by the Strasbourg Court without interfering with the UN's universal peace and security mission.

In sum, the protection offered by the European Convention to victims of Contracting Parties' troops' conduct abroad has improved. The Strasbourg Court understood that it could no longer afford to keep a restrictive interpretation of jurisdiction that allows victims living in foreign lands to be unprotected.[1] With the cases of *Al-Skeini* and *Al-Jedda*, the European Convention has come to the realisation that the conduct of Contracting Parties abroad cannot be swept under the carpet anymore. Moreover, the Strasbourg Court has broken fears of international fragmentation, of interfering with military efficiency and of conflicts with the UN. The message is clear. Troops of Contracting Parties abroad can bring individuals under their jurisdiction and can be liable for the protection of 'conflict relevant rights' under the European Convention. Jurisdiction is being declared outside the *espace juridique* for Contracting Parties sending forces and cases are reaching the merits stage. However, the current interpretation of the concept of jurisdiction is not comprehensive enough to meet the challenges of modern extraterritorial military undertakings. In order to establish a more fitting concept of jurisdiction, the Strasbourg Court should on the one hand, bypass the territorial foundation that remains the starting point of jurisdiction even in the latest case of *Al-Skeini.* The Strasbourg Court also needs to adapt the current authority and control test with an existent threshold, which is the 'direct and immediate link' between the Contracting Party and the victim of the violation. In conclusion, the direct and

[1] C Tomuschat *Human Rights: Between Idealism and Realism* (2nd edn, OUP 2008) 388.

immediate link test is the answer to achieving a coherent and consistent approach to jurisdiction in the context of Contracting Parties military conduct abroad.

6.2 A Territory Does Not Hold Human Rights

Finding a clear concept of jurisdiction applicable to the conduct of Contracting Parties' troops is paramount. Jurisdiction not only determines the reach of the European Convention protection but also determines the possible liability of a Contracting Party. I believe that concept should lean on personal control rather than territorial control. This should be the case more so in the context of military operations abroad, in which situations of tension and vulnerability of individuals are raised up. In the latter context, the concept of jurisdiction should be based on a test that gives priority to the interests of individuals rather than the interests of States and territorial control is a test that traditionally has given preference to States' worries.[2] In the framework of the European Convention, the territorial test was a product of promoting stability inside the *espace juridique*[3] and also a way to keep a reconciliatory approach with general international law.[4] Hence the Strasbourg Court declares that jurisdiction should reflect its meaning in international law.[5] However, while the idea of jurisdiction carries some common features in both international spheres, their purpose is different. Thus, while States are

[2] M Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' in F Coomans and MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

[3] See ch 3.

[4] See ch 1.

[5] 'The Court refers to its case-law to the effect that the concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law…' *Ilascu and Others v. Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), para 312.

happy to expand jurisdiction in the general international sense as it means showing their power, Contracting Parties, in the European Convention context, are not keen on expanding jurisdiction as it entails increasing their human rights obligations and relinquishing some of their power in favour of individuals and their protection. In addition, States associate the concept of jurisdiction with obligations that are limited to their territory and with the impossibility of guaranteeing the same human rights standards of their inhabitants to individuals in foreign land. How can they do it? Outside their territory they lack judicial mechanisms and law-enforcement machinery. Also, just sending troops abroad cannot mean sending with them human rights obligations as well? This reluctance to accept human rights' obligations abroad is not helped by the fact that extraterritorial jurisdiction is unclear in the Strasbourg Court's jurisprudence.[6] However, it is accepted by Contracting Parties that human rights are no longer limited to their territory.[7] I advocate that the use of a jurisdictional test based on personal control inside and outside the Contracting Parties' territory would help increase the protection to victims of military operations.[8] The idea of promoting a 'personal conception of jurisdiction' is also backed by UN treaty bodies[9] and the Inter-

[6] M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 411.

[7] S Gardbaum , 'Human Rights As International Constitutional Rights' (2008) 19 EJIL 749.

[8] '…[C]ontrol over individuals… (is) clearly significant in rendering human rights obligations applicable even when the territorial control tests is not met', R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Isr L Rev 503 (Triggering State Obligations); 'If the exercise of power and authority over individuals is sufficient to find those individuals within the jurisdiction of the contracting State, then it would seem nonsensical to retain the higher standard of effective control over territory.'J Cerone ,'Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context'. (2007) 40 Isr L Rev 412 (Jurisdiction and Power).

[9] Human Rights Committee, General Comment No.31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6

American human rights system.[10] Currently, the Strasbourg Court finds jurisdiction is triggered by territorial as well as personal control of Contracting Parties over individuals. I argue that the 'direct and immediate link' test is sufficient in all circumstances and should be recognized as the touchstone test by the Strasbourg Court.

6.2.1 *Territorial Control and Promoting Stability inside the 'Espace Juridique*

The Strasbourg Court and the now-defunct European Commission, dealt with the first extraterritorial cases using the authority and control test to establish jurisdiction.[11] It was not till the *Loizidou* case, [12] set in northern Cyprus that the idea of extraterritorial jurisdiction based on control over territory was introduced for the first time. From then on Contracting Parties could be liable for violations of human rights based on control over a territory, situated outside their own territory. I suspect the underlying reason for using the territorial test, was down to the aspiration of the European Convention of

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(2004); M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (0UP 2011) 262 (E*xtraterritorial Application)*; see also HJ Steiner, P Alston and R Goodman, *International Human Rights in Context.* (3rd edn, OUP 2008) 965; see also A Cassese, 'Are International Human Rights Treaties and Customary Rules on Torture Binding Upon US Troops in Iraq?' (2004) 2 JICJ 872.

[10] In the '*Brothers to the Rescue'* case the Inter-American Commission of Human Rights declared that Cuba had control over the victims killed, not over the territory where they were killed. *Armando Alejandre Jr. and others v. Republic of Cuba and the Cuban Air Force(Brothers to the Rescue)* Case No. 11.589, Report No. 86/99, 29 September 1999; 'In contrast with the findings of the [Strasbourg Court] in *Bankovic*, the Inter-American Commission … accepts its applicability to its states parties military air operations in international space.'. T Gill and D Fleck '*The Handbook of the International Law of Military Operations' (*OUP 2010) 147; J Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) CHRGJ Working Paper 1; D Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments' in Coomans and Kamminga (n 2) 178.

[11] Mainly cases of consulate and embassies in which Contracting Parties's agents did all they could, (eg: *X v UK, X v Germany*) and *Ocalan*- style cases (*Stoke, Sanchez Ramirez, Freda*) where Contracting Parties' agents arrested and detained abroad individuals with the intention of bringing them back to the Contracting Parties' territory, see ch 3.

[12] *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996).

upholding human rights obligations in conflicting areas with separatist entities, inside the *espace juridique*. Those areas needed to endorse all rights and freedoms the Contracting Parties signed for, all over the Council of Europe region, avoiding any vacuum of protection. The territorial test, would promote stability first to the problematic northern Cyprus, and later to the former Yugoslavia and the unstable Caucasus area.[13] Some commentators argue that, many of the problems in these volatile areas can only be resolved through politics.[14] For instance, applicants from Cyprus that suffered from continuing violations of their rights to home and properties will not find a solution in covering northern Cyprus with a 'blanket application' of the European Convention against Turkey, making Turkey liable for everything.[15] One the other hand, I acknowledge the problematic repercussions of the fact that the TRNC is not a Contracting Party and cannot be a Respondent State before the Strasbourg Court. Additionally, conflicts in Eastern Europe such as in the Nagorno-Kabarah area are also generating complaints from displaced refugees based on Article 1 of Protocol No 1 ECHR (protection of property) and Article 8 ECHR (right to respect for private and family life). On the one hand we have the *Sargsyan* case,[16] based on complaints of

[13].Report of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Doc. 9730 "Areas where the European Convention on Human Rights cannot be implemented" (Council of Europe, 11 March 2003) para 55 < http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9730.htm > accessed 20 September 2011.

[14] E Myjer, 'Human Rights Without Peace? The European Court of Human Rights and Conflicts Between High Contracting Parties' in A. Buyse, *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict* (Intersentia, 2011) 29.

[15] According to Hammer the Strasbourg Court has ignored realities and political history, as the TRNC was already an autonomous entity before the Turkish invasion, to protect the Turkish population on the island. L Hammer, 'Re-Examining the Extraterritorial Application of the ECHR to Northern Cyprus: The Need for a Measured Approach' (2011) 5 IJHR 858.

[16] *Sargsyan v Azerbaijan* App no 40167/06 (GC, Admissibility Decision, 14 December 2011).

Armenian refugees against Azerbaijan.[17] On the other hand, we have the *Chiragov* case,[18] relating to Azerbaijani refugees against Armenia.[19] Both cases have been found recently admissible by the Grand Chamber after being relinquished from their assigned Chambers. The Strasbourg Court in both admissibility decisions has brought the *Ilascu* case to confirm the principles it has set on its case-law on jurisdiction and liability of Contracting Parties.[20] Moreover the *Al-Skeini* case has been mentioned to confirm those principles.[21] The Strasbourg Court has joined the matter of jurisdiction in *Sargsyan* and *Chiragov* to the merits stage and the cases are both pending.[22]

My argument is that if the control to gauge jurisdiction is down to some territorial presence when the Contracting Party has no real control over the violation, it will not help the Strasbourg Court's efficiency. Hence without a strong link between the Contracting Party and the alleged individual's violation, the Contracting Party could not realistically guarantee or protect any rights or freedoms. Albeit, I accept that in particular instances in northern Cyprus in which the Turkish army conduct had a clear

[17] In *Sargsyan* Azerbaijan argued that although the matters complained of had occurred within its territory, Azerbaijan did not have effective control over that area, thus is not liable under Article 1 ECHR. *Sargsyan* (n 16), para 72.

[18] *Chiragov and others v Armenia* App no 13216/05 (GC, Admissibility Decision, 14 December 2011).

[19] In *Chiragov*, Armenia submitted that, 'it did not have effective control or exercise any public power in Nagorno-Karabakh and surrounding regions … nor had Armenia given the Nagorno-Karabakh Republic political, social or financial support …' that could engaged Armenia's liability under the European Convention. *Chiragov* (n 18), para 81.

[20] *Sargsyan* (n 16), para 73; *Chiragov* (n 18), para 82.

[21] *Sargsyan* (n 16), para 74; *Chiragov* (n 18), para 83.

[22] *Sargsyan* (n 16), paras 75-76; *Chiragov* (n 18), para 84.

link with grave human rights violations, such as disappearances of Greek Cypriots,[23] the Strasbourg Court needed to challenge Turkey's conduct. Similarly, the Strasbourg Court has a vital role on supervising cases of extrajudicial execution,[24] tortures and disappearances[25] committed by Russian forces in the Chechnya conflict. Thus, it would be better if the concept of jurisdiction was based exclusively on the control of the Contracting Party over the individual's violations in a particular situation.[26] However, the territorial test was not only used inside the *espace juridique* for territorial control of a Contracting Party outside its own territory like in *Loizidou*. The territorial test was also used inside the *espace juridique* to uphold positive obligations of Contracting Parties with limited control over their own territory, like in the *Ilascu* case.[27] But are positive obligations limited to holding territorial control?

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[23] Many of these cases relate to applicants being taken to police or military custody and latter disappeared, eg: *Orhan v Turkey* App n 25656/94 (ECtHR, 18 June 2002), para 326, *Varnava v Turkey* App nos 16064-16073/90 (GC, 18 September 1990). In the *Varnava* case, the Strasbourg Court found violations of Articles 2, 3 and 5 ECHR, for the pain of the relatives of the missing and the lack of any proper investigation. N. Kyriakou, 'Enforced Disappearances in Cyprus: Problems and Prospects of the Case Law of the European Court of Human Rights' (2011) 2 EHRLR 150.

[24] *Tangiyeva v Russia* App no 57935 (ECtHR, 29 November 2007).

[25] *K*ukayev *v Russia* App no29361/02 (ECtHR, 15 November 2007); *Medova v Russia* App no 25385/04 (ECtHR, 15 January 2009).

[26] 'Arguably, its responsibility [Turkey] would have "been confined to the acts of its own soldiers or officials in northern Cyprus". It would perhaps have been unreasonable to expect them to secure the entire set of Convention rights and freedoms.'. R Lawson, 'Life after *Bankovic*: on the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (n 2) 99.

[27] Gibney highlights another implication out of the *Ilascu* case: if Moldova was found liable for a situation on 'its territory' over which it had no control, would the Strasbourg Court hold liable Contracting Parties for human rights violations in secret detentions and illegal transfers of detainees by CIA officials in European territory? Although these Contracting Parties were not in control of the situation?. M Gibney, *International Human Rights Law: Returning to Universal Principles* (Rowman & Littlefied Publishers 2008) 76; Parliamentary Assembly Report: Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States-Second Report, Doc. No. 11302 rev. (2007) available at http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.; '… [A]t least 15 people have claimed to have been tortured in various countries with the knowledge of the British authorities' in 'Outsourcing torture: did the government subcontract the removal of a man's fingernails?

6.2.2 *Territorial Control and Positive Obligations*

According to Cerone in human rights jurisprudence the actual trend in the extraterritorial contexts shows that on the one hand, States owe negative obligations to all individuals everywhere and also that States owe positive obligations on a more limited extent depending on the amount of territorial control that State holds.[28] Admittedly, the concept of negative obligations is an easier one to understand. It means not violating and not interfering with individual's human rights.[29] In contrast, positive obligations come with a more active decision from the State[30] and are more undetermined.[31] Milanovic seems to follow that trend of limiting positive obligations to areas where the State has 'effective overall control'.[32] Milanovic disagrees with the Strasbourg Court's decision in the *Ilascu* case. How could Moldova owe positive obligations over a territory in which it had no control?[33] Besides, a Contracting Party

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The Economist (9 July 2009) <http://www.econimist.com/node/14006719/print> accessed 8 October 2011.

[28] Cerone, 'Jurisdiction and Power' (n 8) 412.

[29] '… [T]he notion of negative obligations should be a fairly easy and uncontroversial concept to understand and accept. Most, if not all, would agree that it is wrong to harm other people …' Gibney (n 27) 6; see also B Simma and P Alston, 'The Sources of Human Rights: Custom, *Ius Cogens* and General Principles' (1992) 12 Aust YBIL 103.

[30] Positive obligations 'is a label used to describe the circumstances in which a Contracting Party is required to take action in order to secure to those within its jurisdiction the rights protected by the Convention.' R White and C Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010) 100.

[31] '… [T]here is still much to be done to develop a full understanding of the implications of positive duties triggered by human rights, both from a theoretical and practical legal perspective.' S Fredman *Human Rights Transformed: Positive Rights and Positive Duties (*OUP 2008) 3.

[32] Milanovic, *Extraterritorial Application* (n 9) 263.

[33] Ibid 107.

should not be made liable for violations against its population by a foreign State.[34] Promoting positive obligations in the context of a State, without real control over what is happening in its territory,[35] is more a political endorsements than a human rights one.[36] In those situations, and in my opinion, the concept of jurisdiction from a human rights perspective is incorrectly used.

Additionally, in the context of military operations abroad monitoring control over territory is difficult. Quick forces incursions and aerial attacks do not encompass any territorial control. Thus, we are left with occupations as the only military venture to supervise using a territorial test for jurisdiction. Yet, in occupations it is difficult to ascertain when the territorial control exactly started and which precise parts of the territory are covered by that control.[37] Moreover, according to Arai-Takahashi it is hard to see how the public powers of troops can go any further than arrests and detentions.[38] Could it not be the case that in *Ilascu*, Moldova had an obligation not based on territorial control but on the control it had over the applicants? If the Moldovan authorities did not act diligently trying to help the release of the applicants, their

[34] J Ross, 'Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror' in Coomans and Kamminga (n 2).

[35] 'However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.' *Ilascu* (n 5), para 331.

[36] *Ilascu* (n 5), para. 322; Gondek claims that the Strasbourg Court did put more emphasis on the positive obligations of Moldova towards the applicants, so they fall under its jurisdiction, than in analysing first if the applicants where within its jurisdiction and then asserting the obligations of Moldova. M Gondek 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization' (2005) 52 NILR 359.

[37] Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff 2009) 568.

[38] Ibid.

liability should have been down to their link with the applicants' violations. One could look at equating the liability of Moldova with that of Russia's role in this case. Since the Strasbourg Court considered in *Ilascu* that there was 'a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate'.[39] So the question becomes, is it really necessary to have territorial control to owe positive obligations? In fact, control over an individual may also demand positive action for the human right not to be violated,[40] independently of control over territory. For instance in the *Isaak* case, the Strasbourg Court declared that Turkey owed positive obligations to prevent the violent behaviour of its troops and civilians against the victim, even though Turkey had no territorial control over the UN buffer zone where Anastasios Isaak was beaten to death.[41] Also, in the *Al-Saadoon* case in which UK troops had no territorial control and the applicants were already in the hands of Iraqi agents, the Strasbourg Court demanded positive obligations. It was required that the UK must take 'steps to obtain an assurance from the Iraqi authorities that the applicants will not be subjected to the death penalty.'[42] In contrast, according to Milanovic, in order to 'realistically' exercise positive obligations abroad, there is a need for territorial control.[43] However, the same author later accepts that some positive

[39] *Ilascu* (n 5), para 393.

[40] N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 229.

[41] '… [T]he Court cannot ignore the fact that the Turkish or Turkish-Cypriot soldiers actively participated in the beating without making any attempt to apprehend Anastasios Isaak or to prevent the counter-demonstrators from continuing their violent behaviour. Thus, they manifestly failed to take preventive measures to protect the victim's life.' *Isaak v Turkey* App no 44587/98 (ECtHR, 24 June 2008), para 119.

[42] *Al-Saadoon and Mufdhi v the UK* App no 61498/08 (ECtHR, 2 March 2010), para 171.

[43] For Milanovic, territorial control does not mean imposing municipal law. Milanovic, *Extraterritorial Application* (n 9) 262.

obligations may not require control over territory to be effective, like in the case of positive obligations that are procedural or those that are really joined to the Contracting Parties' negative obligations.[44] So, the positive obligations that truly need territorial control are reduced to those that are intended to secure human rights from violations by third parties. [45] Yet in the *Al-Skeini* case, there is an example of the Strasbourg Court declaring the UK troops liable for the death of the third applicants' wife, when there was a possibility that she lost her life at the hands of Iraqi insurgents (third parties), instead of British soldiers. The test used in *Al-Skeini* to determine jurisdiction was that of authority and control. Nonetheless, in reality, an authority and control test attached to the troops exercising some public power in the form of security maintenance, a clear territorial activity.[46] This is precisely why I argue for an authority and control test based on different requirements from the ones established by the Strasbourg Court in *Al-Skeini.* In principle, the *Al-Skeini* case shows a preference for a jurisdictional test based on personal control through the authority and control of Contracting Parties' agents. Still, not only has the Strasbourg Court made clear that a territorial test is still available to activate jurisdiction,[47] but a known element in the territorial test, such as the requirement of exercising public powers,[48] has been included in the authority and

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[44] Ibid 215.

[45] Ibid.

[46] See ch 5.

[47] *Al-Skeini and others v the UK* App no 55721/07 (GC, 7 July 2011), paras 138-141 (*Al-Skeini* GC).

[48]'… [R]equirement of exercise of "normal public powers" to trigger jurisdiction via territorial control was introduced by *Bankovic*.' Wilde, 'Triggering State Obligations' (n 8) 516; 'To say that the scope of application of human rights treaties depends on the right of states to regulate certain types of conduct by their domestic law is nothing less than a category error.' Milanovic *Extraterritorial Application* (n 9) 40.

control test.[49] Understandably leaving this territorial avenue open means that the Strasbourg Court is not overruling its own previous case-law. On the other hand, Judge Rozakis advocates, in his concurring opinion in the *Al-Skeini* case, that 'effective control over an area' is not another ground for jurisdiction different from the Contracting Parties 'authority and control' link. For the latter judge, Contracting Parties' agents operating extraterritorially create a link between their sending Contracting Parties and individuals under their control and authority. Those sending Contracting Parties will be liable if the conduct of the agents affect rights protected by the European Convention.[50]

If the Strasbourg Court is serious about monitoring efficiently Contracting Parties' conduct, and particularly transnational conduct of their troops, it needs to drive away from considering the connections the Contracting Parties have with a territory. I advocate that the only important connection is that between the Contracting Parties' conduct and the individuals' violations; abductions, indefinite detentions, tortures and killings by Contracting Parties' agents do not require territorial control, nor does their prevention.

6.2.3 *Positive Obligations outside the Espace Juridique: Al-Skeini*

In the *Al-Skeini* case, the Strasbourg Court demanded the Contracting Party undertake positive obligations after death has been caused by their forces, despite those forces

[49] *Al-Skeini* (n 47), para 135.

[50] *Al-Skeini* (n 47) (Concurring opinion of Judge Rozakis) 77.

being exposed to very difficult security conditions[51] outside their own territory. Hence, post-*Al-Skeini* the duty to investigate is applicable in military operations conducted outside the *espace juridique.* Admittedly, investigations are linked to the existence of jurisdiction but also to making effective and practical the rights 'secured to everyone' by the European Convention.[52] Investigations bring more needed information about the violations, generate redress and help prevent the repetition of that conduct again.

The *Al-Skeini* case has weakened some of the criticisms surrounding violations of rights by troops abroad. Firstly, by expanding jurisdiction because investigations now include deaths of civilians outside the perimeter of military facilities. The Strasbourg Court describes an effective investigation as one that is independent, prompt in order to maintain public confidence and prevent collusion and lastly, open to public scrutiny by always involving the victims' next of kin.[53] Furthermore, it is recognised that those safeguards should now be applied to military conduct outside the *espace juridique* avoiding much criticized double standards. Notwithstanding the added practical problems the Contracting Parties' forces encountered abroad, namely broken civilian

[51] A Mowbray, *European Convention on Human Rights* (3rd edn, OUP 2012) 81.

[52] 'The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State …' *Al-Skeini* GC (n 47), para 163; A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 225 (*Positive Obligations).*

[53] *Al-Skeini* GC (n 47), para 167.

structures (legislative, administrative or judicial), shortages of local pathologists and linguistic and cultural misunderstandings.[54]

Secondly, in *Al-Skeini* the Strasbourg Court also took into account worries by Amnesty International and the international press that military investigations were starting only after grave human rights violations were made widely available through leaked reports or footage, [55] instead of military investigations being the result of Contracting Parties' normal procedures. In fact, it would actually be quicker, cheaper and more effective if Contracting Parties carried out proper investigations straight away, rather than embarking on expensive and fruitless case enquiries afterwards.[56] Actually, the Strasbourg Court stated in the *Al-Skeini* case that the 'authorities must act of their own motion' once they know the facts and not wait for the families of the victims to act.[57] Thirdly, the procedural effective investigation as developed by the Strasbourg Court offsets the deficiencies of the court martial system. For instance, investigations

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[54] Ibid, para 168.

[55] 'Amnesty International – United Kingdom- Human rights: a broken promise' (EUR 45/004/2006, 23 February 2006) 68; N Whitty, 'Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa' (2010) 10 HRLR 689.

[56] 'The Iraq Historic Allegations Team (IHAT) was established last year to take statements from around 140 Iraqi civilians who claim they were abused by British service personnel between 2003 and 2009… A spokesman said investigators had interviewed one complainant and begun questioning two others but these had to be abandoned. IHAT has cost £1.4 million so far … Some of the complainants are seeking a public inquiry and damages from the British Government.' M Wardrop, 'Iraqi abuse inquiry attacked after only one alleged victim is interviewed' *The Telegraph* (14 Jun 2011) <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/8574205/Iraqi-abuse-inquiry-attacked-after-only-one-alleged-victim-is-interviewed.html> accessed 25 June 2011; 'The Aitken Report: An investigation into cases of deliberate abuse and unlawful killings in Iraq in 2003 and 2004' (25 January 2008) < http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf> accessed 25 June 2011; Aitken report by the MoD (n 56) regarded as irrelevant and a whitewash 'REDRESS : Memorandum to the UK Ministry of Defence on the Aitken Report (31 January 2008) <http://www.redress.org/downloads/publications/Memo%20on%20Aitken%20Report%2031%20Jan%2008.pdf> accessed 25 June 2011.

[57] *Al-Skeini* GC (n 47), para 165.

executed by the British army in Iraq did not seem credible.[58] They jeopardized accountability because they were dependent on 'hierarchical or institutional connection'.[59] The court martial system seems ill-equipped to deal with criminal liability of the troops involved[60] and there are reports supporting that complaint.[61] Another important advantage of investigations under the European Convention is that the investigations are much broader than under military law. Investigations under the Strasbourg Court do not stop at the conduct of the Contracting Parties' troops that used force[62] but also include looking into the control and planning over the whole military

[58] '… [T]he day after a fire fight in May 2004 between British soldiers and insurgents, the bodies of 20 Iraqis were returned to their families. At the time many relatives claimed the corpses shoved signs of torture. Now an investigation by Greater Manchester police has raised the disturbing possibility of an army cover-up.'. R Syal and M Towsend, 'Police expose flaws in army's torture inquiry' *The Observer* (26 July 2009) <http://www.guardian.co.uk/uk/2009/jul/26/Iraq-conflict-army-torture-inquiry/print> accessed 22 June 2011.

[59] '… [F]amilies of the deceased were never involved in any inquiry … commanders … were willing to accept their soldiers' account at their face value.' D McGoldrick, 'Human Rights and Humanitarian Law in the UK Courts' (2007) 40 Isr L Rev 527, 538.

[60] R Kerr, *The Military on Trial: The British Army in Iraq* (WLP 2009).

[61] 'In the case of Mr Mahmud, the Ministry of Defense (MoD) has admitted that the allegation was investigated by RAF police, who decided not to conduct any post-mortem examination of the body. After the case was referred to the RAF's most senior prosecutor, a decision was taken not to bring charges, apparently because the cause of death remained unknown. In the case of Mr Shabram a MoD spokesman said the three Royal Engineers were reported … for manslaughter, but military prosecutors declined to bring charges. His body was recovered after his family hired a diver to search the water. A court martial cleared four soldiers accused of the manslaughter of a 15 year old Ahmed Jabbar Kareem after being allegedly pushed into a canal in Basrah just two weeks before Shabram's death.' I Cobain, 'British servicemen suspected of murdering Iraqi civilians' *The Guardian* (12 September 2010) <http://www.guardian.co.uk/uk/2010/sep/12/iraqi-citizen-murders-servicemen> accessed 25 June 2011.

[62] Notwithstanding the fact that the Strasbourg Court will ask for the investigation to determine if the force used in the particular conduct was justified and for the identification and punishment of those liable. The Strasbourg Court will also expect for the authorities to secure evidence concerning the incident, including eye-witness testimony and forensic evidence including an autopsy. *Al-Skeini* GC (n 47), para 166; the Strasbourg Court has elaborated extensive guidelines, on the methods of obtaining evidence, to undertake an effective investigation into killings by Contracting Parties' officials. Mowbray *Positive Obligations* (n 52) 34-39.

operations.[63] Investigations through the Strasbourg Court do not give an impression of reducing the problem to a 'few bad apples'. The investigations focus not only on the perpetrators but on the whole Contracting Parties' policies failings,[64] touching legal and political spheres.[65] In principle, a proper investigation is going to bring redress in the form of compensation. Paying compensation will give confidence to victims of Contracting Parties' troops abroad to come forward with their claims.[66] Moreover, pay-outs may play a role in changing Contracting Parties attitudes towards their troops conduct abroad. Yet, probably the most welcome outcome of an investigation is its preventive quality. The knowledge of a possible investigation taking place and the result being made public, will deter poor military operations planning. This will hopefully encourage Contracting Parties' troops to think twice before calling in an

[63] In *Al-Skeini* the Strasbourg Court considered that an effective investigation does not only include the scrutinizing of the soldiers conduct but the planning and control of the Contracting Party over that conduct in army operations. *Al-Skeini* GC (n 47) para 163; Mowbray *Positive Obligations* (n 52) 13.

[64] In the case of the fifth applicant's son, a minor who died after drowning, the Strasbourg Court established that, 'Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.' *Al-Skeini* GC (n 47), para 174.

[65] 'There is not comfort in saying that there is no evidence of systematic abuse by British forces because the majority of courts martial resulted in acquittals. According to Singh QC abuses of British soldiers in Iraq were not about 'a few bad apples' there was something 'rotten in the whole barrel'. Troops in Iraq routinely used banned interrogation methods they did not think were illegal. 'UK army rotten, Iraq probe told' *BBC NEWS* (21 September 2009) < http://news.bc.co.uk/go/pr/fr/-/hi/uk/8266699.stm> accessed 20 June 2011.

[66] 'The family of Mr. Musa will take the bulk of the £2.8 million, with the rest going to eight other Iraqis who were detained ate the same time … the MoD finally accepted liability admitting substantive breaches of parts of the [European Convention]. Now a public enquiry is to be held into the circumstances leading to Mr. Musa's death.' M Evans, 'MoD to pay £3 million in compensation to Iraqi torture victims' *The Times* (11 July 2008) <http://www.timesonline.co.uk/tol/news/world/iraq/article 4311297.ece> accessed 11 June 2011.

airstrike or firing at civilians or approaching vehicles[67] and influence the training of troops.

6.3 Jurisdiction and the Direct and Immediate Link Test

On the face of it, the *Al-Skeini* case is a step in the right direction to supervise effectively Contracting Parties' troops' conduct abroad. I welcome the fact that the Strasbourg Court used a personal control test to establish jurisdiction in the *Al-Skeini* case. However, the interpretation of this test could in my opinion go further in order to cover certain modern warfare conduct.[68] The authority and control test offered by the Strasbourg Court in the *Al-Skeini* case is limited. Thus, the use of force by agents of the Contracting Parties will bring the victims under their jurisdiction only when the individuals are in the custody of those Contracting Parties' agents abroad.[69] In addition, this authority and control test in *Al-Skeini* is conditioned to the Contracting Parties' agents keeping some sort of territorial control to implement governmental functions.[70] Does this mean that outside those specific conditions the conduct of Contracting Parties' troops is exempt from human rights obligations? Therefore to avoid troops selecting military activities unsupervised by the *Al-Skeini* test, I propose a different test that replaces any territorial basis of jurisdiction. The personal control test I suggest is

[67] Assuming the troops are exercising some sort of public powers on the area.

[68] See ch 5.

[69] *Al-Skeini* GC (n 47), para 136; ie the *Ocalan* case.

[70] *Al-Skeini* GC (n 47), para 135; another of the limiting principles used for the Strasbourg Court in the authority and control test is that of acts of diplomatic and consular agents, this principle is not relevant for the conduct of Contracting Parties' troops abroad. *Al-Skeini* GC (n 47), para 134.

one based on the existence of a direct and immediate link between a Contracting Party conduct and the alleged individual's violation.

6.3.1 *Judge Bonello and the Functional Jurisdiction Test*

In his concurring opinion in the *Al-Skeini* judgment Judge Bonello proposed a new test for jurisdiction. He argues that jurisdiction is 'not territorial or extraterritorial it ought to be functional'.[71] By functional Bonello means that a Contracting Party has jurisdiction under Article 1 ECHR when it is in its power to observe or breach the following functions: firstly, no violating human rights through their agents; secondly, having in place mechanisms to prevent human rights breaches; thirdly, investigating abuses; fourthly, punishing the Contracting Parties' agents and lastly, compensating the victims.[72] This jurisdiction test is reduced to two questions: the first one, did it depend on the agents of the Contracting Party whether the alleged violation would be committed of would not be committed?[73] The second question is, was it within the power of the Contracting Party to punish the perpetrator and to compensate the victim?[74] The first question will fit with my idea of what jurisdiction should entail. However, the second question could in my opinion fit better in the merits stage of the Strasbourg Court judgments.[75] I agree that investigation, punishment and compensation

[71] (Concurring Opinion of Judge Bonello) *Al-Skeini* GC (n 47), para 12 (Judge Bonello's Concurring Opinion).

[72] Ibid, paras 9-10.

[73] Ibid, para 16.

[74] Ibid, para 16.

[75] M Scheinin 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Coomans and Kamminga (n 2) 73

are paramount towards effectiveness of right guaranteed by the European Convention,[76] but they are not activities that will determine if the applicants are within the jurisdiction of any Contracting Party and their troops operating abroad. Judge Bonello believes that in the *Al-Skeini* case the UK troops were liable through their conduct for the death of the applicants, so the applicants were under the UK's jurisdiction. However he also includes the processes of investigation, punishment and compensation of the victims under the UK's authority and control.[77] The question is, once jurisdiction is established and the applicants get the protection of the European Convention, why is it necessary to repeat the need of control by the Contracting Party to investigate, punish or compensate? I suspect Judge Bonello's functionality in jurisdiction is coupled with the idea of practicality on enforcing human rights outside a Contracting Party's territory. According to Milanovic, those difficulties 'can *only* be addressed on the merits'.[78] In reality, the practical problems a Contracting Party has to face after its conduct violates human rights in another territory are not the victim's fault. Admittedly the Strasbourg Court, once past the hurdle of declaring jurisdiction,[79] is being assertive about the Contracting Parties' duties to investigate and compensate regardless of their troops location. For instance, in *Al-Skeini* the Strasbourg Court declared the need for effective, independent and prompt investigations despite admitting to the practical problems

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[76] text to note 52.

[77] Judge Bonello's Concurring Opinion (n 71), para 22.

[78] '… [T]he practical difficulties arising from applying human rights treaties extraterritorially … can *only* be addressed on the merits not artificially downplayed by denying the applicability of the treaty on the first place.' Milanovic *Extraterritorial Application* (n 9) 109.

[79] Milanovic has alleged that the Strasbourg Court may have used the admissibility stage to exclude Contracting Parties' jurisdiction, in order to avoid the merits stage in political and security charged cases. Milanovic *Extraterritorial Application* (n 9) 109.

Contracting Parties' troops encountered abroad.[80] In my opinion, the problem still turns on the concept of jurisdiction and belongs to the admissibility stage. The Strasbourg Court needs to steer away from the territorial control test and any reminiscence of it, particularly in the context of Contracting Parties' troops conduct abroad. Instead the solution lies not only on embracing a personal control test but on finding a solid threshold for this test.

6.3.2 *Jurisdiction and the 'Direct and Immediate Link' Threshold*

I argue for a jurisdictional test based on personal control. In contrast, for Milanovic the authority and control test still is a secondary test only used when the territorial control test cannot be applied to the particular case.[81] For the latter author the problem with the authority and control test rests on its threshold. The threshold is unreasonable and too broad[82] because Contracting Parties' personal control is defined by whenever the

[80] 'The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war … the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.' *Al-Skeini* GC (n 47), para 168; 'Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.' *Al-Skeini* GC (n 47), para 169.

[81] Milanovic *Extraterritorial Application* (n 9) 221.

[82] 'In *Al-Skeini* the applicants also found the authority and control test too broad : '… To find that these individuals fell within the authority of the United Kingdom armed forces would not require the acceptance of the impact-based approach to jurisdiction which was rejected in *Banković* ...' *Al-Skeini* GC (n 47), para 124; in fact this trend of thought was followed by the Strasbourg Court that opted for narrowing down the authority and control test through 'defining principles'. Hence authority and control is down to: firstly,acts of diplomatic and consular agents; secondly, application of authority and control by Contracting Parties' agents through the exercise of public powers in a foreign country that allows that conduct; thirdly, the use of force by Contracting Parties' agents abroad through taken individuals into custody. *Al-Skeini* GC (n 47), paras 133-137.

Contracting Parties have the 'ability to substantively violate an individual's rights'.[83] Milanovic in an attempt to limit the authority and control test used four approaches: physical custody, control over an individual in a specific place or by specific agents, nationality and membership in the armed forces and lastly exercise of a legal power. [84] In fact, none of the four approaches was successful at limiting the personal control test. I contend that the authority and control does not trigger jurisdiction just based on the Contracting Parties 'ability to violate' human rights but is based on an 'actual violation'.[85] In addition, the authority and control test can be limited effectively through the direct and immediate link the Contracting Parties have with a particular violation. Thus, with this threshold of a direct and immediate link the personal control test will not collapse as feared by Milanovic.

Lawson has already described a threshold based on a direct and immediate link:

> … [I]f there is a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's rights, then the individual must be assumed to be 'within the jurisdiction', within the meaning of Article 1, of the state concerned.[86]

[83] Milanovic *Extraterritorial Application* (n 9) 173.

[84] Ibid 187-207.

[85] '… [T]he issue of jurisdiction … is inherently linked with … issues such as … whether there was a *violation* of a human right.' Sheinin in Coomans and Kamminga (n 2) 73 (emphasis added).

[86] Lawson in Coomans and Kamminga (n 2) 104.

I argue that the Strasbourg Court implicitly applied the direct and immediate link it the *Pad* case:

> … [I]n the instant case, it was not disputed by the parties that the victims of the alleged events came within the jurisdiction of Turkey. While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives, who had been suspected of being terrorists …[87]

It is true that in *Pad* the respondent Contracting Party conceded jurisdiction. However, the Strasbourg Court did not dispute the fact that the cause of death was the fire discharged from the helicopter, as the direct and immediate link. That single fact was the trigger for Turkey's jurisdiction. Furthermore, the Strasbourg Court dismissed the information relating to the applicants' location when killed. In contrast, the applicant's relatives relying on the previous Strasbourg's Court case-law were keen on proving that the victims were physically held by Turkish troops before being killed.[88] However, later in the *Al-Skeini* case the Strasbourg Court established that, if in the *Issa* case it was proved that the applicants' relatives were at some point in the custody of Turkish'

[87] *Pad and others v. Turkey* App no. 60167/00 (ECtHR, Admissibility Decision 28 June 2007), para 54.

[88] According to the applicants' eye witness: soldiers descended from two helicopters in north-west Iran; they handcuffed, beat, cut and shot dead the seven Iranian captured men. *Pad* (n 87), paras 41-42.

troops, Turkey would have exercised jurisdiction over the victims.[89] Understandably, by insisting on the physical custody the Strasbourg Court is following not only one of the defining principles of the authority and control test in *Al-Skeini* but also the line of cases based on detentions and arrests abroad, such as the *Ocalan* case. Yet, the above position of the Strasbourg Court still sits uneasily with its own decision in the *Pad* case. In *Pad* there is no personal or territorial control, only the Contracting Party admission of a direct and immediate link between the conduct of its troops and the death of the applicants. Nonetheless, it was really in the case of *Andreou* where the Strasbourg Court explicitly accepted the direct and immediate link between Turkish troops conduct and the applicant's injuries as the trigger for Turkey's jurisdiction. Milanovic questions why in the *Andreou* case the Strasbourg Court did not apply a personal control test as the basis for jurisdiction as it did in the very similar cases of *Isaak*[90] *and Solomou.*[91] In my opinion, *Andreou* was indeed a case of control over individuals in which the Strasbourg Court used the threshold to define the test. Hence, the conduct of the Turkish troops was 'the direct and immediate cause' of Mrs Andreou's injuries. This threshold could have equally been applied in *Isaak and Solomou* as part of the personal control test. Why not use this threshold that is free of territorial limitations and not constrained by the need of physical personal control?

[89] *Al-Skeini* GC (n 47), paras 136.

[90] '… [E]ven if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents …' *Isaak v Turkey* App no 44587/98 (Admissibility Decision, 28 September 2006) 2

[91] *Solomou and others v Turkey* App no 36832/97 (ECtHR Admissibility Decision, 18 May 1999); Milanovic *Extraterritorial Application* (n 9) 186.

6.3.3 *The Direct and Immediate Link Test inside the Espace Juridique*

I propose to follow the 'direct and immediate link'test to find jurisdiction in the context of military operations abroad. This test has been used in the latest cases involving troops' conduct in northern Cyprus, inside the *espace juridique.*[92] In *Andreou* the Strasbourg Court declared that:

> … [E]ven though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the *direct and immediate cause* of those injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey within the meaning of Article 1 of the Convention. [93]

Jurisdiction was triggered through the conduct of the Contracting Parties' troop being the 'direct and immediate cause of those injuries'. In *Solomou*[94] the cause of death and trigger for jurisdiction was the fact that bullets were fired by the Turkish-Cypriot forces.[95] How is that situation any different from that of Al-Skeini, who was shot dead in the street by the commander of a British patrol? [96] The only difference with the *Al-*

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[92] In the Cyprus cases this test goes further than Contracting Parties' agents and includes private individuals 'acting with the connivance and acquiescence of state authorities', as capable of exercising jurisdiction over individuals. See ch 3.

[93] *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009), para 25 (emphasis added), (*Andreou* Merits).

[94] *Solomou and others v Turkey* App no 36832/97 (ECtHR, 24 June 2008) (*Solomou* Merits).

[95] Ibid, paras 50-51.

[96] *Al-Skeini* GC (n 47), paras 34-38; 'UK: Amnesty International's reactions to Law Lords' judgement on the Al-Skeini & Others case' (Posted 13 June 2007) <http://www.amnesty.org.uk/news_details_p.asp?newsid=17377.> accessed 30 June 2011.

Skeini case is that the conduct of the Contracting Parties' troop was displayed outside the *espace juridique.* As stated before the Strasbourg Court dealt with military conduct abroad already in the cases of *Bankovic, Issa* and *Pad*. Nonetheless, the protection offered by the European Convention towards victims of troops outside the *espace juridique* was never well-defined. For example, in the *Pad* case the Contracting Party had acknowledged that 'the fire discharged from the helicopters had caused the killing of the applicants'.[97] Hence, Turkey admitted to exercising jurisdiction over the victims through the conduct of its military agents.[98] In contrast, in *Al-Skeini*, the UK did not recognise the exercise of jurisdiction by its troops outside their army bases when abroad. How have things changed after the *Al-Skeini* case was decided in the Strasbourg Court? The Grand Chamber has established in *Al-Skeini* that *espace juridique* is not a reason to limit extraterritorial jurisdiction anymore.[99] The Strasbourg Court should not be able to remark as it did in *Andreou* that unlike the applicants in *Bankovic* Ms Andreou was 'within territory covered by the Convention [*espace juridique]*'.[100] I advocate for a personal control test that does not need to include, as was established in the *Al-Skeini* case, the physical apprehension of an individual or the 'territorial' condition of exercising public powers on the area. In fact, in the *Solomou*

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[97] *Pad* (n 87), para 54 .

[98] The objection for failing to exhaust domestic remedies was upheld and the application declared inadmissible in the *Pad* case.

[99] *Al-Skeini* GC (n 47), para142.

[100] *Andreou v Turkey* App no 45653/99 (Admissibility Decision, 3 June 2008), 11 (*Andreou* Admissibility Decision).

case the Strasbourg Court specified that the applicant was under the authority and control of the respondent State without the above requirements:

> In view of the above [that the bullets which had hit Mr Solomou had been fired by the members of the Turkish-Cypriot forces], the Court considers that in any event the deceased was under the authority and/or effective control of the respondent State through its agents …[101]

Moreover, in the *Andreou* case the Strasbourg Court accepts jurisdiction without personal or territorial control:

> The Court reiterates that, in exceptional circumstances, the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of Article 1 of the Convention.[102]

Admittedly, the Strasbourg Court seems to be excluding *Andreou* from the authority and control test when it declares that Turkey had 'exercise no control or authority' over the victims. However, I will argue that Turkey did exercise personal control over Mrs Andreou but it was based on a different threshold and limits of those normally attached to the personal control test in the Strasbourg Court's jurisprudence. The jurisdiction test

[101] *Solomou* Merits (n 94), para 51; '… [Jurisdiction] also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.' Judge Bonello's Concurring opinion (n 71), para 28.

[102] *Andreou* Admisibility Decision (n 100) 10.

used by the Strasbourg Court in the *Andreou* case clearly differs from the test used in the *Al-Skeini* case. In *Andreou* the question that determines jurisdiction is, was the Contracting Parties' troops' conduct the direct and immediate cause of the violation? The advantage of this test is that it can be used for killings and injuries involving armed forces, even when they do not have territorial or physical personal control over the victims. This is a very fitting test for finding jurisdiction in the conduct of troops abroad and more flexible to include aerial attacks. These recent Cyprus cases, in which the Strasbourg Court based jurisdiction on control of the Contracting Parties' troops over the victims, were not mentioned by the Grand Chamber in *Al-Skeini.*[103] The cases of *Solomou* or *Andreou* could not fit under the authority and control' defining principles established in the *Al-Skeini* case. Firstly, the Turkish troops were not acting as diplomats outside their territory. Secondly, the troops were not exercising any governmental functions in the area where the applicants were killed or injured. Lastly, we cannot even include them with Contracting Parties' agents that use force as in *Ocalan, Issa, Al-Saadoon* and even *Medvedyev,*[104] because they referred specifically to cases in which the applicants are in the custody of the Contracting Parties' agents. So, how would the future '*Solomous* or *Andreous'* stand up before the Strasbourg Court?

[103] The only mention of the Cyprus use of force cases is, by the applicants, to establish that the Strasbourg Court's case-law accepts extraterritorial jurisdiction through Contracting Parties' agent authority and through control over an area: eg in the cases of *Andreo*u and in *Solomou* . Both jurisdiction tests are accepted side-by side on the latter cases. *Al-Skeini* GC (n 47), para 122.

[104] *Medvedyev v France* App no 3394/03 (GC, 29 March 2010). The inclusion of this case was highly criticized by judge Bonello that stated: '… I find the jurisdictional guidelines established by the Court to regulate the capture by France of a Cambodian drug-running ship on the high seas, for the specific purpose of intercepting her cargo and bringing the crew to justice (*Medvedyev*), to be quite distracting and time-wasting when the issue relates to a large territory outside the United Kingdom, conquered and held for over three years by the force of arms of a mighty foreign military set-up, recognised officially by international law as an "occupying power", and which had established itself indefinitely there. (Judge Bonello's Concurring opinion) (n 71), para 29.

What will happen in cases of quick incursions by army forces in foreign countries[105] in which they do not exercise public powers or they do not have their alleged victims on their custody? How will military aerial attacks fit in the *Al-Skeini* authority and control test? The UK government found no distinction between deaths in an aerial attack and the deaths of the first five applicants in ground operations in *Al-Skeini.*[106] Yet, the Strasbourg Court remained silent about the British comparison between aerial attacks and ground attacks in *Al-Skeini*. In reality, even in military circles there is an understanding that giving the enemy the opportunity to surrender, employing non-lethal force or shooting to wound can be 'easily' implemented in ground troops operations with small arms.[107] These requirements can extend easily to precisions aircrafts attacks too.[108] Precision guidance seems to impose a fairly strict requirement for due diligence on commanders responsible for ordering air strikes.[109]

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[105] The new authority and control test devised in *Al-Skeini* will not increase: '… liability in cases of … ad hoc military operations abroad by troops.'. Lawson in Coomans and Kamminga (n 2) 83.

[106] *Al-Skeini* GC (n 47), para 116 .

[107] M Hansen, 'Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict' (2007) 194 Mil L Rev 1, 56.

[108] '[And] … "jurisdiction" must be flexible enough to take account of the availability and use of modern precision weapons which allow extra-territorial action of great precision and impact without the need for ground troops.' *Bankovic and Others v. Belgium and 16 Other Contracting States* App no 52207/99 (GC Admissibility Decision, 12 December 2001), para 52 ; 'Libya: NATO acknowledges civilian casualties in Tripoli bombing' *The Telegraph* (20 June 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8585998/Libya-Nato-acknowledges-civilian-casualities-in-Tripoli-bombing.html> accessed 25 June 2011.

[109] 'Modern air forces can put a bomb accurately on any designated point, but they cannot be certain what it is they are hitting when they do so … In the precision-guidance age, intelligence and reconnaissance failures leading to mistaken identification of targets are the most probable cause of unintended civilian casualties from air strikes … commanders should be held culpable for civilians casualties which occur as a result of targeting decisions which have been made without sufficient care to ensure that they are based on accurate information about the target …'. H White, 'Civilians in the Precision-Guidance Age' in I Primoratz (ed), *Civilian Immunity in War* (OUP 2007) 197-198.

In sum, while I admit that the *Al-Skeini* case will assist Contracting Parties to be more forthcoming to the idea of holding human rights obligations through their troops abroad, there is still the need to think about a new test which is more inclusive than the preferred authority and control test. The suggestion is to acknowledge the direct and immediate link test as a more adequate test to deal with jurisdiction of Contracting Parties' troops abroad. The direct and immediate link test will increase the human rights protection offered by the European Convention to civilians abroad, principally those affected by quick military incursion without detentions and aerial attacks performed by Contracting Parties' forces. What if in *Al-Skeini* the UK troops moved away from South East Iraq to a zone where they did not exercise public functions? Could they kill civilians in that new area without triggering jurisdiction? Or, what if the UK troops had decided instead of occupation to perform a quick military incursion in Iraq killing the same amount of civilians, in the same venues and guise as in *Al-Skeini*? If the British troops did not exercise any security roles in the area, or did not physically apprehend any of the victims, who would be liable? Not only would the victims in the *Al-Skeini* case been covered under the direct and immediate link test but this new test will cover more extensively cases of alleged Contracting Parties' troops violations.

6.3.4 *Jurisdiction and the Extraterritorial Burden*

The worries about human rights obligations abroad are usually coupled with anxieties of imposing upon Contracting Parties unrealistic and impractical obligations. Firstly, we have to remember that after the *Al-Skeini* case the Strasbourg Court accepts that

under the authority and control test Contracting Parties do not have to be liable for the 'entire range' of European Convention's rights in the area.[110]

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are *relevant to the situation* of that individual.[111]

I contend that in the context of military operations abroad, troops sent by Contracting Parties can realistically ensure and protect Articles 2 (right to life), 3 (right to not being tortured), 5 (right to liberty) and 6 (right to a fair trial) of the ECHR. [112] I refer to these rights as conflict relevant rights.[113]

Secondly, there is no reason to believe that the Strasbourg Court will request more than 'due diligence' on the conduct of Contracting Parties' troops abroad. It certainly will not exceed what is demanded from troops on their own territory. [114] In fact, there are

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[110] *Al-Skeini* GC (n 47), para 138.

[111] Ibid, para 137 (emphasis added).

[112] '… [T]he extraterritorial application of the human rights regime would still be worth having with regard to torture, fair trial, or arbitrary deprivations of liberty or life.' Milanovic, *Extraterritorial Application* (n 9) 114; 'State agents on a mission in the territory of another state cannot, therefore, act in a way which would be directly in breach of the rights to life, liberty or freedom from torture. If they do so their state may be liable for a breach of international human rights law.' Lubell (n 40) 48.

[113] See ch 5; These rights '… do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular)…'. *Medvedyev* (n 104) , para 117; '… [F]or the use of force that may result in deprivations of life, the test of necessity needs to be "stricter and more compelling" that the one used to determine if a [Contracting Party] conduct is "necessary" under paragraphs 2 of Articles 8 to 11 ECHR.'. *Mezhidov v. Russia* App no 67326/01 (ECtHR, 25 September 2008), para 56.

[114] '… [Applicants need] to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.' *Osman*

two protection mechanisms being expected by the European Convention from Contracting parties' defence forces in relation to Article 2 ECHR:[115] proper planning and execution of military operations[116] and granting an investigation after the loss of life.[117] There is no reason for these safeguards not to be applied in military operations abroad. This was the case in *Al-Skeini* when the Strasbourg Court demanded an investigation, despite the UK awarding damages in civil proceedings to one of the applicant's relatives.[118]

Lastly, in practical terms for Contracting Parties to investigate and punish their own troops and to compensate victims of their conduct is not a disproportionate burden.[119]

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v UK App no 23542/94 (ECtHR, 28 October 1998), para 116; the assertion of not burdening the Contracting Party with excessive obligations in contexts of risk and rapid flow of events was repeated by the Grand Chamber in the recent case of *Giuliani and Gaggio v Italy* App no 23458/02 (GC, 24 March 2011). In this particular case a Contracting Party's agent resorted to the use of a lethal weapon for personal protection. The agent was trying to defend himself when his Land Rover became isolated and was subjected to a violent attack by a crowd of demonstrators during the mass protest that accompanied the G8 Summit in Italy on July 2001. The resulting death did not mean a breach of Article 2 ECHR according to the Strasbourg Court; S Skinner, 'The Right to Life, Democracy and State Responsibility in "Urban Guerilla" Conflict: The European Court of Human Rights Gran Chamber Judgment in Giuliani and Gaggio v Italy' (2011) 11 HRLR 568.

[115] See ch 2.

[116] '… [E]ven assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population …' *Isayeva v Russia* App no 57950/00 (ECtHR, 25 February 2005), para 199.

[117] '… [N]either the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces, more so in cases … where the circumstances are in many respects unclear …' *Ergi* (n 117) para 85. 'Furthermore, under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to "secure" an effective enjoyment of the right to life...' *Case of Ergi v Turkey* App no 23818/94 (ECtHR, 28 July 1998), para 79.

[118] 'What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances … Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages …'. *Al-Skeini* GC (n 47), para165.

[119] '… Nor must these [positive] obligations be interpreted in such a way as to impose an impossible or disproportionate burden …' *Ilascu* (n 5), para 332.

Furthermore, investigations, punishments and compensations are essential in maintaining public confidence in Contracting Parties' agents' adherence to the rule of law. This will prevent any appearance of collusion with the sending Contracting Party.[120] Furthermore, prompt action will avoid Contracting Parties embarking in expensive campaigns such as the British government public inquiry launched after the death of Baha Mousa, one of the applicants in the *Al-Skeini* case.

In sum, the Strasbourg Court has brought many applauded changes with *Al-Skeini* in the context of Contracting Parties' military operations abroad. Contracting Parties know now that fulfilling their human rights' obligations do not have irresolvable military, political or security consequences. However, the Strasbourg Court could go even further by embracing the direct and immediate link test, which threshold is based on the connection between the Contracting Parties' conduct and the alleged violation of individual's rights. More importantly, this test has already been used by the Strasbourg Court in the cases of *Andreou* and *Pad.* Thus, there is no need for 'radical surgery'[121] or returning to the 'drawing board'[122] for a Strasbourg Court's ultimate jurisdictional test; a test capable of facing the challenges that modern extraterritorial military operations pose.

[120] 'Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force …'. *McKerr v UK* App no 28883/94 (ECtHR, 4 May 2001), para 160.

[121] Milanovic *Extraterritorial Application* (n 9) 264.

[122] (Judge Bonello's Concurring opinion) (n 71), para 8.

6.4 A Test for the Future?

With the recent cases of *Al-Skeini* and *Al-Jedda*, the Strasbourg Court is adapting its case-law to Contracting Parties' military operations abroad. While there is no doubt that the latter two cases will influence the way in which the Strasbourg Court will deal with future cases involving troops conduct outside their territory, I contend that neither goes far enough. This section considers how *Al-Skeini* and *Al-Jedda* may affect forthcoming cases involving troops participating in UN multinational missions and cases involving aerial attacks, including the latest trends of targeting drones.

6.4.1 *Behrami and Saramati, and Bankovic revisited*

The two cases reconsidered in this section look first at the Contracting Parties' liability for troops contributed to UN multinational forces, and then look into liability for aerial attacks. Both cases were highly criticized, yet they have not been rejected by the subsequent jurisprudence of the Strasbourg Court. In *Behrami and Saramati,* [123] the Strasbourg Court did not examine jurisdiction or liability of Contracting Parties' troops for violations committed under UN's auspices.[124] Instead the Strasbourg Court insisted on fully attributing liability to the UN in an attempt to stay clear of interfering with the UN's universal peace and security mission. In fact, following this case troops sent by Contracting Parties under UN auspices were out of the reach of the European Convention. [125] However, in the recent *Al-Jedda* case the Strasbourg Court admits to

[123] *Case of Behrami v France* App no 71412/01 and *Saramati v France, Germany and Norway* App no 78166/01 (GC decision on admissibility, 2 May 2007).

[124] See ch 4.

[125] G Verdirame, 'Breaches of the European Convention on Human Rights Resulting from the Conduct of International Organisations' (2008) 2 EHRLR 209.

the possibility of dual or multiple attribution which means that the same conduct can be attributed to the UN and to a Contracting Party.[126] Thus, through dual or multiple attribution the Strasbourg Court has opened the way to avoid confrontations with the UN universal mission and has also gone back to supervising the conduct of the individual Contracting Parties that send troops to be part of the UN multinational forces. It is important to recall that in *Al-Jedda* the Grand Chamber distinguished this case from *Behrami and Saramati*. It is true that in Kosovo the multinational force and its military operation were set up by the UNSC under Chapter VII. In contrast, in Iraq the multinational force invaded the country without UN authorization.[127] However, I argue that *Behrami and Saramati*- type cases can be supervised by the Strasbourg Court using dual or multiple attribution. Thus, Contracting Parties' troops as part of multinational forces can now be treated as any other sent-abroad troops and their conduct could be covered by the direct and immediate link test to find jurisdiction.
In the *Behrami* case, a father complained about the death of one of his sons and the serious injuries of another son under Article 2 ECHR. Both children were playing in a district of Kosovo, where French KFOR had 'knowingly' left unmarked an area with cluster bombs. A bomb was detonated while one of the children through the artifact in the air. It is clear that the direct and immediate cause of the death and injuries of Mr Beharami's children was the conduct of French KFOR by not removing the bombs or marking the area. The Strasbourg Court has dealt before with cases of Contracting

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[126] 'The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations…' *Al-Jedda v the UK* App no 27021/08 (GC, 7 July 2011), para 80 (*Al-Jedda* GC).

[127] See ch 4.

Parties that overlooked mines left on their territory and were declared liable for violations of Article 2 ECHR. For instance the *Pasa* case,[128] in *Pasa* the Strasbourg Court declared that Turkey had failed to take the necessary steps to prevent innocent civilians from entering the area.[129] It was found inconceivable to just display warning signs every 20-metres interval[130] and to surround the place by two rows of barbed wire relatively far apart; those measures were openly inadequate to prevent children crossing over.[131] The Strasbourg Court found that Turkey did not take all necessary measures to ensure protection from the risk of death or injury.[132] Another case related to mines is that of *Albekov,* [133] in which the Strasbourg Court declared that the Russian authorities were aware that mines were laid in the area. Thus, to protect residents from the potential risk of the mines some practical positive obligations needed to be followed: firstly, to locate and deactivate the mines; secondly, to mark and seal off the mined area; and lastly to provide people in the vicinity with thorough warnings.[134] Furthermore, the Strasbourg Court decided that the investigation launched by Russia, to

[128] The *Pasa* case bares some similarities with *Behrami*. The Turkish government had laid anti-personnel mines in the proximity of the applicants' village, in a place previously used for grazing. When nine-year old Erkan and other children entered to gather their sheep, they were all wounded by the explosion of one of the mines. *Pasa and Erkan Erol v Turkey* App no 51358/99 (ECtHR, 12 December 2006).

[129] The Strasbourg Court unanimously held Turkey liable for violating the applicants' right to life under Article 2. *Pasa* (n 128), para 38.

[130] *Pasa* (n 128), para 29.

[131] Ibid, paras 36-37.

[132] Ibid, para 38.

[133] The applicants complained under Art 2 ECHR against Russia; alleging that three victims were blown up by landmines and that the authorities did not conduct a proper investigation. '… The essential purpose of such investigation … in those cases involving State agents or bodies, (is) to ensure their accountability for deaths occurring under their responsibility. *Albekov and others v Russia* App no 68216/01 (ECtHR, 9 October 2008), para 94.

[134] *Albekov* (n 133), para 90.

find out if the authorities were liable for the failure to prevent the incident, was not effective. [135] I accept that the last two cases are not extraterritorial ones. However, any Contracting Parties' troops can show the same due diligence abroad relating to unattended bomb sites as the one that is expected of them inside the *espace juridique* by the Strasbourg Court. Additionally, an investigation into who was liable for the violating conduct and possible compensation for the victims can certainly be achieved, even if the Contracting Parties' troops are operating in a foreign land.

In *Saramati*, we have a case of indefinite detention very similar to the *Al-Jedda* case. Mr Saramati was a Kosovar kept detained by KFOR commanders under the pretext of being a threat to the international presence in Kosovo. Mr Saramati claimed to be the subject of extra-judicial detention without access to a court, complaining under Articles 5 and 6 ECHR. If we could release this case too from the UN exclusive attribution rule and follow the *Al-Jedda*-accepted dual or multiple attribution, *Mr* Saramati would have been under the authority and control of the KFOR commanders that ordered his detention. The direct and immediate cause of Mr Saramati's indefinite detention was the decision made by the KFOR commanders. In *Al-Jedda* the Strasbourg Court attributed the conduct of the British troops acting under UN flag to the UK, jurisdiction was based on authority and control of the British forces over Mr Al-Jedda. This judgement did not bring about any confrontation with the UN or its universal peace and security mission. To the contrary, the Strasbourg Court admitted that the Secretary General of the UN and UNAMI voiced their concerns about the detention of thousands

[135] Ibid, paras 96-102.

of persons 'without due process'.[136] While after the *Al-Jedda* case there is more probability that the Strasbourg Court will find jurisdiction and liability on Contracting Parties' troops participating in UN military operations, even under UNSC Resolution and authorized. Conversely, I suspect the *Al-Skeini* case will not have much influence on future *Bankovic's* type cases. Admitedly, with *Al-Skeini* the Strasbourg Court is considering jurisdiction less of an obstacle to examine liability of Contracting Parties' troops abroad. In fact, *Al-Skeini* has implications too for UK personnel, now under the protection of the European Convention, even when located outside their base.[137] However, while the authority and control test used to determine jurisdiction over the applicants in *Al-Skeini*, is not limited to being under the troops' physical custody, this personal control test does not include on its jurisdictional tests aerial bombardments cases, such as *Bankovic.*

In the *Bankovic* case the leading question hinged on finding out if the applicants were under the jurisdiction of the respondent Contracting Party as a result of an aerial bombing.[138] The Strasbourg Court avoided questions about the control NATO's States had over the air strike and the victims of the bombarding in favour of establishing when Contracting Parties exercise jurisdiction and preferring the territorial control test.[139] Why was it relevant if NATO's States had territorial control over Belgrade?

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[136] This conduct has not got humanitarian law backing either. Humanitarian law does not accept an occupying power using indefinite internment without trial, it should be a measure of last resort. *Al-Jedda* GC (n 126), paras 40-41.

[137] *Smith v Secretary of Defence* [2010] UKSC 29, [2010] 3 WLR 223; Application lodged: *Pritchard v UK* (App no 1573/11), footnote 78 ch 5.

[138] D McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights in Coomans and Kamminga (n 2).

[139] Sheinin in Coomans and Kamminga (n 2).

In my opinion, the only relevant question would be: was the bombing of the radio station the direct and immediate cause of the death and injuries of the applicants? In reality, things have not moved much in the context of aerial attacks extraterritorially. After *Al-Skeini*, it is clear that the Strasbourg Court still looks for some territorial link to justify the fact that victims are to be considered under the jurisdiction of the Contracting Parties' troops. An aerial attack does not suffice to bring civilians located outside the *espace juridique* within the Contracting Parties' jurisdiction. In *Al-Skeini* the Strasbourg Court accepts that the 'death of the applicants were caused by British troops … during the course of or contiguous to security operations carried out by British soldiers.'[140] However, those security operations in which one could include aerial bombings are linked in *Al-Skeini* to assuming 'public powers' in the area.[141] In aerial bombings occurring inside the *espace juridique*, such as the ones in Chechnya, there are boots on the ground, in the form of Russian troops stationed nearby.[142] Russia's 'counter-terrorist operation' in Chechnya has resulted in indiscriminate bombardments. The Strasbourg Court has found Russia on violation of the right to life (Article 2 ECHR). The violation of Article 2 ECHR is based on the lack of appropriate care and planning on the aerial attacks,[143] on expertise proving the shells belong to

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[140] *Al-Skeini* GC (n 47), para 150.

[141] Ibid ,para 149.

[142] In the *Mezhidov* case, the applicant's parents, brother and two sisters were killed by a shell which burst in the courtyard of their house. All were killed on Znamenskoye (Chechnya), a village that came under fire from a mountain range , in which Russian troops were stationed as part of a counter-terrorist operation. *Mezhidov* (n 113), paras 11-13.

[143] The Strasbourg Court considered the lack of appropriate care by the Russian authorities that order the pilots to attack six men working in a field, resulting in the deaths of Mr Khatsiyeva and Mr Akiyev. *Khatsiyeva and others v Russia* App no 5108/02 (ECtHR, 17 January 2008), para 137.

Russian armed forces[144] and on the lack of a complete and effective investigation into the bombings (procedural limb of Article 2 ECHR).[145] *Al-Skeini* has not overruled *Bankovic* or provided any jurisdictional link applicable to aerial attacks. Thus, the Strasbourg Court has not yet followed the plea of the applicants in *Bankovic* of accepting a jurisdictional test 'flexible enough to take account of the availability and use of modern precision weapons which allow extra-territorial action of great precision and impact without the need for ground troops'. [146] In sum, it is felt that 'aerial attacks' are out of reach of the current interpretation of jurisdiction by the Strasbourg Court.[147]

6.4.2 *The Strasbourg Court and Modern Aerial Operations*

If the Strasbourg Court wants to be at the forefront of international instruments for the supervision of human rights, it needs to contemplate the modern ways in which Contracting Parties' troops are participating in operations abroad. The switch from boots on the ground to aerial fighting and machine wars is well under way. It is clear that public opinion is tired of long, fruitless and expensive wars, not forgetting the cost of many soldiers' lives. In a climate of austerity and defence cuts,[148] the increase on

[144] The Strasbourg Court found a violation of Article 2 ECHR based on an expert report indicating that the large-calibre shells used in the attack were presumably in the exclusive possession of the Russian armed forces. *Mezhidov* (n 113), para *60.*

[145] The authorities failed to carry out a thorough and effective investigation into the applicants' family deaths. *Mezhidov* (n 113) para 75.

[146] *Bankovic* (n 108), para 52.

[147] However, the *Pad* case (n 87) may hold the door open to cases of indiscriminate bombing even outside the *espace juridique* and without troops on the ground.

[148] 'Spending Review: Ministers agree MoD budget cut' *BBC News* (16 October 2010) <http://www.bbc.co.uk/news/uk-11556770?print=true > accessed 10 October 2011.

targeted killings will come as no surprise.[149] Nor will it be unexpected the increase on aerial operation following Libya's use of 'cautious' aerial intervention. Libya's operation after only seven months[150] wound up without any reports of troops casualties. Without a doubt there have been many sighs of relief by NATO's military and political leaders, which this time did not walk into another Iraq or Afghanistan-like quagmires. On the other hand, critics of this NATO campaign have not only brought to attention the fact of civilian deaths[151] but the point about participant countries exceeding their mandate under UNSC Resolution 1973.[152] A Resolution that was limited to imposing a no-fly zone and authorizing the protection of civilians.[153] In reality, Libyan' civilians have been killed in NATO's strikes.[154]

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[149] Targeted killing avoids the need to resort to large-scale military operations. M Ramsden 'Targeted killings and international human rights law: the case of Anwar Al-Awlaki' (2011) 16 JCSL 2011 (16) 385, 401-402.

[150] 'NATO to end Libya campaign on 31 October' *The Guardian* (22 October 2011) <http://www.guardian.co.uk/world/2011/oct/22/nato-end-libya-31-october> accessed 30 October 2011.

[151] 'NATO's Libya campaign causes civilian deaths, Russia warns' *CNN World* (7 July 2011) <http://articles.cnn.com/2011-07-07/world/libya.russia_1_rebel-stronghold-rebel-fighters-civilians?_s=PM:WORLD> accessed 30 October 2011.

[152] Approved in New York on the 17th March 2011 'International reactions to the 2011 military intervention in Libya' *Wikipedia* (2 November 2011) <http://en.wikipedia.org/wiki/International_reactions_to_the_2011_military_intervention_in_Libya> accessed 2 November 2011.

[153] 'UN Security Council Resolution 1973 (2011) on Libya – full text' *The Guardian* (17 March 2011) <http://www.guardian.co.uk/world/2011/mar/17/un-security-council-resolution> accessed 30 October 2011.

[154] M Georgy, 'Libyans offer new graves as proof of civilian dead' *Reuters* (Tripoli 21 March 2011) <http://www.reuters.com/article/2011/03/20/libya-burials-idUSSGE72J01020110320> accessed 30 October 2011; "It is important to stress that Nato does not target individual," said the spokesman. "We only target military assets that pose a threat"'. J Blitz and H Carnegy, 'Confusion over NATO role in Gaddafi death' *The Financial Times* (London, Paris, 20 October 2011) <http://www.ft.com/cms/s/0/af362fc0-fb2e-11e0-8756-00144feab49a.html#axzz1bVrXdCyp> accessed 21 October 2011.

Aerial and targeted killings are out of the scope of the Strasbourg Court. Take the well-publicized recent killings of Osama Bin Laden[155] in Pakistan and the death of U.S.-born radical cleric Anwar Awlaki in Yemen.[156] If both killings were planned and executed by Contracting Parties' troops instead of the US: who would have been liable? Following the *Al-Skeini* case, Bin Laden's and Awlaki's relatives will need to prove that the Contracting Parties' troops involved in the killings exercised some sort of public powers in Pakistan or Yemen; or they will have to prove that the two victims were on the custody of Contracting Parties' soldiers before being killed.[157] Either way, the presumption is that one requires Contracting Parties' boots on the ground to consider jurisdiction and liability. Still, the problem is that victims of targeted killings, either by quick troops' incursions or aerial machines, are not protected by humanitarian law[158] unless the situation qualifies as an armed conflict. According to Lubell, the 'loosely defined war on terror' is not a foundation to rank targeting killing as part of an armed conflict.[159] On the other hand, Alston asserts that States that use targeted killings

[155] D Walsh, 'Osama bin Laden killed in US raid on Pakistan hideout' *The Guardian* (Abbottabad, 2 May 2011) <http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-dead-pakistan/print> accessed 20 October 2011; M Milanovic, 'Was the Killing of Osama bin Laden Lawful? *EJIL: Talk! (*2 May 2011) <http://www.ejiltalk.org/was-the-killing-of-osama-bin-laden-lawful/> accessed 22 October 2011.

[156] M Chulow, 'Al-Qaida cleric Anwar al-Awlaki is dead, says Yemen' *The Guardian* (Beirut 30 September 2011)< http:// www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-dead > accessed 10 October 2011.

[157] APV Rogers and D McGoldrick, 'Assassination and Targeted Killing – The Killing of Osama Bin Laden' (2011) 60 ICLQ 778.

[158] The new robotic warfare is not regulated by humanitarian law which is not familiar with risk-free wars, D Kilcullen and A McDonald Exum, 'Death From Above, Outrage Down Below' *The New York Times* (17 May 2009) <http:www.nytimes.com/2009/05/17/opinion/exum.html?pagewanted=print> accessed 7 October 2011. (Death from Above)

[159] Lubell (n 40) 255 ; We assume the Strasbourg Court would not allow terrorism as an excuse for undermining Article 2 ECHR, it did not allow it against Article 5 ECHR in the *Medvedyev* case: '… [T]he Court has noted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems … This does not mean, however, that the investigating

have not specified the legal justifications for this type of killing.[160] In the words of Tomuschat:

> I am profoundly convinced that such cases [targeted killing] should also be assessed pursuant to the rules of human rights law. In circumstances where no fighting between opposite forces takes place, a licence to kill is unacceptable.[161]

Targeted killings are not new to Contracting Parties, for instance Russia has used a targeted killing policy.[162] Additionally another worrying fact is the latest trend on targeted killing: the use of drones. [163] NATO commanders have used drones in Libya's recent attacks and in Afghanistan; these operations are not supervised even though they are killing civilians.[164] There is no investigation of civilian casualties and no compensation paid.[165] Furthermore, Contracting Parties are following the US lead and trying to catch on the drone race.[166]

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authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free … (from) the Convention supervisory institutions, whenever they choose to assert that terrorism is involved.' *Medvedyev* (n 113), para126.

[160] P Alston, 'Study on Targeted Killings' Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, UN Doc A/HRC.14/24/Add.6 (28 May 2010) para 3.

[161] C Tomuschat, 'Human Rights and International Humanitarian Law' (2010) 21 EJIL 15, 22.

[162]'Russia kills Chechen warlord' *BBC News* (25 April 2002) http://news.bbc.co.uk/1/hi/world/europe/1950679.stm ; J Paust, 'Self-Defence Targeting of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2010) 19 J Transnatl L & Poly 238.

[163] Kilcullen and McDonald Exum (n 158).

[164] 'The ethics of warfare: Drones and the man' *The Economist* (30 July 2011) <http://www.econimist.com/node/21524876/print> accessed 8 October 2011.

[165] '… [A] record 118 strikes last year and 50 so far in 2011…there were just nine strikes from 2004 to the end of 2007.'. 'Drones in Pakistan: Out of the blue, a growing controversy over the use of unmanned

It is true that the Strasbourg Court is offering in its recent jurisprudence a more comprehensive approach to protecting victims of Contracting Parties troops conduct in foreign lands. However, I argue that the current preferred authority and control test, used in the context of supervising forces conduct abroad, does not go far enough. My proposed test to trigger jurisdiction is one that bypasses territorial foundations and is based on the direct and immediate link between the Contracting Parties' forces performance and the human rights violations.[167] This new proposed test presents two advantages because it is not a completely new test for the Strasbourg Court that has previously used it in its case-law, and because it is a comprehensive enough test to cover new tendencies in military operations abroad. This new test could have ripple consequences, informing international law of the effects States' agents' conduct has extraterritorially and the liability they should bare for their performance in a foreign land.

6.5 Conclusion

No doubt the Strasbourg Court is advancing in the right direction. After *Al-Skeini* and *Al-Jedda*, the concept of jurisdiction has expanded to protect more victims of Contracting Parties' conduct outside their own territory, including areas outside the

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aerial strikes' *The Economist* (Islamabad, 30 July 2011) <http://www.econimist.com/node/21524916/print> accessed 8 October 2011.

[166] Russia resented that Georgia deployed Israeli surveillance drones against its forces during the 2008 war between the two countries W Wan and P Finn 'Global race on to match U.S. drone capabilities' *The Washington Post* (4 July 2011) <http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html> accessed 10 October 2011.

[167] '… [I]f state agents … are able to carry out their plan to target individuals with intent to take life, this might amount to a form of authority and control over the life of the individual.' Lubell (n 40) 223.

espace juridique. The preferred test to find jurisdiction in this context of military operations is the authority and control test. While it looked as if the Strasbourg Court was finally bypassing the territorial control test,[168] in reality, authority and control is still attached to the performance of some public powers in the area by the troops. Consequently, the expansion of jurisdiction is being devised to include 'boots on the ground' type military operations. Yet, nowadays there is a recent appetite in the Western world for more cautious military interventions in foreign lands through aerial attacks and target killings.

This thesis highlighted some of the problems posed by the extraterritorial conduct of troops belonging to Contracting Parties and their supervision under the European Convention. I argue that the Strasbourg Court can go further in its protection of victims from the troops' conduct by using the direct and immediate link test. A more inclusive jurisdictional test that will increase investigations and compensations for victims and families of Contracting Parties' troops' violations, and will improve the applicability of human rights in any future military operations: be they occupations, quick incursions, peace-enforcement or peacekeeping campaigns. Furthermore, the direct and immediate link test has already been used by the Strasbourg Court inside[169] and outside[170] the *espace juridique.* However, although debates will remain ongoing about extraterritorial jurisdiction of the European Convention, these and the new forms of warfare are likely to test the effectiveness of the jurisdictional tests used by the Strasbourg Court. I

[168] '… [B]ypassed in *Al-Skeini* and deemed irrelevant to *Al-Saadoon* , the docrine of territorial control has yet to be applied outside the [*espace juridique] …'* M Schaefer 'Al-Skeini and the elusive parameters of extraterritorial jurisdiction' (2011) 5 EHRLR 566, 580.

[169] *Andreou* , text to n 102.

[170] *Pad* (n 87).

contend that using the direct and immediate link test will not only impact positively on the protection the European Convention offers to victims of Contracting Parties' troops conduct everywhere' but will help to inform the conduct of any Contracting Parties' agents abroad, related or not to military operations. Moreover, this test will enhance the supervisory effect of the European Convention.

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